STATE OF MICHIGAN

COURT OF APPEALS

SHAWN SEYMOUR,

Plaintiff-Appellant/Cross-Appellee,

v

CHAMPS AUTO SALES, INC.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 19, 2020

No. 350063
Wayne Circuit Court
LC No. 17-007690-NZ

Before: BOONSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment in his favor in this odometer fraud action, wherein the trial court awarded plaintiff attorney fees and costs. In his appeal, plaintiff challenges the amount of an award of attorney fees and costs in his favor and against defendant. Defendant cross-appeals the same judgment,[1] alleging that because it was entitled to summary disposition this Court should reverse the trial court's judgment in favor of plaintiff. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This case arises out of plaintiff's purchase of a 2009 Lexus IS250 ("the vehicle") from defendant, a used car dealership, on December 30, 2016. Defendant purchased the vehicle at an auction from State Farm Mutual Automobile Insurance Company ("State Farm"). When defendant purchased the vehicle from State Farm, the certificate of title contained contradictory information regarding the mileage of the vehicle. The "odometer" category on the front of the certificate of

[1] This Court granted defendant's application for a delayed cross-appeal. *Seymour v Champs Auto Sales, Inc*, unpublished order of the Court of Appeals, entered November 21, 2019 (Docket No. 350874). Although defendant's application for a delayed cross-appeal was filed in Docket No. 350874, this Court's order granting the application for a delayed cross-appeal provided that all further filings were to be in Docket No. 350063. *Id*.

title indicated that there were 88,000 miles on the vehicle, and the phrase "actual mileage" was listed. But the "title assignment by seller" section, which was signed by a representative of State Farm as well as a representative of defendant, listed 88,000 miles as the odometer reading, and a box was checked stating, "not actual mileage—WARNING ODOMETER DISCREPANCY."

On December 30, 2016, when defendant sold the vehicle to plaintiff, defendant represented that the actual mileage was 88,000 on numerous documents, including the purchase agreement, the application for title and registration for plaintiff, and the "title assignment by seller" section of the certificate of title, on which defendant checked a box marked "actual mileage" after listing 88,000 miles for the odometer reading. Plaintiff's total purchase price for the vehicle, including finance charges, taxes, title fees, a service contract, and document fees, was $26,949. Plaintiff was not provided with the title to the vehicle. On February 22, 2017, plaintiff obtained a Carfax vehicle history report, which showed that the mileage on the vehicle was 101,052 on October 31, 2016, when defendant had the vehicle serviced at Meade Lexus of Lakeside ("Meade Lexus"); the Carfax report also showed that, earlier in 2016, before State Farm sold the vehicle to defendant, the vehicle had been stolen, declared a total loss, and then recovered.

On May 22, 2017, plaintiff commenced this action by filing an 11-count complaint. Most of the counts are not pertinent to this appeal. As relevant here, plaintiff asserted a claim for violation of the Motor Vehicle Information and Cost Savings Act ("the federal odometer act"), 49 USC 32701 *et seq*. Regarding that claim, plaintiff alleged that defendant failed to provide an accurate disclosure of the mileage of the vehicle and acted with the intent to defraud plaintiff with respect to the accuracy of the vehicle's odometer reading. Plaintiff sought damages under the federal odometer act of three times his actual damages or $10,000, whichever was greater, as provided under the federal odometer act. Plaintiff ultimately moved for summary disposition under MCR 2.116(C)(10) regarding his federal odometer act claim, and the trial court granted the motion.

Plaintiff then filed a motion for election of remedies, for entry of judgment for statutory damages pursuant to that election, and to set the matter for an evidentiary hearing regarding plaintiff's attorney fees and costs. Plaintiff noted that the federal odometer act entitles him to either treble damages or $10,000, whichever is greater. See 49 USC 32710(a) ("A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $10,000, whichever is greater.") Also, 49 USC 32710(b) provides, "The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person." Plaintiff said that he wanted to elect his remedy under the federal odometer act to a judgment for $10,000 along with costs and attorney fees, in lieu of a trial and in lieu of proceeding on his remaining claims. The trial court granted plaintiff's motion. Plaintiff then filed a petition for attorney fees and costs. Plaintiff asserted that his principal attorney was entitled to an hourly rate of $400. Plaintiff presented an itemized billing invoice reflecting 63.1 hours of work by his attorneys. Plaintiff sought attorney fees in the amount of $23,920.32 and costs in the amount of $1,840.67.

An evidentiary hearing was held regarding plaintiff's attorney fees and costs. Plaintiff presented the testimony of Terry Adler, a consumer attorney, in support of the fee petition. At the conclusion of the evidentiary hearing, the trial court announced its decision from the bench:

> All right. The Court has reviewed the matter. The Court has looked at the factors that have been argued. The Court doesn't find that this case was so novel and difficult. The Court has looked at the pleadings. The Court has considered the fee schedules or the fees that are requested and what is considered normal in this area.
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> The Court finds that $350.00 an hour is reasonable and 40 hours is reasonable. The Court looks at the requests, damages in the amount of $10,000.00, that's granted. Attorney fees will be $14,000.00, the cost at $1,308.00. Okay.

The trial court entered a judgment in favor of plaintiff and against defendant in the amount of $10,000 and awarding plaintiff's counsel $14,000 in attorney fees and $1,308.75 in costs. This appeal and cross-appeal ensued.

II. ANALYSIS

A. Plaintiff's Appeal

On appeal, plaintiff argues that the trial court erred in determining the amount of the attorney fee award because the court failed to address all of the *Smith*[2] factors and failed to consider the remedial purpose of the fee-shifting provision of the federal odometer act.

The amount of an attorney fee award is reviewed for an abuse of discretion. *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 97; 795 NW2d 205 (2010). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id*. "A trial court necessarily abuses its discretion when it makes an error of law." *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

Under the "American rule," "attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Pirgu*, 499 Mich at 274-275 (quotation marks and citation omitted). The federal odometer act contains a fee-shifting provision, 49 USC 32710(b), which provides: "A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction. The action must be brought not later than 2 years after the claim accrues. **The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person**." (emphasis added). The federal odometer act "was passed by Congress to protect purchasers of motor vehicles by entitling them to rely on representations made regarding a vehicle's mileage." *Hughes v Box*, 814 F2d 498, 501 (CA 8, 1987).[3] "Given the fact that the statute is remedial legislation, it should be broadly construed to effectuate its purpose." *Id*. (quotation marks and citation omitted); see also *Kennedy*

[2] *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

[3] Decisions of lower federal courts are not binding on this Court but may be persuasive. *Vanderpool v Pineview Estates, LC*, 289 Mich App 119, 124 n 2; 808 NW2d 227 (2010).

v Robert Lee Auto Sales, 313 Mich App 277, 299; 882 NW2d 563 (2015) (noting that remedial legislation must be liberally construed in order to achieve its intended goal).

The plain language of 49 USC 32710(b) provides for an award of costs and a *reasonable* attorney fee. Because the statute provides for an award of a *reasonable* fee, the analysis set forth in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), and refined in *Pirgu*, for determining a reasonable attorney fee, applies to determine the appropriate amount of the fee. See *Powers v Brown*, 328 Mich App 617, 621-622; 939 NW2d 733 (2019) (the analysis set forth in *Smith*, and refined in *Pirgu*, is triggered by statutory language providing for an award of a *reasonable* attorney fee); *Kennedy*, 313 Mich App at 279, 285, 294-296, 299-301 (applying the *Smith* analysis to fee-shifting provisions contained in the federal Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.). And because the federal odometer act is remedial legislation, *Hughes*, 814 F2d at 501, the trial court was required to consider the remedial purpose of the fee-shifting provision when awarding attorney fees, *Kennedy*, 313 Mich App at 279, 299.

A trial court must begin its analysis under *Smith* by determining the fee customarily charged in the locality for similar legal services. *Powers*, 328 Mich App at 622-623, citing *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.). This number is then multiplied by the reasonable number of hours expended on the case. *Powers*, 328 Mich App at 623, citing *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). " 'The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee.' " *Powers*, 328 Mich App at 623, quoting *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). A trial court should then "consider a number of factors to determine whether an upward or downward adjustment is appropriate." *Powers*, 328 Mich App at 623, citing *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). The factors that a trial court should consider have been most recently distilled as follows:

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
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> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
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> (3) the amount in question and the results obtained,
>
> (4) the expenses incurred,
>
> (5) the nature and length of the professional relationship with the client,
>
> (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
>
> (7) the time limitations imposed by the client or by the circumstances, and
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> (8) whether the fee is fixed or contingent. [*Powers*, 328 Mich App at 623, citing *Pirgu*, 499 Mich at 282.]

" 'These factors are not exclusive, and the trial court may consider any additional relevant factors.' " *Powers*, 328 Mich App at 623, quoting *Pirgu*, 499 Mich at 282. "Further, to aid 'appellate review, the trial court should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors.' " *Powers*, 328 Mich App at 623-624, quoting *Pirgu*, 499 Mich at 282. A trial court errs if it fails to follow this method. *Powers*, 328 Mich App at 624, citing *Pirgu*, 499 Mich at 282.

In addition, this Court has "recognized that fee-shifting provisions are essential to legal redress in public interest or consumer cases in which the monetary value of the case is often meager." *Kennedy*, 313 Mich App at 299 (quotation marks and citation omitted). This Court has thus held that a trial court abused its discretion by failing to consider the remedial nature of the statutory scheme containing the fee-shifting provision. See *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 98; 537 NW2d 471 (1995) (holding that "the district court abused its discretion in failing to consider the remedial nature of the acts involved [i.e., the MMWA and the MCPA]").

> In consumer protection as this, the monetary value of the case is typically low. If courts focus only on the dollar value and the result of the case when awarding attorney fees, the remedial purposes of the statutes in question will be thwarted. Simply put, if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would indeed be ironic: it is precisely those with ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial acts are intended. [*Kennedy*, 313 Mich App at 299-300, quoting *Jordan*, 212 Mich App at 98-99.]

This does not mean that a plaintiff in such a case is always entitled to the full amount of fees requested. *Kennedy*, 313 Mich App at 300, citing *Jordan*, 212 Mich App at 99. "Rather, a court is to consider 'the usual factors,' and 'must also consider the special circumstances presented in this type of case.' " *Kennedy*, 313 Mich App at 300, quoting *Jordan*, 212 Mich App at 99. The framework set forth in *Smith* is the most appropriate way to honor the intent of remedial legislation and to serve the goal of awarding a reasonable fee in such cases. *Kennedy*, 313 Mich App at 301.

In the present case, the trial court's analysis failed to comport with the requirements of the caselaw discussed above. The trial court did not adequately adhere to the framework required by *Smith* and *Pirgu*. The trial court's analysis was cursory. The trial court stated that an hourly rate of $350 was reasonable but did not explain how it arrived at that figure. The trial court was required to begin its analysis by determining the fee customarily charged in the locality for similar legal services. *Powers*, 328 Mich App at 622-623, citing *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.). Plaintiff presented evidence supporting his request for a $400 hourly fee for his principal attorney, Dani Liblang, including the 2017 economics of law practice survey of the State Bar of Michigan, Liblang's affidavit, and Adler's testimony; the court did not explain why it concluded that a $350 hourly fee was appropriate. The trial court was then required to multiply the reasonable hourly rate by the reasonable number of hours expended. *Powers*, 328 Mich App at 623, citing *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). Plaintiff presented billing

invoices indicating that 63.1 hours of billable time were expended; the trial court stated that 40 hours were reasonably expended but failed to explain how it arrived at this figure. Further, after determining a baseline figure, the trial court failed to address most of the other factors that should be considered in determining whether an upward or downward adjustment was appropriate. See *Powers*, 328 Mich App at 623. Other than tersely asserting that the case was not novel and difficult, the trial court did not address the remaining factors. Nor is there any indication that the trial court considered the remedial nature of the legislation involved in this case. See *Jordan*, 212 Mich App at 98.

Given the trial court's failure to adhere to the appropriate framework for determining a reasonable attorney fee, we vacate the attorney fee award and remand the case to the trial court to determine the appropriate amount of the attorney fee award in conformity with the caselaw discussed in this opinion. See *Pirgu*, 499 Mich at 283; *Powers*, 328 Mich App at 624-625.[4]

Defendant's suggestion that alternative grounds exist to affirm the trial court's attorney fee award runs contrary to the caselaw discussed above and is therefore, unavailing. Defendant argues that the amount of fees requested was disproportionate to the result obtained, that the alleged recovery by plaintiff's counsel of a contingency fee and statutory attorney fees is unreasonably excessive, that attorney fees incurred after the vehicle was destroyed were unnecessary and excessive, and that plaintiff's counsel billed for proceedings or conferences that did not occur or did not last as long as claimed. Defendant's arguments reflect that defendant does not understand the nature of the trial court's error. The trial court erred in failing to follow the proper framework under *Smith* and its progeny for determining the amount of a reasonable attorney fee award. The trial court's failure to do so requires that the attorney fee award be vacated and the case remanded for reconsideration of the fee award. Defendant's arguments are directed to whether plaintiff's requested fee was reasonable, but it is for the trial court on remand to determine a reasonable fee under the framework required by the caselaw discussed above. Defendant's arguments thus do not provide alternative grounds for affirmance.

Plaintiff next argues on appeal that he is entitled to reasonable attorney fees and costs incurred in litigating his fee petition.

As noted earlier, a provision of the federal odometer act, 49 USC 32710(b), provides, "The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person." Because the federal odometer act is remedial legislation, it is broadly construed to effectuate its purpose. *Hughes*, 814 F2d at 501; see also *Kennedy*, 313 Mich App at 299 (noting that remedial legislation must be liberally construed in order to achieve its intended goal).

Persuasive federal authority indicates that cost and fees incurred in litigating a fee petition may generally be obtained under fee-shifting provisions contained in federal statutes. In *In re*

[4] Plaintiff asserts that he is entitled to reasonable appellate attorney fees under the federal odometer act. Plaintiff is free to seek such fees in an updated petition on remand in the trial court; it is for the trial court in the first instance to consider whether such fees are allowable and reasonable here. See *Fleet Investment Co, Inc v Rogers*, 505 F Supp 522, 524 (WD Okla, 1980) (the trial court is the proper forum to determine reasonable appellate attorney fees in a federal odometer act case).

Nucorp Energy, Inc, 764 F2d 655, 659-660 (CA 9, 1985), the court explained, "In statutory fee cases, federal courts, including our own, have uniformly held that time spent in establishing the entitlement to and amount of the fee is compensable." Federal courts have consistently reached this conclusion in applying various federal fee-shifting statutory provisions. See *id*. at 660 (citing cases for this proposition). The rationale for this position has been explained as follows:

> If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. Recognizing this fact, attorneys may become wary about taking Title VII cases, civil rights cases, or other cases for which attorneys' fees are statutorily authorized. Such a result would not comport with the purpose behind most statutory fee authorizations, *viz*, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies. Indeed, courts have consistently held that attorneys may be awarded, under statutory fee authorizations, compensation for the expenses of and time spent litigating the issue of a reasonable fee—i.e. for time spent on the fee application and successful fee appeals. [*Id*. (citation omitted).]

See also *Northeast Ohio Coalition for the Homeless v Husted*, 831 F3d 686, 723 (CA 6, 2016) (noting that *Nucorp* "supports fully compensatory awards of fees for fees, and it cited cases from other circuits doing the same[]"); *Knop v Johnson*, 712 F Supp 571, 592-593 (WD Mich, 1989) (awarding reasonable fees and costs for litigating a fee petition under a federal civil rights law).

Accordingly, we conclude that plaintiff is entitled to recover reasonable attorney fees and costs incurred in litigating the fee petition. On remand, therefore, the trial court should include any such reasonable fees and costs when determining the appropriate amount of the award.

Plaintiff asks that this Court sanction defendant for filing a frivolous appeal and for falsely representing to this Court that it had obtained the AutoCheck report before selling the vehicle to plaintiff. Plaintiff again notes that the AutoCheck report in the record is dated February 23, 2017, nearly two months after the December 30, 2016 sale of the vehicle to plaintiff. In response, defendant claims that it had obtained an AutoCheck report before the sale of the vehicle to plaintiff and that defendant has never asserted that the AutoCheck report in the record is the same AutoCheck report on which defendant relied before the sale of the vehicle to plaintiff.

Plaintiff's request for appellate sanctions must be brought in a separately filed motion rather than in plaintiff's appellate brief. See *Barrow v Detroit Election Comm*, 305 Mich App 649, 683-684; 854 NW2d 489 (2014), citing MCR 7.216(C)(1) and MCR 7.211(C)(8). Plaintiff may file such a motion "within 21 days after the date of this Court's opinion disposing of [this appeal and cross-appeal]." *Id*. at 684, citing MCR 7.211(C)(8). We therefore "deny the request for appellate sanctions without prejudice." *Barrow*, 305 Mich App at 684.

B. Defendant's Appeal

Defendant argues on cross-appeal that the trial court erred in granting summary disposition to plaintiff regarding his claim under the federal odometer act.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). When considering a motion under MCR 2.116(C)(10),

> a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*El-Khalil*, 504 Mich at 160 (quotation marks and citations omitted).]

Defendant has abandoned this argument. Defendant's principal brief on cross-appeal fails to cite any pertinent authority about the requirements of the governing statutory scheme, the federal odometer act. "A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position. Failure to adequately brief an issue constitutes abandonment." *Seifeddine v Jaber*, 327 Mich App 514, 519-520; 934 NW2d 64 (2019) (citation omitted). In any event, defendant's argument fails on the merits as well.

When enacting the federal odometer act, Congress made the following findings:

> (a) Findings. —Congress finds that—
>
> (1) buyers of motor vehicles rely heavily on the odometer reading as an index of the condition and value of a vehicle;
>
> (2) buyers are entitled to rely on the odometer reading as an accurate indication of the mileage of the vehicle;
>
> (3) an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle; and
>
> (4) motor vehicles move in, or affect, interstate and foreign commerce. [49 USC 32701(a).]

The federal odometer act contains disclosure requirements; in particular, 49 USC 32705(a) provides, in relevant part:

> (a)(1) Disclosure requirements. —Under regulations prescribed by the Secretary of Transportation that include the way in which information is disclosed and retained under this section, a person transferring ownership of a motor vehicle shall give the transferee the following written disclosure:
>
> (A) Disclosure of the cumulative mileage registered on the odometer.
>
> (B) Disclosure that the actual mileage is unknown, if the transferor knows that the odometer reading is different from the number of miles the vehicle has actually traveled.

> (2) A person transferring ownership of a motor vehicle may not violate a regulation prescribed under this section or give a false statement to the transferee in making the disclosure required by such a regulation.
>
> (3) A person acquiring a motor vehicle for resale may not accept a written disclosure under this section unless it is complete.

The federal odometer act provides a private cause of action when a defendant violates the act with the intent to defraud. *Nabors v Auto Sports Unlimited, Inc*, 475 F Supp 2d 646, 649 (ED Mich, 2007), citing 49 USC 32710. A plaintiff is not required to show damages or causation; all that a plaintiff is required to show is that the defendant violated the federal odometer act and had a fraudulent intent in regard to the mileage of the vehicle. *Nabors*, 475 F Supp 2d at 652. Congress intended to provide a remedy for "fraud carried out through odometer tampering or misrepresenting the mileage." *Id*.

An intent to defraud may be established by an intentional violation or a reckless disregard for the truth regarding a vehicle's mileage. *Id*. "Constructive knowledge, recklessness, or even gross negligence in determining and disclosing the actual mileage traveled by a vehicle have been held sufficient to support a finding of intent to defraud under the statute." *Ryan v Edwards*, 592 F2d 756, 762 (CA 4, 1979); see also *Mayline Enterprises, Inc v Milea Truck Sales Corp*, 641 F Supp 2d 304, 308 (SD NY, 2009) ("The intent to defraud required under the [f]ederal [o]dometer [a]ct can be inferred when a seller lacks actual knowledge of the true mileage but exhibits gross negligence or a reckless disregard for the truth in preparing odometer disclosure statements."). "The inference of an intent to defraud is no less compelling when a person lacks actual knowledge of a false odometer statement only by closing his eyes to the truth." *Tusa v Omaha Auto Auction, Inc*, 712 F2d 1248, 1254 (CA 8, 1983) (quotation marks, brackets, and citation omitted). "Mere reliance on the odometer reading, in the face of other readily ascertainable information from the title and the condition of the [vehicle] constitutes a reckless disregard that rises to the level of intent to defraud, as a matter of law." *Aldridge v Billips*, 656 F Supp 975, 978-979 (WD Va, 1987).

Initially, it is important to keep in mind what defendant is, and is not, arguing on cross-appeal. Defendant's argument does not challenge what appears to be an inconsistency in the trial court's reasoning. When granting summary disposition to plaintiff on the federal odometer act claim, the trial court stated that the facts did not compel a finding of an intent to defraud on the part of defendant because it was possible that defendant's reliance on an AutoCheck report regarding the mileage was reasonable. As noted, however, a claim under the federal odometer act requires an intent to defraud on the part of the defendant (which, as noted above, may consist of gross negligence or a reckless disregard for the truth). But defendant's argument on cross-appeal does not focus on this inconsistency in the trial court's reasoning. Indeed, defendant's argument on this issue in his principal brief on cross-appeal does not even address the requirement of an intent to defraud or cite any caselaw regarding that requirement. Defendant instead argues that there was a genuine issue of material fact regarding the vehicle's actual mileage when it was sold to plaintiff. That is, defendant asserts a factual dispute regarding the mileage of the vehicle rather than that a factual dispute existed regarding the existence of an intent to defraud. In short, defendant's principal brief on cross-appeal does not address the requirement of an intent to defraud or the inconsistency in the trial court's reasoning. It is not this Court's role to help defendant make its arguments. *Seifeddine*, 327 Mich App at 521. By failing to brief any issue regarding an intent

to defraud or the inconsistency in the trial court's reasoning, defendant has abandoned any such issue. *Id*.

Defendant does briefly refer to the intent to defraud requirement in its reply brief on cross-appeal but does not address the inconsistency in the trial court's reasoning. "Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007).

In any event, as explained below, the trial court reached the correct result in granting summary disposition to plaintiff on the federal odometer act claim. See *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 449; 886 NW2d 445 (2015) ("We will affirm a trial court's decision on a motion for summary disposition if it reached the correct result, even if our reasoning differs.").

There is no genuine issue of material fact regarding whether defendant was on notice that the mileage of the vehicle was not actually 88,000. The undisputed evidence reveals that defendant purchased the vehicle from State Farm at an auction in October 2016. The Copart auction bid sheet included the following information: "Odometer: 0 mi (NOT ACTUAL)." As previously stated, when defendant purchased the vehicle from State Farm, the certificate of title contained contradictory information regarding the mileage of the vehicle. The "odometer" category on the front of the certificate of title indicated that there were 88,000 miles on the vehicle, and the phrase "actual mileage" was listed. But the "title assignment by seller" section, which was signed by a representative of State Farm as well as a representative of defendant, listed 88,000 miles as the odometer reading, and a box was checked stating, "not actual mileage—WARNING ODOMETER DISCREPANCY." Shortly after purchasing the vehicle, defendant had it serviced at Meade Lexus; a repair order from Meade Lexus showed the mileage on that date as being 101,052.

On December 30, 2016, when defendant sold the vehicle to plaintiff, defendant represented that the actual mileage was 88,000 on numerous documents, including the purchase agreement, the application for title and registration for plaintiff, and the "title assignment by seller" section of the certificate of title, on which defendant checked a box marked "actual mileage" after listing 88,000 miles for the odometer reading. On February 22, 2017, plaintiff obtained a Carfax vehicle history report, which showed that the mileage on the Lexus was 101,052 when defendant had the vehicle serviced at Meade Lexus.

Defendant has provided an AutoCheck report dated February 23, 2017 (i.e., after the December 30, 2016 sale to plaintiff) stating that the last reported odometer reading was 88,000 and that there was no indication of any odometer rollback or tampering. The AutoCheck report stated that the mileage was 88,000 on July 11, 2016, and the AutoCheck report did not indicate the mileage for any subsequent dates. The AutoCheck report in the record is dated after the sale to plaintiff and thus could not have been relied on by defendant at the time of the sale to plaintiff. Defendant asserts that another AutoCheck report was provided before the sale. Even if this is true, the fact remains that the AutoCheck report does not reflect the mileage for any date after July 11, 2016, which was more than five months before the December 30, 2016 sale to plaintiff. Given the numerous indicia that the mileage was greater than 88,000, and that there was a discrepancy regarding the odometer reading, defendant could not have reasonably relied on the AutoCheck report to believe the mileage was actually 88,000 at the time of the sale of the vehicle to plaintiff.

Accordingly, the evidence establishes as a matter of law that defendant was informed of discrepancies regarding the odometer reading and that the mileage was not actually 88,000 at the time of sale. The multiple sources of information available to defendant regarding the mileage discrepancy establishes as a matter of law that defendant was grossly negligent or exhibited a reckless disregard for the truth regarding the vehicle's mileage. The trial court therefore reached the correct result in granting summary disposition to plaintiff on his federal odometer act claim. *Ryan*, 592 F2d at 762; *Tusa*, 712 F2d at 1254.

Defendant next argues on cross-appeal that the destruction of the vehicle following an accident constituted spoliation of evidence justifying dismissal of the case or an adverse inference in favor of defendant because defendant was denied an opportunity to inspect the vehicle.

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014) (quotation marks and citation omitted). Defendant did not preserve its argument that the destruction of the vehicle following an accident amounts to spoliation of evidence requiring dismissal of the case or an adverse inference in favor of defendant. Defendant did not file a motion to dismiss the case or for other relief arising from the alleged spoliation of evidence.

A trial court's decision whether to sanction a party for the spoliation of evidence is ordinarily reviewed for an abuse of discretion. *Brenner v Kolk*, 226 Mich App 149, 160-161; 573 NW2d 65 (1997). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). However, because the issue is unpreserved, any review is limited to plain error affecting substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). Defendant must show that an error occurred, the error was clear or obvious, and the error affected substantial rights. *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). Generally, an error affects substantial rights if it is prejudicial, i.e., it affected the outcome of the case. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

This Court has explained:

> When a party destroys or loses material evidence, whether intentionally or unintentionally, and the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence, a trial court has the inherent authority to sanction the culpable party to preserve the fairness and integrity of the judicial system. There is also a general rule that if a party intentionally destroys evidence that is relevant to a case, a presumption arises that the evidence would have been adverse to that party's case. [*Teel v Meredith*, 284 Mich App 660, 666-667; 774 NW2d 527 (2009) (citation omitted).]

In addition, this Court has noted:

> [I]n a case involving the failure of a party to preserve evidence, a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence. An appropriate sanction may be the exclusion

> of evidence that unfairly prejudices the other party or an instruction to the jury that it may draw an inference adverse to the culpable party from the absence of the evidence. [*Brenner*, 226 Mich App at 161 (citations omitted).]

"Because [a trial court's] inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Swain v Morse*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 346850); slip op at 5, lv pending (quotation marks and citation omitted).

As noted, defendant failed to preserve this issue below by moving for dismissal or other relief on the basis of the alleged spoliation of evidence. The trial court thus was not afforded an opportunity to exercise its discretion to determine if any sanction was appropriate and, if so, what that sanction should be. In any event, defendant has not established that the failure to impose a sanction is a clear or obvious error that affected the outcome of the case. There is no indication that plaintiff intentionally destroyed the vehicle; rather, it was totaled as a result of an automobile accident. Defendant vaguely alludes to possible prejudice, noting that it was denied an opportunity to inspect the vehicle to determine its mileage. But defendant also has argued that it inspected the vehicle before selling it to plaintiff. Nevertheless, ample evidence exists that the mileage of the vehicle was greater than 88,000, and that defendant knew the mileage was greater than 88,000. Defendant offers no specific reason from which this Court could conclude that a further opportunity to inspect the vehicle would have affected the outcome of the case.

Defendant certainly provides no basis to conclude that the extreme sanction of dismissal was warranted. See *Brenner*, 226 Mich App at 163 ("Dismissal is a drastic step that should be taken cautiously. Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper.").

Nor has defendant established that even the lesser sanction of an adverse inference was proper or that it would have altered the outcome of the case. The trial court granted summary disposition to plaintiff on the federal odometer act claim. Defendant cites no authority establishing that an adverse inference applies at the summary disposition stage. Defendant has thus abandoned this part of the issue by failing to cite pertinent authority. *Seifeddine*, 327 Mich App at 519-520. In any event, drawing an adverse inference at the summary disposition stage would be duplicative because, when ruling on a summary disposition motion, the trial court is already required to view all evidence, and to draw all reasonable inferences, in the light most favorable to the nonmoving party. See generally, *Dillard v Schlussel*, 308 Mich App 429, 445; 865 NW2d 648 (2014). Overall, defendant has not identified an outcome-determinative plain error in failing to grant relief for the alleged spoliation of evidence.

Defendant further argues on cross-appeal that the award of damages to plaintiff in this case constitutes an impermissible double recovery because plaintiff was already reimbursed by his insurance company for the loss of the vehicle in an accident. Defendant's argument fails.

This Court has explained:

> Generally, under Michigan law, only one recovery is allowed for an injury. To determine whether a double recovery has occurred, this Court must ascertain what injury is sought to be compensated. Thus, where a recovery is obtained for

> any injury identical with another in nature, time, and place, that recovery must be deducted from the plaintiff's other award. [*Grace v Grace*, 253 Mich App 357, 368-369; 655 NW2d 595 (2002) (citations omitted).]

Defendant offers no reason to conclude that the award of statutory damages under the federal odometer act is for an injury that is identical in nature, time, and place with the loss of the vehicle arising from a subsequent automobile accident. The award of damages in this case is for defendant's violation of the federal odometer act, not for the loss of the vehicle in an accident. Also, 49 USC 32710(a) states that "[a] person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages *or* $10,000, *whichever is greater*." (Emphasis added.) Plaintiff elected the remedy of the statutory minimum award of $10,000. Under the statutory language, plaintiff was entitled to the minimum statutory award of $10,000 regardless of the amount of his actual damages. See also *Nabors*, 475 F Supp 2d at 652 (a plaintiff is not required to show damages to state a claim under the federal odometer act but only needs to show that the defendant violated the act and had a fraudulent intent). Defendant's argument that plaintiff has received an impermissible double recovery lacks merit.

Defendant's final argument on cross-appeal is that plaintiff is not entitled to an award of attorney fees and costs because the underlying grant of summary disposition to plaintiff on the federal odometer act claim was erroneous. As explained earlier, the trial court did not err in granting summary disposition to plaintiff on the federal odometer act claim. The federal odometer act contains a fee-shifting provision. According to 49 USC 32710(b), " . . . The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person." Hence, defendant's argument that plaintiff is not entitled to an award of attorney fees and costs is unavailing.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello