

FILED

No. 2--02--0011

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ROBERT J. MANGAN, CLERK  
APPELLATE COURT 2nd DISTRICT

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

|                                    |   |                         |
|------------------------------------|---|-------------------------|
| BANK ONE MILWAUKEE,                | ) | Appeal from the Circuit |
|                                    | ) | Court of Kane County.   |
| Plaintiff and                      | ) |                         |
| Counterdefendant,                  | ) |                         |
|                                    | ) |                         |
| v.                                 | ) | No. 97--LM--502         |
|                                    | ) |                         |
| EDUARDO SANCHEZ,                   | ) |                         |
|                                    | ) |                         |
| Defendant and                      | ) |                         |
| Counterplaintiff,                  | ) |                         |
|                                    | ) |                         |
| (Aida Sanchez, Defendant and       | ) |                         |
| Counterplaintiff-Appellant and     | ) |                         |
| Cross-Appellee; Don McCue          | ) |                         |
| Chevrolet-Geo, Inc., Defendant-    | ) |                         |
| Appellee and Cross-Appellant;      | ) |                         |
| Ernesto Ponce, Defendant-Appellee; | ) | Honorable               |
| Seguros Commercial America,        | ) | Timothy Q. Sheldon,     |
| Defendant).                        | ) | Judge, Presiding.       |

JUSTICE GROMETER delivered the opinion of the Court:

Plaintiff, Aida Sanchez, appeals from the judgment of the circuit court of Kane County denying her claims against defendants Ernesto Ponce and Don McCue Chevrolet-Geo, Inc. Aida alleged that McCue and Ponce violated the Consumer Fraud and Deceptive Business Practices Act (Act) (815 ILCS 505/1 et seq. (West 1998)) in two ways. First, she asserted that defendants forged her signature as a cosigner on a contract for the sale of a truck purchased by her nephew, Eduardo Sanchez. Second, she alleged that defendants failed to disclose that a portion of a charge for an extended warranty was retained by the dealership instead of being paid to

the third party that provided the warranty, as implied by the contract. Aida brought her claims as counterclaims in an action originally initiated by Bank One Milwaukee, which is not a party to this appeal, after Eduardo ceased making payments on the truck. The trial court ultimately found that Aida had failed to prove the allegations set forth in her complaint.

Aida then filed this appeal, raising a number of errors that include the dismissal of one of her claims, the barring of Eduardo's testimony because of a discovery violation, the imposition of attorney fees under both the Act and Supreme Court Rule 137 (155 Ill. 2d R. 137), and the denial of her motion to voluntarily dismiss her claims against Ernesto. The resolution of these issues has no significant precedential value; thus, they will be relegated to an unpublished portion of this opinion. McCue has also filed a cross-appeal, attacking Aida's standing to bring an action under the Act. This issue, which deals with a question previously unaddressed by the courts of this state, merits publication, and, as it concerns standing, we will address it first.

#### McCUE'S CROSS-APPEAL

McCue moved to dismiss Aida's counterclaim, arguing that she lacked standing to bring a cause of action under the Act (815 ILCS 505/1 et seq. (West 1998)) because, taking the allegations of her complaint as true, she is not a consumer. A plaintiff's standing to maintain an action may be properly raised in a motion to dismiss brought pursuant to section 2--619 of the Civil Practice Law (735 ILCS 5/2--619 (West 1998)). City of Chicago ex rel. Scachitti v.

Prudential Securities, Inc., 332 Ill. App. 3d 353, 369 (2002). All well-pleaded facts must be taken as true and viewed in the light most favorable to the nonmovant. Altair Corp. v. Grand Premier Trust & Investment, Inc., 318 Ill. App. 3d 57, 61 (2000). Lack of standing is an affirmative defense. Skolnick v. Altheimer & Gray, 191 Ill. 2d 214, 237 (2000). The burden is on a defendant to show that a plaintiff lacks standing. Noyola v. Board of Education of the City of Chicago, 227 Ill. App. 3d 429, 433 (1992). We conduct de novo review of a trial court's decision to dismiss a complaint. Myers v. The Telegraph, 332 Ill. App. 3d 917, 921 (2002).

McCue observes that Aida has alleged that her signature on the contract was actually a forgery. Taking this allegation as true, McCue reasons, Aida did not sign the contract and was therefore not a purchaser of the truck. The Act defines a consumer as "any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household." 815 ILCS 505/1(e) (West 1998). Thus, McCue concludes, accepting as true Aida's allegation that she was not a signatory to the contract, she does not fit within the definition of "consumer," and she lacks standing to bring an action under the Act. See, e.g., Norton v. City of Chicago, 267 Ill. App. 3d 507, 509-10 (1994). Admittedly, McCue's position is logical; however, it is also wholly unpersuasive.

The Act is remedial in nature. Robinson v. Toyota Motor Credit Corp., 201 Ill. 2d 403, 417 (2002). Furthermore, the legislature has mandated that it is to be liberally construed to

effectuate its purposes. 815 ILCS 505/11a (West 1998). Several courts have noted that "[t]here is a clear mandate from the Illinois legislature that the courts of this State utilize the Act to the utmost degree in eradicating all forms of deceptive and unfair business practices and grant appropriate remedies to injured parties." Duhl v. Nash Realty Inc., 102 Ill. App. 3d 483, 495 (1981); Perlman v. Time, Inc., 64 Ill. App. 3d 190, 198 (1978); see also Kirkruff v. Wisegarver, 297 Ill. App. 3d 826, 838 (1998) ("In addition, courts should liberally construe and broadly apply the Act to eradicate all forms of deceptive and unfair business practices"). The Act makes unlawful both unfair and deceptive business practices. Robinson, 201 Ill. 2d at 417.

McCue relies on a line of cases denying standing to plaintiffs where it was determined that they were not consumers. See, e.g., Norton, 267 Ill. App. 3d at 509-10; McCarter v. State Farm Mutual Automobile Insurance Co., 130 Ill. App. 3d 97, 101 (1985); Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 328 (1977). For example, in Steinberg, our supreme court held that applicants to medical school were not consumers as defined by the Act and could therefore not maintain a cause of action. Steinberg, 69 Ill. 2d at 328. We note, however, that another line of cases exists that allows a plaintiff to maintain a cause of action under the Act despite the fact that the plaintiff is not a consumer as defined by the Act (see 815 ILCS 505/1(e) (West 1998)). E.g., Sullivan's Wholesale Drug Co. v. Faryl's Pharmacy, Inc., 214 Ill. App. 3d 1073, 1082-83 (1991); Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc., 190 Ill. App. 3d 524, 534 (1989).

A number of cases have allowed a business to maintain a cause of action under the Act even though the business was not a consumer of the defendant's goods. In Downers Grove Volkswagen, Inc., 190 Ill. App. 3d at 534, for instance, this court confronted the question of whether a business had standing to sue a competitor under the Act where the competitor published false information about the business's prices for services. We held that, "where the dispute involves two businesses that are not consumers, the proper test is as stated in Pain Prevention Lab, [Inc. v. Electronic Waveform Labs, Inc.], 657 F. Supp. 1486, 1493 (N.D. Ill. 1987),] whether the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns." Downers Grove Volkswagen, Inc., 190 Ill. App. 3d at 534. We concluded that the competitor's conduct implicated consumer protection concerns and that the business could therefore maintain a suit under the Act. See also Zinser v. Rose, 245 Ill. App. 3d 881, 886-87 (1993); Sullivan's Wholesale Drug Co., Inc., 214 Ill. App. 3d at 1082-83; Gadson v. Newman, 807 F. Supp. 1412, 1421 (C.D. Ill. 1992).

Thus, the question before us becomes whether the test for standing articulated in Downers Grove Volkswagen is limited to businesses or whether a nonbusiness plaintiff who meets this criterion may also maintain an action under the Act. In answering this question, we find considerable guidance in the plain language of the Act, which is, of course, the best indicator of the legislature's intent in enacting a statute (Lauer v. American Family Life Insurance Co., 199 Ill. 2d 384, 388 (2002)).

We first observe that section 10a of the Act grants a cause of action to "[a]ny person who suffers actual damage." (Emphasis added.) 815 ILCS 505/10a (West 1998). We further note that section 1 of the Act provides the following definition of "person":

"The term 'person' includes any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof." (Emphasis added.) 815 ILCS 505/1 (West 1998).

Thus, the Act draws no distinction between natural persons and businesses, granting both the status of "person." By virtue of this status, both are further granted the right to bring an action under the Act in section 10a. 815 ILCS 505/10a (West 1998); cf. Skyline International Development v. Citibank, F.S.B., 302 Ill. App. 3d 79, 85 (1998) ("However, as long as the plaintiff, whether a business entity or a person, is a consumer, it need only show a personal injury caused by the fraudulent or deceptive acts").

Given that the Act is to be liberally construed to eradicate all forms of unfair or deceptive practices, and given that the Act itself draws no distinction between natural persons and businesses, we hold that the test set forth for standing in Downers Grove Volkswagen (see Downers Grove Volkswagen, Inc., 190 Ill. App. 3d at 534) applies to any entity seeking to bring an action under the Act. A contrary holding, that businesses have standing to vindicate such concerns while natural persons do not, would be anomalous indeed, and we see no basis in the Act itself or

elsewhere for drawing such a distinction. See Sullivan's Wholesale Drug Co., Inc., 214 Ill. App. 3d at 1082 ("The Act expressly defines the term 'person' to include any corporation, company or business entity"). Thus, if a natural person, like a business, alleges "conduct [that] involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns" (Downers Grove Volkswagen, Inc., 190 Ill. App. 3d at 534), that person has standing to sue under the Act. We must now determine whether Aida has met this standard.

Aida alleged that McCue forged her signature on the contract it prepared in connection with Eduardo's purchase of the truck. This conduct is clearly not "addressed to the market generally"; hence, we must consider whether it "otherwise implicates consumer protection concerns." See Downers Grove Volkswagen, Inc., 190 Ill. App. 3d at 534. It has been noted that "[n]either the Consumer Fraud Act nor its legislative history provides definitional parameters for the phrase 'implicates consumer protection concerns.'" " Brody v. Finch University of Health Sciences/The Chicago Medical School, 298 Ill. App. 3d 146, 159 (1998). Moreover, "our legislature intended that any gaps in the Consumer Fraud Act be supplied by judicial construction." Brody, 298 Ill. App. 3d at 159. Whatever the outer parameters of the meaning of "implicates consumer protection concerns," we have little trouble concluding that the allegations set forth in the instant case fall squarely within its scope. Quite simply, Aida alleged that a merchant bound her to a commercial transaction through a fraudulent

act. We conclude that she has standing to bring an action under the Act.

[The following material is nonpublishable under Supreme Court Rule 23.]

#### AIDA'S APPEAL

Aida raises the following issues in her appeal: (1) whether the trial court properly dismissed her claim that alleged McCue failed to disclose that it retained a portion of the charge for her extended warranty; (2) whether the trial court abused its discretion in barring the testimony of Eduardo; (3) whether the trial court's decision was against the manifest weight of the evidence; (4) whether the trial court properly awarded defendants attorney fees as sanctions under Supreme Court Rule 137 (155 Ill. 2d R. 137) and pursuant to the Act (815 ILCS 505/10a(c) (West 1998)); (5) whether the trial court erred in refusing to allow Aida to voluntarily dismiss her claims against Ernesto. We will address these issues separately and discuss relevant facts as they pertain to them.

#### 1. WHETHER THE TRIAL COURT ERRED IN DENYING AIDA'S CLAIM THAT McCUE FAILED TO DISCLOSE THAT IT RETAINED A PORTION OF THE CHARGE FOR AN EXTENDED WARRANTY

Aida first contends that the trial court erred in denying her claim that McCue violated the Act by failing to disclose that it retained a portion of the fee for her extended warranty. Aida relies on Bernhauser v. Glen Ellyn Dodge, Inc., 288 Ill. App. 3d 984 (1997), in support of this argument. In Bernhauser, this court held that the trial court erred in dismissing a complaint in circumstances virtually identical to those in the present case.

Aida has waived this argument. In her brief, Aida initially complains that the trial court erred in dismissing this claim. Nevertheless, she shortly thereafter relies on what she terms a judicial admission in support of her claim of error. Thus, it appears that she is actually arguing that the trial court erred in finding against her following trial. However, the trial court's written order disposing of Aida's claims--which Aida did not provide a citation to in her argument--simply states that "the claim of Aida Sanchez, Counter-Plaintiff against Don McCue Chevrolet and Ernesto Ponce is denied and the counterclaim against Don McCue Chevrolet and Ernesto Ponce is dismissed with prejudice." The order does not identify which claims are dismissed and which are denied. Because Aida is relying on evidence presented at trial, we will treat this issue as a challenge to the trial court's verdict.

The elements of a cause of action under the Act are: "(1) a deceptive act or practice, (2) intent on the defendants' part that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce." Siegel v. Levy Organization Development Co., Inc., 153 Ill. 2d 534, 542 (1992). Bernhauser only addresses the first element. See Bernhauser, 288 Ill. App. 3d at 990. Aida makes no attempt to argue that she met the other two elements of this cause of action, nor does she provide any citation to the record regarding evidence pertaining to these elements. Furthermore, outside a citation to what she terms a judicial admission by McCue's general manager, she provides no citation to the record in support of this argument at

all. Notably absent is any citation to the trial court's decision or the basis therefore. Supreme Court Rule 341(e)(7) provides that "[p]oints not argued are waived." Official Reports Advance Sheet No. 21 (October 17, 2001), R. 341(e)(7) (eff. October 1, 2001). Additionally, "[i]t is also well settled that the failure to cite to the pages of the record relied upon waives the issue argued. Scoggin v. Rochelle Community Hospital, 176 Ill. App. 3d 648, 650 (1988). Accordingly, we conclude that Aida's omissions result in the waiver of this argument.

2. WHETHER THE TRIAL COURT ERRED IN BARRING EDUARDO'S TESTIMONY

Aida next argues that the trial court erred in barring Eduardo's testimony for discovery violations. The decision to bar a witness that has not been properly disclosed lies within the sound discretion of the trial court. Reinneck v. Taco Bell Corp., 297 Ill. App. 3d 211, 216 (1998). In making this determination, the following factors are relevant: "(1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. Whether to impose sanctions is a decision lying "within the sound discretion of the trial court, and that decision will not be reversed absent an abuse of discretion." Warrender v. Millsop, 304 Ill. App. 3d 260, 268 (1999). It is generally true that a court should avoid barring the testimony of a witness where to do so would deprive a party of a fair trial. Knight v. Haydary, 223 Ill. App. 3d 564, 578 (1992). Applying these standards to the instant case, we cannot conclude

that the trial court abused its discretion in barring Eduardo from testifying.

The first factor, surprise to the adverse party, clearly weighs heavily against Aida. Quite simply, Eduardo was not disclosed until the last day of trial. Prejudice, the second factor, also weighs against her. Eduardo's proposed testimony went to the heart of the case. Defendants were not given a chance to depose him, investigate the content of his testimony, or check the authenticity of certain documents Eduardo had in his possession.

The third consideration involves the nature of the testimony. Some opinions treat the second and third factors together (see e.g., Ashpole v. Brunswick Bowling and Billiards Corp., 297 Ill. App. 3d 725, 728 (1998)); however, they involve distinct considerations. We believe that this is the proper place to consider how the "interests of justice" (see 177 Ill. 2d R. 213, Committee Comments) will be served by the decision to allow or bar the witness. The nature of Eduardo's testimony was certainly important to Aida's case. However, it was also somewhat cumulative of her testimony. Nevertheless, Eduardo's testimony would have called into question some of the testimony of Oliver Ponce, who is Ernesto's son and a salesman at McCue, and may have also bolstered Aida's credibility. Accordingly, we conclude that this factor favors Aida.

The fourth and fifth factors favor defendants. McCue propounded interrogatories to Aida requesting that she disclose all persons who would testify at trial as well as the subject matter of their testimony. This request was made in March 1998, over two

years prior to trial. In September 1998, McCue filed a motion to compel Aida to answer outstanding discovery. Thus, McCue was diligent. See Warrender, 304 Ill. App. 3d at 268. Furthermore, defendants promptly objected when Aida attempted to call Eduardo.

The final factor concerns the good faith to the party calling the witness. Aida contends that she acted in good faith because she was unaware of Eduardo's whereabouts prior to the day upon which she attempted to call him as a witness. Assuming this is true, Aida was aware of Eduardo's availability at 8:00 a.m. on the day that she attempted to call him and did not disclose this fact until sometime after 2:30 p.m. when she attempted to introduce his testimony. This omission deprived defendants of the few hours Aida could have given them to contemplate his testimony. While this is not a huge omission, it is inconsistent with acting in good faith. In short, we view this factor as favoring neither party significantly.

Thus, four factors favor defendants, one favors Aida, and one is inconclusive. Given the predominance of factors weighing against Aida, we cannot say that the trial court abused its discretion in barring Eduardo's testimony. See Ashpole, 297 Ill. App. 3d at 729.

3. WHETHER THE TRIAL COURT'S DECISION WAS AGAINST  
THE MANIFEST WEIGHT OF THE EVIDENCE

Aida next argues that the trial court's judgment in favor of McCue and Ponce was contrary to the manifest weight of the evidence. We will not disturb the findings and judgment of a trial court unless they are against the manifest weight of the evidence.

City of Springfield v. Hashman, 332 Ill. App. 3d 748, 754 (2002). A decision is contrary to the manifest weight of the evidence if an opposite conclusion is clearly apparent. Kirschenbaum v. Northwestern University, 312 Ill. App. 3d 1017, 1026 (2000). Further, it barely needs repeating that a trial court is in a superior position to judge the credibility of witnesses, for it has the benefit of live testimony, while this court must rely on a cold record. Habitat Co. v. McClure, 301 Ill. App. 3d 425, 441 (1998).

Aida points to a number of facts that she contends support her position. She notes that no one testified that they saw her sign the document and asserts that her testimony that her signature was forged was uncontroverted. She further observes that Oliver testified that the credit application was filled out in Ernesto's handwriting. Documents pertaining to past deals were kept in McCue's business office, to which any employee, including Ernesto, had access. A copy of her old driver's license, which she had provided to McCue in connection with a past transaction and which had subsequently been destroyed, appeared in the records relating to the purchase of the truck. She further asserts that her signature on the credit application was different from her signature on the contract as well as on her driver's license. Finally, she notes that the title to the truck was issued in Eduardo's name alone.

Regarding Aida's claim that her signatures on various documents were different, the trial judge, noting that he was not a handwriting expert, stated that he viewed the signatures and could not tell who signed them. Moreover, he observed that the

signature at issue appeared in the crease of the document, making it more difficult to examine. The trial court also noted the absence of expert handwriting testimony. Further, we note that even if the signatures were different, this does not establish that it was McCue, rather than Eduardo, that forged the signature. The trial court also found that Eduardo had the greatest motivation to forge Aida's signature, for it would enable him to gain possession of the truck. McCue, on the other hand, would have likely sold the truck to someone else and the salesman's motive in obtaining a commission was relatively small compared to Eduardo's motive.

More significantly, the trial court found Aida's credibility to be questionable. Specifically, the trial court observed that she first suspected Eduardo as the perpetrator when she filed a police report concerning the incident. Moreover, the trial court, unlike this court, was able to observe her testimony first hand. The trial court also credited Oliver's testimony that Aida was present at the dealership and escorted her to the finance office.

Ultimately, the trial court based its decision on a failure of Aida to present sufficient evidence to prove her case. This decision was based in significant part on its rejection of Aida's testimony and acceptance of Oliver's testimony. We do not perceive Aida's testimony as so compelling that the trial court was required to accept it nor do we view Oliver's as so incredible that the trial court had to reject it. The trial court's conclusion as to Eduardo having a stronger motive to forge the signature was sound. In sum, an opposite conclusion to that arrived at by the trial court is not clearly apparent. Accordingly, we cannot say that the

trial court's decision was contrary to the manifest weight of the evidence. Kirschenbaum, 312 Ill. App. 3d at 1026.

#### 4. ATTORNEY FEES

Following trial, the circuit court awarded attorney fees to both McCue and Ernesto. The trial court justified this award both as sanctions under Supreme Court Rule 137 (155 Ill. 2d R. 137) against Aida and her attorneys and under the fee shifting provision of the Act against Aida individually (815 ILCS 505/10a(c) (West 1998)). McCue was awarded approximately \$41,000, and Ernesto was awarded about \$31,000. We must examine both bases for the awards.

##### A. Rule 137 Sanctions

Aida first contends that the trial court erred in awarding fees as sanctions pursuant to Rule 137 (155 Ill. 2d R. 137). We apply the abuse-of-discretion standard to a trial court's decision to sanction a party under Rule 137; however, notwithstanding the considerable deference the trial court is accorded, we may independently review the record and find an abuse of discretion if the facts so warrant. Technology Innovation Center, Inc. v. Advanced Multiuser Technologies Corp., 315 Ill. App. 3d 238, 244 (2000). A trial court may impose sanctions "against a party or his [or her] counsel for filing a motion or pleading that is not well-grounded in fact, not supported by existing law, or lacks a good-faith basis for modification, reversal, or extension of the law, or is interposed for any improper purpose." Krautsack v. Anderson, 329 Ill. App. 3d 666, 683 (2002). Rule 137 is penal in nature and thus must be strictly construed. Rankin ex rel. Heidlebaugh v. Heidlebaugh, 321 Ill. App. 3d 255, 260 (2001). The

party seeking sanctions under Rule 137 bears the burden of proving that they are warranted. Technology Innovation Center, Inc., 315 Ill. App. 3d at 243. This burden entails "proving not only that the allegations of the complaint were made without reasonable inquiry, but also that the allegations of the complaint are untrue." Burrows v. Pick, 306 Ill. App. 3d 1048, 1055 (1999). Finally, Rule 137 requires a trial court to set forth the basis for sanctioning a party to facilitate appellate review. Twardowski v. Holiday Hospitality Franchising, Inc., 321 Ill. App. 3d 509, 513 (2001). Failure to set forth specific findings warrants the reversal of the trial court's order. Twardowski, 321 Ill. App. 3d at 513; Bedoya v. Illinois Founders Insurance Co., 293 Ill. App. 3d 668, 681 (1997) ("Therefore, we reverse the trial court's grant of Rule 137 sanctions and remand the cause for further proceedings to allow the trial court to make specific findings of fact or law supporting its decision").

We are concerned as to several bases of the trial court's decision. Several comments the trial court made during its oral ruling on defendant's request for fees indicate that the trial court was concerned not with whether Aida's allegations were "well grounded in fact" (155 Ill. 2d R. 137), but with whether the evidence would bear out her allegations. For example, the trial court stated, "So what is troubling to me is [Aida's attorney] knew from day one that the case couldn't be proved." "Well grounded in fact" is not the same standard as supported by the evidence. Our Rule 137 appears to be drawn verbatim from a former version of Rule 11 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 11).

Rule 11 was subsequently amended so that it now reads "the allegations and other factual contentions have evidentiary support." Our rule focuses on facts rather than evidence, and thus an attorney or party may consider more information when deciding whether to proceed with a case. For example, in the instant case, the record refers to a handwriting expert who, though unable to say to a degree of certainty sufficient to allow him to testify, did believe that the signature on one of the documents was not that of Aida. While not rising to the level of evidence, Aida and her counsel could consider this opinion in deciding whether to proceed.

We also note that the trial court never found that the allegations contained in Aida's pleadings were untrue. In its written orders, the court did recite the language of Rule 137, stating that Aida's claim was "not well-grounded in fact and under the existing law or a good faith extension thereof." Merely paraphrasing the rule does nothing to aid our review. Nowhere does the order identify what is false much less why the court concluded any particular allegation was false.

Moreover, we note that the trial court's findings at the conclusion of trial appear inconsistent with a finding that Aida's allegations were false. For example, the trial court stated, "It has never been proven by either side of the case as to who put her name on this." Later, the court made the following statements: "She [could have recovered] tens of thousands of dollars for perpetuating a fraud. I'm not saying that she did, but she's just as suspect as any of the rest." (Emphasis supplied.) We are hesitant to read too much into these statements, as they were made

in the context of whether Aida met her burden of proof at trial. However, they are the only findings concerning the veracity of Aida's allegations that appear in the record.

Additionally, some support existed for the proposition that Aida did not sign the contract in the fact that she reported the alleged forgery to the police. If she had, in fact, signed the document, she exposed herself to criminal sanctions by making the report. In probable cause cases, courts recognize that police are entitled to give more weight to civilian informants who voluntarily come forward, thus exposing themselves to sanctions for making a false report. See Adams v. Williams, 407 U.S. 143, 146-47, 32 L. Ed. 2d 612, 617, 92 S. Ct. 1921, 1923-24 (1972); United States v. Sierra-Hernandez, 581 F. 2d 760, 763 (9th Cir. 1978). Similarly, in the instant case, the fact that Aida reported to the police that her signature was forged enhanced her credibility. That the court ultimately rejected her claim is of no moment. Cf. McClaghry v. Village of Antioch, 296 Ill. App. 3d 636, 645 (1998) (holding sanctions inappropriate where a party "presents objectively reasonable arguments for his position, regardless of whether the arguments are deemed to be unpersuasive or incorrect").

Similarly, some support existed for the inference that it was someone at the dealership, rather than Eduardo, that forged Aida's signature. In another case from the criminal milieu, one court observed that "[t]he familial ties of the alibi witnesses may bring their veracity under scrutiny such that their testimony may be rejected." People v. Garza, 92 Ill. App. 3d 723, 729 (1981). The obvious inference to which the Garza court was alluding is that

family members are likely to treat each other favorably. In the case at bar, one could infer that a stranger, such as someone at the dealership, was more likely than Aida's nephew Eduardo to forge her name on a contract. We also note that the trial court recognized that there was a motive, albeit a smaller one than for Eduardo, for someone at McCue to forge Aida's signature.

Given the trial court's findings at the end of trial, some of the inferences that appear reasonable to us, and, most importantly, the trial court's failure to explicitly set forth the basis for its award of fees, we are left in a position where we are unable to conduct meaningful review of this issue. Accordingly, we vacate the trial court's award of fees under Rule 137 and remand this cause so that the trial court can make appropriate findings and enter whatever order it deems to be in conformity therewith.

B. Shifting Fees Under The Consumer Fraud Act

As an alternative justification for the fee award, the trial court relied on section 10a of the Act (815 ILCS 505/10a(c) (West 1998)). Section 10a provides that a court may award "reasonable attorney's fees and costs to the prevailing party." 815 ILCS 505/10a(c) (West 1998). Whether a prevailing party is entitled to attorney fees is a matter lying within the discretion of the trial court, and we will not disturb the decision of the trial court absent an abuse of that discretion. Majcher v. Laurel Motors, Inc., 287 Ill. App. 3d 719, 730 (1997). The burden of proof is on the party seeking to recover its fees. See Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc., 286 Ill. App. 3d 1028, 1033 (1997) (holding "[t]he burden of proof of entitlement to fees rests with

the plaintiff," where the plaintiff was the party seeking fees). The following factors are relevant in ascertaining whether a party is entitled to fees under the Act: "(1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (4) whether the party requesting fees sought to benefit all consumers or businesses or to resolve a significant legal question regarding the Act; and (5) the relative merits of the parties' positions." Graunke v. Elmhurst Chrysler Plymouth Volvo, Inc., 247 Ill. App. 3d 1015, 1022-23 (1993). This list is not an exclusive one, and no single factor is dispositive. Graunke, 247 Ill. App. 3d at 1023. Applying the factors set forth in Graunke, we conclude that the trial court abused its discretion in awarding attorney fees to plaintiff under the Act.

We recognize that an apparent split of authority exists as to whether bad faith is a sine qua non to an award of fees under the Act. In Washington Courte Condominium Association-Four v. Washington-Golf Corp., 267 Ill. App. 3d 790, 826 (1994), the First District held that the decision as to whether a fee award is appropriate "primarily hinges on a determination of bad-faith." Similarly, in Casey v. Jerry Yusim Nissan, Inc., 296 Ill. App. 3d 102, 108 (1998), the Third District stated that, before awarding attorney fees, "a trial court must first determine whether the plaintiff acted in bad faith." This district does not so hold; however, we do recognize that bad faith is a factor of great import. Graunke, 247 Ill. App. 3d at 1023 ("Thus, the existence of

bad faith in the action by an opposing party is not the only consideration, but it is an important factor, in some cases the controlling one, which should be considered by a court deciding whether to award attorney fees").

Bad faith, the first factor, does not militate strongly in favor of a fee award in the instant case. The operative consideration here is "the degree of the opposing party's culpability or bad faith." (Emphasis supplied.) Graunke, 247 Ill. App. 3d at 1022. The trial court's oral pronouncement on this issue is a bit unclear. In support of this finding, the trial court stated, "The bad faith I guess comes and I would make that finding that after all the discovery, after all the evidence, after everything was in still the complaint--the sixth amended complaint was filed and the case went forward after all of your discovery and you knew it was unprovable." [Sic.] Thus, the trial court's finding can be read as being limited to the time of the filing of the sixth-amended complaint. If so, then, by implication, Aida was not proceeding in bad faith prior to this time. We note that the sixth-amended complaint, save one passage regarding the addition of Aida's name to another document, is identical to the fourth-amended complaint, which was filed in June 1999. The trial court's finding of bad faith does not appear limited to the additional allegation contained in the sixth-amended complaint. Hence, if this reading of the trial court's order is correct, plaintiff's pretrial allegations, which are also contained in the sixth-amended complaint, were not made in bad faith. Since this filing came on the last day of trial, the degree of bad faith exhibited by Aida is

minimal. Moreover, the bulk of attorney fees were for work done prior to this filing, so they were not caused by Aida's bad faith.

If, on the other hand, the trial court's finding was not limited to the filing of the sixth-amended complaint and the trial court meant that Aida exhibited bad faith by bringing this claim to trial when it was apparent that it was unprovable, we disagree. Quite simply, the claim was not unprovable. If the court had accepted her testimony, which was corroborated to an extent by the fact that she filed a police report (though the trial court did not see it that way), she would have proven a substantial portion of her case. Further, had the trial court drawn the inference set forth in the preceding section regarding it being more likely that a stranger would forge Aida's signature than a relative, it may have found for her. This inference is supported by the trial court's observation that some employees at McCue did have a motive to forge her signature. That the trial court relied on ascertaining who had the strongest motive to forge her signature does not mean that this inference is unreasonable. Moreover, as Aida points out in her brief, other circumstantial evidence supporting her position exists, most notably the fact that McCue's employees could have accessed her records from a previous transaction and that an old copy of her driver's license appeared in the records for the purchase of the truck. While this evidence may not have been particularly compelling, it certainly does not comport with the trial court's finding that her claim was unprovable.

Accordingly, we conclude that any bad faith exhibited by Aida was minimal. Thus, this factor, which even this district recognizes as being of particular importance (Graunke, 247 Ill. App. 3d at 1023), provides only weak support for awarding defendants attorney fees under the Act. We will now turn to the balance of the factors set forth in Graunke.

The second factor, the ability of the party to satisfy a fee award (Graunke, 247 Ill. App. 3d at 1022), also provides little, if any, support for awarding fees in this case. At trial, Aida testified that she was employed and was making \$11 per hour at the time of the transaction at issue in this case. Assuming a forty-hour work week, this translates into about \$23,000 per year. Further, she owned two houses at one time, but the record does not reveal such things as their value or how much equity she had in them. She did testify, however, that she received around \$7,000 from the sale of one of the properties. Thus, the evidence available is speculative at best regarding Aida's ability to satisfy a fee award of over \$70,000. Because the burden of proof is on the party seeking fees (see Schorsch, 286 Ill. App. 3d at 1033), McCue's assertion that Aida failed to present evidence that she did not have the ability to satisfy the award is irrelevant. Further, given the speculative evidence available, defendants did not sustain their burden as to this factor.

The third factor--whether an award would deter others from acting under similar circumstances (Graunke, 247 Ill. App. 3d at 1022)--favors neither party. This factor is a bit peculiar, in that it would virtually always seem to favor an award. Any time a

court awards fees, it would deter others from acting in similar circumstances. Thus, for this factor to carry any weight, some special circumstance would have to be present to distinguish this case from any other where fees were sought. McCue merely asserts that a fee award would send "out a message to all would be litigants to be mindful of the merits of their case before they unjustly accuse others of wrongdoing." We agree, but such is true of any case in which fees are shifted. Thus, this factor provides no support for a fee award.

Fourth, we must consider "whether the party requesting fees sought to benefit all consumers or businesses or to resolve a significant legal question regarding the Act." Graunke, 247 Ill. App. 3d at 1022-23. McCue argues, in essence, that by prevailing, they have benefitted all businesses by deterring plaintiffs from maintaining baseless claims. This argument is essentially a reiteration of the argument that was appropriately addressed in the preceding paragraph. McCue also suggests that "[b]y awarding fees to a prevailing honest business from plaintiffs who maintain baseless claims, the honest and fair businesses will benefit from the direct effect of such fee shifting." Undoubtedly, this is a true statement. Awarding fees to any defendant who prevails would be a benefit to that defendant. It would also be contrary to the American rule that each party bear its own expense of litigation. Morris B. Chapman & Associates, Ltd. v. Kitzman, 193 Ill. 2d 560, 572 (2000). We do not believe section 10a of the Act (815 ILCS 505/10a(c) (West 1998)) can be read as a general fee shifting provision, so such considerations are irrelevant. We also note

that defendant has not attempted to establish a new rule of law that would benefit businesses generally. Thus, this factor does not weigh in favor of a fee award.

Finally, Graunke directs that we consider "the relative merits of the parties' positions." Graunke, 247 Ill. App. 3d at 1023. The merits of defendants' position were clearly stronger; however, as discussed above, Aida had some support for her position. Given the near lack of a basis for an award under any of the other relevant factors, this factor cannot carry the day.

In determining whether to award fees to a prevailing defendant, a court must keep certain policy concerns in mind. The Fourth District has observed that "[t]he Act indicates a public policy to encourage plaintiffs who have a cause of action to sue even if recovery would be small." Haskell v. Blumthal, 204 Ill. App. 3d 596, 602 (1990). Further, "[t]he exposure of a plaintiff to being required to reimburse a prevailing defendant for attorney fees is a deterrent to bringing an action." Haskell, 204 Ill. App. 3d at 602. In light of these policy concerns and the weak support for a fee award found in the record, we hold that the trial court abused its discretion in awarding fees under the Act. Accordingly, we reverse this portion of the trial court's judgment.

#### 5. DENIAL OF AIDA'S MOTION TO DISMISS ERNESTO

Finally, Aida complains that the trial court improperly denied her motion to voluntarily dismiss Ernesto. See 735 ILCS 5/2--1009 (West 1998). A plaintiff must comply with the following three conditions in order to dismiss an action under section 2--1009 of the Civil Practice Law (735 ILCS 5/2--1009 (West 1998)): "1) the

plaintiff must move for the voluntary dismissal prior to the beginning of trial or hearing; 2) the plaintiff must give proper notice; and 3) the plaintiff must pay costs." Valdovinos v. Luna-Manalac Medical Center, Ltd., 328 Ill. App. 3d 255, 267 (2002). Aida concedes that she did not satisfy the third condition; however, she charges that the trial court erred by not giving her an opportunity to pay Ernesto's costs. We disagree.

Where all three conditions set forth in section 2-1009 are satisfied, a trial court lacks discretion to deny a plaintiff's motion to dismiss. Farrar v. Jacobazzi, 245 Ill. App. 3d 26, 30 (1993). Conversely, if all three conditions are not satisfied, the decision to grant such a motion lies within the discretion of the trial court. See Farrar, 245 Ill. App. 3d at 31 ("Additionally, the record and pleadings on file show that plaintiff did not pay or even allege the payment or tender of court costs. Although the trial judge surely had the power to grant plaintiffs' request for a voluntary dismissal even though plaintiffs did not strictly comply with the section 2--1009 requirements, we cannot say that it was improper for him to deny the motion"). Furthermore, a plaintiff must allege that all costs have been satisfied in the motion to voluntarily dismiss. Dolido v. Zenith Radio Corp., 194 Ill. App. 3d 268, 272 (1990).

Aida did not satisfy all three preconditions set forth in section 2--1009, specifically she neither paid costs to Ernesto nor alleged that she did so. Thus, the trial court possessed the discretion to deny Aida's motion. Aida does not seriously attempt to argue that the trial court abused this discretion. She does

complain that she "saw no reason to state explicitly that she would pay the requisite costs," since defendants' opposition to her motion was not based on this omission. We are unpersuaded. There is ample reason to state explicitly that one has paid costs, namely, section 2--1009 explicitly states that this is required (735 ILCS 5/2--1009 (West 1998)), and the case law interpreting the statute states the same thing (e.g., Dolido, 194 Ill. App. 3d at 272)). We see no abuse of discretion in the trial court's decision to deny Aida's motion.

[The preceding material is nonpublishable under Supreme Court Rule 23.]

#### CONCLUSION

Accordingly, we hold that the circuit court properly denied the motion to dismiss Aida for lack of standing. In the unpublished portion of this opinion, we concluded that the trial court erred in awarding attorney fees to defendants under the Act (see 815 ILCS 505/10a(c) (West 1998)) and reversed that portion of the trial court's decision. We also vacated the trial court's award of fees under Supreme Court Rule 137 (155 Ill. 2d R. 137) and remanded on this issue so that the trial court can make appropriate findings and enter an order in conformity therewith. We affirmed as to all other matters raised by Aida.

Affirmed in part, reversed in part, and vacated in part; cause remanded with directions.

BYRNE and KAPALA, JJ., concur.