Circuit Court for Frederick County
Case No. C-10-CV-18-000528

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 734

September Term, 2019

SHARON GILES-SIMMONS

v.

HYUNDAI MOTOR AMERICA

Kehoe,
Berger,
Shaw Geter,

JJ.

Opinion by Kehoe, J.

Filed: August 17, 2020

This appeal arises out of the judgment entered in the Circuit Court for Frederick County in a civil action brought by Sharon Giles-Simmons against Hyundai Motor America, for breaches of written and implied warranties pursuant to the Magnuson-Moss Warranty Act, codified at 15 U.S.C. § 2301 *et seq*. Ms. Giles-Simmons raises four issues, which we have consolidated into two:

> 1. Did the circuit court abuse its discretion in granting Hyundai Motor's motion *in limine* to exclude the testimony of Ms. Giles-Simmons's expert witness?
>
> 2. Did the circuit court err in granting Hyundai Motor's motion for summary judgment?[1]

We answer no to each question and will affirm the court's judgment.

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[1] Ms. Giles-Simmons phrases the issues as:

> 1. Whether the trial court erred in requiring expert testimony as to the existence of a product defect when admissions and other evidence produced by the defendant demonstrates the question is within the common knowledge of lay jurors?
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> 2. Whether the trial court erred in excluding expert testimony as to the existence of a defect by requiring a degree of specificity in the testimony that could only be obtained by performing an examination that would void the warranty a consumer seeks to enforce?
>
> 3. Whether the trial court erred in excluding expert testimony based on its specificity when such goes to the weight or credibility of the testimony?
>
> 4. Whether admissions and other evidence produced by the defendant is sufficient to raise a fact question as to the existence of a defect in the absence of expert testimony?

Background

Ms. Giles-Simmons's Experiences with her Hyundai Elantra

In May 2016, Sharon Giles-Simmons purchased a new 2017 Hyundai Elantra (hereinafter, "the vehicle") from Massey Hyundai in Frederick, Maryland. The vehicle came with a five-year or sixty-thousand mile bumper-to-bumper warranty as well as other standard warranties. Pursuant to the manufacturer's warranty, Hyundai Motor promised to "[r]epair or replace[] . . . any component originally manufactured or installed by . . . Hyundai Motor America (HMA) that is found to be defective in material or workmanship under normal use and maintenance."

On five occasions over the next nineteen months, Ms. Giles-Simmons brought the vehicle into Massey Hyundai for routine maintenance and other minor issues, such as a manufacturer's recall on a door handle. During this time, Ms. Giles-Simmons did not experience any issues with the vehicle's heating system.

That changed in December 2017 when Ms. Giles-Simmons noticed that the vehicle would not blow hot air out of two of the vehicle's four dashboard vents when the car was idling and the outside temperature was below freezing. For that reason, on December 14, 2017, Ms. Giles-Simmons brought the vehicle into Massey Hyundai. Ultimately, Ms. Giles-Simmons would bring the vehicle into Massey Hyundai and another Hyundai dealership five more times over the next several months for the same problem. A summary of each visit is outlined below.

December 14, 2017 (28,593 miles): Ms. Giles-Simmons complained that the "HVAC system, yesterday was blowing cold air, today blowing lukewarm air." The servicer noted that "[e]ngine temp won't go above 160 degrees" but that, once replacing the thermostat, the "engine went up to full operation temp." The servicer also noted that the vehicle had "no heat at idle" and so bled the cooling system.

December 18, 2017 (28,661 miles): Ms. Giles-Simmons complained of "poor or no heat" coming from the dashboard vents. The servicer indicated that "on first inspecting the heat was not very warm." The servicer elevated the vehicle and bled the cooling system. After performing the procedure, the servicer noticed that there was more heat coming from the vehicle than before the procedure, and that "the heat output is higher when driving and gets cooler at idle." Then, after performing a "special air pocket bleed procedure several times," the car had "[n]otable improvement." Finally, the servicer "performed [the actions recommended in the] cooling system bleed bulletin." [We discuss the "bulletin" in more detail below]. The servicer otherwise found no issues in the temperature blend mechanism in the HVAC box.

December 27, 2017 (29,067 miles): Ms. Giles-Simmons complained that the "vehicle has no heat." The servicer indicated that the engine temperature was "100 [degrees] at idle" but "rises to 135 [degrees]" when applying the accelerator. The servicer called the manufacturer and was instructed to perform the bleed procedure.

January 2, 2018 (29,282 miles): Ms. Giles-Simmons complained that "the heat is not getting hot." The servicer verified that the engine temperature was "90 degrees at idle, [but] increases to 150 degrees on highway," and that the lower radiator hose was cold regardless of the engine temperature. After calling the manufacturer's "techline," the servicer bled the cooling system and elevated the front of the vehicle overnight. In the morning, during a test drive, the engine temperature increased to 150 degrees when cruising, and 140 degrees at idle. During a longer test drive, however, the engine temperature dropped to 60 degrees at idle, and one of the radiator hoses dropped to 0 degrees. The servicer diagnosed the problem as "insufficient coolant flow at idle." In response, the servicer removed and replaced the water pump and added coolant. On a subsequent test, the vehicle's temperatures ran as normal.

February 5, 2018 (30,452 miles): Ms. Giles-Simmons brought the vehicle into Ideal Hyundai located in Frederick, complaining of the same heating

> issue. The servicer indicated that there was "[n]o problem found" in the vehicle, that the heating system was operating "as other Elantras" do, and made no repairs. It did, however, bleed the cooling system again.
>
> December 26, 2018 (45,570 miles): Ms. Giles-Simmons brought the vehicle to Massey Hyundai a final time, complaining of the same heating issue. The servicer inspected the vehicle and did not find any issues with it, but did conduct an update for the vehicle.[2]

As indicated on the December 18, 2017, service report, the servicer bled the vehicle's cooling system pursuant to the manufacturer's "bulletin." This technical service bulletin is titled "No or Limited Heat from HVAC @ Low Engine RPM's Bleed the Cooling System" and applies to 2017 Hyundai Elantra models, the vehicle owned by Ms. Giles-Simmons. After a servicer confirms there is an issue with a vehicle's HVAC system, the bulletin directs the servicer to "bleed the cooling system." Below the directions for the procedure is a "notes" section indicating, among other things, that (emphasis added): "[i]t is normal for some heat loss with lower engine speeds *when the heater is being used at max blower speed*;" that "[t]he Engine Temperature can drop up to 85°f *at idle w/ blower on Max Heat*, while in Heat or Defrost mode, *in below freezing weather*;" and that "[d]riving in 'Sports Mode' will increase the engine revs and help create heat."

In her deposition, Ms. Giles-Simmons explained that the air coming out of two of the four dashboard vents was not hot when: the vehicle is idle, the fan is turned to the "max" setting, and the outdoor temperature is below freezing. All of these factors must be present

[2] By this final visit to the dealership, Ms. Giles-Simmons had filed suit against Hyundai Motor.

for the alleged heating issue to manifest itself. Ms. Giles-Simmons indicated that the air from the two dashboard vents became warm or hot when the car accelerates or when the fan speed is set to below the max setting at idle.

Ms. Giles-Simmons also testified that the dealership performed all of the repairs on her vehicle under warranty, and so did not charge her for any of the work; that the dealership provided a loaner vehicle to her, free of charge, each time she brought her vehicle in for repairs; and that she did not experience the heating issue with any of the loaner vehicles, which were the same make and model of her vehicle.[3] Finally, Ms. Giles-Simmons testified despite the heating issue, she continues to drive the vehicle regularly, about 14 miles per day, 5 days a week.

The Litigation

On March 21, 2018, Ms. Giles-Simmons's counsel sent a letter to Hyundai Motor informing it of the alleged heating defect and demanding return of fifty percent of the vehicle's purchase price "as compensation for its diminished value due to its defect," as well as attorney's fees. When Hyundai Motor did not agree, Ms. Giles-Simmons filed the present action, asserting claims against Hyundai Motor for breach of express and implied warranties under the Magnuson-Moss Warranty Act, codified at 15 U.S.C. § 2301 *et seq.*[4]

[3] Ms. Giles-Simmons could not recall the year of the loaner vehicles.

[4] Hyundai Motor is the distributor of Hyundai vehicles in the United States and, as the warrantor of the vehicle, is a proper party to this case under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1).

Discovery

Ms. Giles-Simmons enlisted the services of James Hetherington to act as her expert witness in the lawsuit. Based in Minnesota, Hetherington is an independent mechanic with over forty-two years of automotive experience. Hetherington did not inspect Ms. Giles-Simmons's vehicle himself. Instead, he hired another, Maryland-based mechanic, Ricardo Joachim, to inspect the vehicle, which Joachim did on January 27, 2019. Joachim wrote a report based on his inspection. Hetherington, who was not present for the inspection, concluded that "[i]t's my opinion that [the vehicle] has, at the time of sale, that it has a significant mechanical defect." His conclusion was based on Joachim's inspection report, as well as his own knowledge and experience.

In his deposition, Hetherington was asked to explain what exactly the specific mechanical defect is. Hetherington indicated that Joachim found that "the engine is not providing sufficient heat at low speed and based specifically when it comes to idle." When asked why the engine is providing insufficient heat, Hetherington replied (emphasis added):

> Well, *I don't know what the defect specifically is* but I can say this, each engine has a thermostat that is supposed to regulate its temperature. So, if you have a 195-degree thermostat, that should bring your engine up there. . . . And this one seems to be excessively low temperature.

When asked if he thought the vehicle's thermostat is defective, Hetherington indicated: "I'm not saying specifically the thermostat is. There is a problem in the engine cooling system that is preventing it from providing sufficient heat at low speed, at idle."

Hetherington also discussed a "touch test" performed by Joachim, in which the latter felt the radiator hoses with his bare hands and found they were cold to the touch. Hetherington explained that "[t]his is abnormal condition . . . [t]hat was [Joachim's] indication that there's a problem in the system," but Joachim never indicated what the specific problem was in his report. When asked if he could identify a problem, Hetherington responded (emphasis added):

> What is being seen is that there is unequal cooling that engine. That engine is showing when he was doing his temperature checks under the hood, when he was looking at it, you can see that there are areas of the vehicle that are up to operating temperature and there are other areas that are feeling cold in the cooling system, indicating a circulation problem of some type. Possible trapped air. *There [are] many things it could be*.

When asked what the ideal temperature of the vents at issue should be, Hetherington explained "I don't know what the specific specification or if there is even one that would tell you exactly what, after that many minutes, it should be." Again, at no time did Hetherington personally inspect the vehicle, nor did he ever communicate directly with Ms. Giles-Simmons about the vehicle.[5]

[5] Hyundai Motor's own expert inspected Ms. Giles-Simmons's vehicle on February 26, 2019, and found that "[t]he higher the fan speed the more the vent temperature would drop due to the increased air passing over the heater core which removes more heat from the engine. However, that expert tested a "like" Elantra under the same conditions, and the test results were the same: "The higher the fan speed the more the vent temperature would drop due to the increased air passing over the heater core which removes more heat from the engine."

The Issues on Appeal

On May 13, 2019, Hyundai Motor filed a motion for summary judgment asserting that Ms. Giles-Simmons has not proven the existence of a defect that existed at the time of sale of the vehicle, which is required to support a breach of an express or implied warranty claim under the Magnuson-Moss Warranty Act, and that Ms. Giles-Simmons has not suffered any loss or damages. In support, Hyundai Motor indicated that Ms. Giles-Simmons drove the vehicle for nineteen months and over 28,500 miles before complaining of any HVAC issue, and, during that period, she had the vehicle serviced on five separate occasions; that there is no admissible evidence that the alleged HVAC issue is not a normal condition of the vehicle; that Ms. Giles-Simmons' expert, James Hetherington, could not identify a specific defect in the vehicle; and that Ms. Giles-Simmons still owns and routinely drives the vehicle.

On May 29, 2019, Hyundai Motor filed a motion *in limine* to exclude Hetherington from testifying at trial as an expert witness. That motion, which incorporated Hyundai Motor's motion for summary judgment, asserted that Hetherington "merely speculates as to the presence of a defect without any supporting evidence." Because Hetherington did not have a sufficient factual basis to support his opinions as to Ms. Giles-Simmons' vehicle, his testimony should not be admitted under Maryland Rule 5-702.

On June 6, 2019, the circuit court denied both of these motions.

Trial began on June 11, 2019.[6] On the second day of trial, before Hetherington testified, Hyundai Motor renewed its motion *in limine* and its motion for summary judgment. The trial court reheard both motions. Guided by Maryland Rule 5-702, the court found that Hetherington's testimony would not "assist the trier of fact to understand the evidence—*i.e.*, identify a defect, because he himself is unable to identify the specific defect in the subject vehicle which is required by Maryland law[,]" and granted the motion *in limine* to exclude Hetherington's testimony. Then, because the court concluded that expert testimony was "required by Maryland law" in automotive warranty cases, the court granted summary judgment.

The Standard of Review

We observe that "the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal." *Roy v. Dackman*, 445 Md. 23, 38-9 (2015) (internal quotations omitted). Thus, we will reverse a circuit court's decision to exclude a witness only if there is a clear abuse of discretion. *Roy*, 445 Md. at 39.

Following its ruling on the motion *in limine*, the court granted Hyundai Motor's motion for summary judgment. A trial court may grant summary judgment "when there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law." Md.

[6] We note that the judge who ruled on Hyundai Motor's motions prior to trial did not preside over the trial.

Rule 2-501. When appellate courts review an order granting summary judgment, we undertake a two-step process. The first is determine whether there is a genuine dispute of material fact. We review the record without deference to the trial court's conclusions and "in the light most favorable to the non-moving party and we construe any reasonable inferences that may be drawn from the well-pled facts against the moving party[.]" *D'Aoust v. Diamond*, 424 Md. 549, 574–75 (2012) (cleaned up). Once past that threshold, we review a circuit court's decision to grant a motion for summary judgment for errors of law. *Young Electrical v. Dustin Construction*, 459 Md. 356, 383 (2018).

If the circuit court grants the motion based upon a misunderstanding of the law, the normal appellate remedy is to reverse the judgment because to do otherwise "would interfere with the discretion that a trial court normally enjoys to deny, or defer until trial, the merits of summary judgment on a particular issue." *Id.* There is, however, a narrow exception to this rule: an appellate court can affirm the judgment on another ground "if the trial court would have had no discretion as to the particular issue." *Id.* (citing *Mathews v. Cassidy Turley Maryland*, 435 Md. 584, 598–99 (2013)). As we will explain, the circuit court's judgment was based on an error of law but we will apply a variation on the principle articulated in *Young* and *Matthews* to affirm the judgment.

Analysis

1. *A Not So Brief Legal Overview*

The Magnuson–Moss Act Warranty Act was enacted in 1975 "to improve the 'clarity, truth, and strength of consumer product warranties.'"[7, 8] *Crickenberger v. Hyundai Motor*

[7] The Act defines a "consumer" as:

> [A] buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

[8] The Act defines "written warranty" as:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6).

The Act defines "implied warranty" as "an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product." 15 U.S.C. § 2301(7).

America, 404 Md. 37, 45 (2008) (quoting 1 David G. Owen et al., *Madden And Owen On Products Liability 3d*. § 4.23 (2000)). The Act mandates that consumer product warranties must be in writing, clearly and conspicuously disclosed, and designated as either "full" or "limited." 15 U.S.C. §§ 2302, 2303.

The Magnuson-Moss Warranty Act authorizes a state cause of action for breach of express and implied warranties. *See* 15 U.S.C. § 2310(d)(1)(A) ("[A] consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation . . . under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief . . . in any court of competent jurisdiction in any State or the District of Columbia[.]"). In that way, "the Magnuson–Moss Act supplements State law with regard to its limited and implied warranty provisions."

Crickenberger, 404 Md. at 46 (citing *Champion Ford Sales, Inc. v. Levine*, 49 Md. App. 547, 563 (1981)); *see* Maryland Code Com. Law §§ 2-313[9] and 2-314.[10]

[9]Com. Law § 2-313 provides in pertinent part:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

[10] Com. Law § 2-314 provdes:

> (1) Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. Notwithstanding any other provisions of this title
>
> (a) In §§ 2-314 through 2-318 of this title, "seller" includes the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer; and
>
> (b) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) Pass without objection in the trade under the contract description; and
> (b) In the case of fungible goods, are of fair average quality within the description; and

The Act affords several remedies to consumers, who may elect to repair, replace, or receive a refund if the warrantor breaches the warranty. There are two particularly relevant to this appeal. The first is 15 U.S.C. § 2304(a)(4), which provides that when a product "contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or a replacement without charge of, such product or part (as the case may be)." The second is 15 U.S.C. § 2310(d)(2) which permits a prevailing plaintiff to recover attorney's fees against the seller for breach of an implied warranty. *See Champion Ford*, 49 Md. App. at 563 ("The Act thus permits recovery of attorneys' fees by

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> (c) Are fit for the ordinary purposes for which such goods are used; and
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> (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
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> (e) Are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) Conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.
>
> (4) Subsections (1) and (2) of this section apply to a lease of goods and a bailment for hire of goods that pass through the physical possession of and are maintained by the lessor, sublessor, or bailor.

a consumer who prevails in an action against the seller for breach of an implied warranty under state law provided the seller is afforded an opportunity to cure.").

In a breach of warranty action, "the plaintiffs bear the burden of proving several elements, including the existence of an incurable defect." *Murphy v. 24th Street Cadillac Corp*., 353 Md. 480, 505 (1999). "[T]o allow the jury to decide whether there was a breach of warranty, there must be some evidence beyond mere speculation which would enable the jury to rationally decide it is more probable than not that the defect existed at the time of sale." *Crickenberger*, 404 Md. at 49 (quoting *Ford Motor Co. v. General Accident Insurance Co.*, 365 Md. 321, 334 (2001)). In *Evans v. General Motors Corp*., 459 F.Supp.2d 407 (D. Md. 2006), the federal district court observed:

> [T]he Court of Appeals of Maryland interpreted the statute to require (1) the existence of a defect, (2) the defect must be one that the manufacturer is unable to fix after a reasonable number of attempts, and (3) the defect must be one that substantially interferes with the use and market value of the vehicle.

459 F.Supp.2d at 412; *see also Crickenberger*, 404 Md. at 49-50; *Zitterbart*, 182 Md. App. at 515; *Erie Insurance Company v. Amazon.com, Inc*., 925 F.3d 135, 140 (2019)

Against this backdrop, we turn to the issues raised on appeal.

2. *The Motion* in Limine

Ms. Giles-Simmons challenges the circuit court's ruling on Hyundai Motor's renewed motion *in limine* excluding Hetherington's expert testimony on several:

First, Ms. Giles-Simmons argues that, contrary to the trial court's conclusions, Hetherington was able to identify a specific defect in her vehicle. She points to

Hetherington's testimony that the defect was in the vehicle's cooling system because the vehicle could not circulate coolant properly. Thus, according to Ms. Giles-Simmons, Hetherington identified the defect (coolant not circulating in the cooling system), as well as the symptom of that defect (the vents not blowing hot air).

Second, as an alternative to her first argument, Ms. Giles-Simmons maintains that Hetherington could not identify a specific defective component in her vehicle because doing so would require dismantling the vehicle, which in turn would void the warranty. This places Ms. Giles-Simmons, as well as similarly situated consumers, in a "Catch-22." Thus, in Ms. Giles-Simmons's view, the circuit court's ruling effectively limits breach of warranty claims by consumers.

Third, Ms. Giles-Simmons argues that the trial court, in making its ruling, confused the concept of *admissibility* of evidence with the concept of the *weight* and *credibility* of the evidence. She asserts that a lack of specificity in an expert's testimony is not grounds for exclusion of that testimony. Rather, it goes to the weight of the expert's testimony, which was within the jury's power to review. By that standard, Ms. Giles-Simmons maintains that, instead of excluding Hetherington's testimony outright, the court should have allowed him to testify, and then leave it to the jury to determine whether to give any weight to his testimony.

The trial court based its ruling excluding Hetherington's testimony on the requirements of Maryland Rule 5-702, which governs the admission of expert testimony. The Rule provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Here, we are concerned only with the third requirement: that an expert's testimony be supported by a sufficient factual basis. A factual basis "may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions." *Taylor v. Fishkind*, 207 Md. App. 121, 143 (2012), *cert. denied* 431 Md. 221 (2013). Further, we have observed that:

> [S]imply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion, which does not otherwise comport with Md. Rule 5–702. No matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown.

Giant Food, Inc. v. Booker, 152 Md. App. 166, 182 (2003) (cleaned up) (quotation marks omitted). Therefore, an expert's opinion "must be based on facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support such conclusion. The facts upon which an expert bases his opinion must permit reasonably accurate conclusions as distinguished from mere conjecture or guess." *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 741 (1993). Moreover, an opinion of an expert who is unable to anchor his conclusions to data

constitutes nothing more than an "*ipse dixit*" and is inadmissible. *Blackwell v. Wyeth*, 408 Md. 575, 606 (2009) (citing *General Electric Company v. Joiner*, 522 U.S. 136, 146 (1997)).

The trial court concluded that Hetherington's testimony would not assist the trier of fact to understand the evidence (*i.e.*, the existence of a defect) because he could not identify a specific defect in Ms. Giles-Simmons's vehicle. We agree.

Hetherington's deposition testimony was full of uncertainty and ambiguity. Reading Joachim's inspection report, Hetherington concluded that Ms. Giles-Simmons's vehicle had a "significant mechanical defect" at the time of sale. However, Hetherington was unable to explain the precise defect when asked for an explanation. At one point, Hetherington opined that the defect was due to the engine "not providing sufficient heat at low speed and . . . when it comes to idle." He ruled out the possibility that the thermostat was defective ("I'm not saying specifically the thermostat is [defective.]") Rather, Hetherington persisted in his belief that the engine, the cooling system, or a combination thereof was the issue. ("There is a problem in the engine cooling system that is preventing it from providing sufficient heat at low speed, at idle.") Although Hetherington could narrow down the location of the defect, he could not narrow down the realm of possible causes. ("There [are] many things it could be.") Nor could Hetherington explain what the temperature should be, assuming the car functioned as warranted ("I don't know the specific specification or if there is even one that would tell you exactly what, after that many minutes, it should be.").

Certainly, there are some cases in which expert testimony may not be necessary to prove a defect.[11] *See, e.g.*, *Virgil v. Kash N' Karry Service Corp.*, 61 Md. App. 23, 31 (1984) ("Expert testimony is hardly necessary to establish that a thermos bottle that explodes or implodes when coffee and milk are poured into it is defective."). But this case is not one of them because of the very nature of the alleged defect, namely, that, *only when* the car is idling in cold weather and *only when* the fan is turned up to its maximum speed, the air coming from *some but not all* of the vents isn't warm. Is this a "defect," or simply the way that her vehicle operates, however irritating that might be to Ms. Giles-Simmons?

Because Hetherington was unable to identify anything in the vehicle that was not working properly, there was no factual basis to support his testimony. *See, e.g., Evans v. General Motors Corp.*, 459 F.Supp.2d 407, 410-11 (2006) (District Court disregarded expert witness's affidavit that did not provide an opinion on the issue of whether plaintiff's vehicle suffered from defect.).

We also disagree with Ms. Giles-Simmons's contention that the trial court conflated the admissibility of evidence with the concept of the weight and credibility of the evidence. The Court of Appeals considered and rejected this same argument in *Evans v. State,* 322 Md. 24, 34-35 (1991). Evans conceded that "an expert's judgment has no probative force unless there is a sufficient basis upon which to support his conclusions," *see Bohnert v. State*, 312 Md. 266, 275 (1988), but contended that "the adequacy of the basis for the

[11] We will return to this topic presently.

opinion goes only to the weight to be given the testimony, and that consequently a trial judge must permit a qualified expert to express an opinion about any matter within the expert's field." *Evans*, 322 Md. at 34. The Court disagreed, reasoning:

> An expert opinion derives its probative force from the facts on which it is predicated, and these must be legally sufficient to sustain the opinion of the expert. The premises of fact must disclose that the expert is sufficiently familiar with the subject matter under investigation to elevate his opinion above the realm of conjecture and speculation, for no matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown. The opinion of an expert, therefore, must be based on facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support such conclusion. The facts upon which an expert bases his opinion must permit reasonably accurate conclusions as distinguished from mere conjecture or guess.

State Health Dep't v. Walker, 238 Md. 512, 520 (1965). Professor McLain sums it up in this fashion:

> The expert's opinion is of no greater value than the soundness of the reasons given for it will warrant. If no adequate basis for the opinion is shown, the opinion should not be admitted or, if already admitted, should be stricken. (Footnotes omitted.)

L. McLain, *Maryland Evidence* § 705.1 (1987).

322 Md. at 34-35. (cleaned up; citations omitted).

We ascertain no difference between the argument presented by the defendant in *Evans* and the argument presented by Ms. Giles-Simmons in this appeal. Thus, Ms. Giles-Simmons's argument is unpersuasive when we apply the Court's reasoning in *Evans*. *Accord Beatty*, 330 Md. at 741 (Maryland courts reject "the argument that the adequacy of

the basis for the opinion of an expert goes only to the weight to be given to the expert's testimony, and not to its admissibility as evidence.").

Ultimately, Hetherington could not specify what the defect was. In his own words, he stated, "*I don't know what the defect specifically is*." Nor did Hetherington provide any basis for his conclusory statement that a defect existed "at the time of sale."[12] Maryland law requires that the plaintiff not only prove the *existence* of a defect in her vehicle, but that she must also show that the defect existed *at the time of sale*. *See Erie Insurance Co.*, 925 F.3d at 140. Ms. Giles-Simmons has failed to do both. As a result, she cannot demonstrate the elements necessary for a breach of warranty action.

That leaves Ms. Giles-Simmons's argument that she is in a "Catch-22" because requiring Hetherington to dismantle the vehicle would void the warranty. This argument is founded entirely on Hetherington's bald assertion in his deposition testimony that he "can't perform any specific testing on the vehicle without voiding the warranty. So, we can only do a visual inspection to confirm the complaint and see if [a defect] really exists or not." In her briefs, Ms. Giles-Simmons does not refer us to any language in the warranty

[12] Hetherington seemed uncertain as to how vehicles perform in Maryland generally. When asked if Ms. Giles-Simmons's vehicle passed the Maryland state inspection, Hetherington answered: "I have no idea if it passed the Maryland state inspection. I don't know what the ramifications of the Maryland state inspection are." When asked the effect of the heating issue in more detail, Hetherington opined: "I assume in Maryland that you guys get cold temperatures and that it can become—that you get frost on your windshields? How would you—how would a vehicle with a defective heater that is sitting there at low speed, that blows cold air, be able to clear the windshields? It's actually a safety issue."

agreement that supports Hetherington's statement and his otherwise-unexplained legal conclusion is not a basis for us to conclude that the trial court erred in granting the motion *in limine*.

We conclude that the trial court did not abuse its discretion in granting Hyundai Motor's motion *in limine*.

3. *The Motion for Summary Judgment*

Next, Ms. Giles-Simmons challenges the circuit court's grant of Hyundai Motor's motion for summary judgment. The trial court's explanation of the basis of its ruling was (emphasis added):

> For all these reasons, the Court grants the Defense's motion *in limine* to exclude Mr. Hetherington's testimony, and because it appears that there is no additional expert witnesses that have been identified by counsel for the plaintiff, the plaintiff is left without an alleged expert to testify as to an alleged defect, *which is required by Maryland law*.
>
> *Based on extensive case law requiring that an expert in cases alleging a defect in a motor vehicle*, the plaintiff is unable to meet their [sic] burden as a matter of law, and the Defense's renewed motion for summary judgment is granted.

Ms. Giles-Simmons argues that Maryland law does not require expert testimony to prove the existence of a defect in breach of warranty actions, and so the court's conclusion that her claim fails without such testimony was in error.

Presuming her first contention is correct, Ms. Giles-Simmons then argues that there was additional evidence, apart from Hetherington's testimony, from which the jury could have found the presence of a defect in her vehicle. Specifically, she points to two pieces of

evidence: (i) Hyundai Motor's repeated repairs to her vehicle under warranty; and (ii) the contents of the technical service bulletin.

In Ms. Giles-Simmons's view, Hyundai Motor has admitted to the defect by attempting to repair the problem under warranty. She theorizes that because the warranty on her vehicle covers "[r]epair or replacement of any component originally manufactures or installed by . . . Hyundai Motor America (HMA) that is found to be defective in material or workmanship under normal use and maintenance" the jury could reasonably infer that the repairs to the Elantra under warranty demonstrates defects in the vehicle. For legal support, Ms. Giles-Simmons cites to the Ninth Circuit's decision in *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912 (9th Cir. 2005), specifically that Court's conclusion that "[b]y attempting to repair the rear window seal and the brakes under warranty, Mercedes admitted the defective nature of these conditions."

Ms. Giles-Simmons also maintains that Hyundai Motor has admitted to the existence of a defect through its technical service bulletin concerning the HVAC system in 2017 Hyundai Elantra's. For support, she points to the bulletin's title "No or Limited Heat from HVAC @ Low Engine RPM's Bleed the Cooling System" that acknowledges her vehicle suffers from a defect. Thus, Ms. Giles-Simmons contends that the existence of the bulletin itself is proof of an inherent defect in her vehicle and similar vehicles.

For these reasons, in Ms. Giles-Simmons's view, the jury could find the existence of a defect in the vehicle based on Hyundai Motor's own concessions without relying on expert testimony.

We agree with Ms. Giles-Simmons that Maryland does not have a blanket requirement for expert testimony in product liability cases. In *Mohammed v. Toyota Motor Sales, U.S.A., Inc.*, 179 Md. App. 693 (2008), this Court recognized that "[u]nquestionably, the presence of the design or manufacturing defect may be inferred in the appropriate case 'without the necessity of weighing and balancing the various factors involved.'" 179 Md. App. at 706-07. For example, "[a] defect attributable to the manufacturer of the product may be inferred 'where circumstantial evidence tends to eliminate other causes, such as product misuse or alteration . . . .'" *Laing v. Volkswagen of America, Inc.*, 180 Md. App. 136, 159 (2008) (quoting *Ford Motor Co. v. General Accident Insurance Co*., 365 Md. 321, 337 (2001)). In such cases, circumstantial evidence will sustain an inference of an inherent defect when the proof of defect "rises above surmise, conjecture, or speculation." *Id*. at 160.

We consider the following factors in determining whether circumstantial evidence by itself supports an inference of a product defect:

> (1) expert testimony as to possible causes; (2) the occurrence of the accident a short time after the sale; (3) same accidents in similar products; (4) the elimination of other causes of the accident; (5) the type of accident that does not happen without a defect.

Id.

Thus, contrary to the trial court's reasoning, expert testimony is not "required by Maryland law." However, that is not the end of the analysis.

Where such an inference cannot be made, however, expert testimony will be required. In *Crickenberger*, the Court of Appeals held that expert testimony was required to prove the existence of a defect in a used vehicle that suffered from a myriad of mechanical issues. 404 Md. at 53. Without such an expert, the plaintiff's "allegations of a defect in this case amount to 'mere speculation[,]'" and so warranted summary judgment in the warrantor's favor. 404 Md. at 53; *but see also Crickenberger*, 404 Md. 47, 54 (Murphy, J concurring) (Writing separately "out of concern that the majority opinion will be cited as authority for the incorrect propositions that—in every breach of warranty action—the defendant is entitled to summary judgment unless the plaintiff produces expert testimony on the issues of (1) whether the product was defective, and (2) the precise nature of the defect.")).

On the heels of *Crickenberger* came *Zittebart v. American Suzuki Motor Corp.*, 182 Md. App. 495 (2008) and *Laing v. Volkswagen of America, Inc.*, 180 Md. App. 136 (2008). In *Zittebart*, this Court held that that the plaintiff's attestation in an affidavit that her vehicle was suffering from a "'hesitation problem' was not admissible evidence of a defect," and that "[a]ny such evidence would have to be established by expert testimony." 182 Md. App. at 505. We explained that "Mrs. Zitterbart is a layperson with no expertise in motor vehicle mechanics. The existence of a defect, condition, or non-conformity in [her vehicle] is a matter within the specialized knowledge of experts in the field of motor vehicle mechanics, and is not something she is qualified to offer an opinion about." *Id*. at 511-12.

In *Laing*, we held that summary judgment was appropriate where the plaintiff did not provide expert testimony to prove a defect of the kind that laid outside the ken of the

average juror. 180 Md. App. at 150. In affirming, we observed that "favorable expert testimony was necessary to sustain appellant's burden of production" or else the jury would be required to speculate as to the existence of the underlying defect or conditions. *Id*. at 163.[13]

When we apply the factors in *Laing* to the facts before us, we conclude Ms. Giles-Simmons cannot meet her burden. As to the first factor, Ms. Giles-Simmons has no expert testimony to point to a possible cause of the defect. Second, it is undisputed that Ms. Giles-Simmons was never involved in an accident as a result of the alleged defect in the HVAC system, and that the alleged issue did not arise shortly after she purchased the vehicle. Indeed, Ms. Giles-Simmons did not notice an issue with her vehicle until some 18 months after purchasing it, and after it had around 28,000 miles on it.

Third, Ms. Giles-Simmons has attempted to provide evidence, in the form of the technical service bulletin, that vehicles of the same make and model suffer from the same HVAC issue. But this bulletin does not indicate that *all* 2017 Hyundai Elantras suffer from some inherent defect, nor does it prove that *her* vehicle suffers from any inherent defect.

[13] The requirement for an expert witness in an automotive warranty case is similar to the requirement for expert testimony in a medical malpractice case. As Judge Deborah S. Eyler explained in *DeMuth v. Strong*, 205 Md. App. 521, 539 (2012), expert testimony as to causation is required in medical malpractice cases except when "the defendant's act or omission is such that ordinary lay people would be able to determine that the act or omission was a breach of the standard of care, such as amputating the wrong leg."); *see also Brown v. Meda*, 74 Md. App. 331, 342 (1988) (providing examples of cases that did not require expert testimony), aff'd on other grounds, *Meda v. Brown*, 318 Md. 418 (1990).

Nor, for that matter, is the bulletin itself direct evidence of a defect. *See Mohammed v. Toyota Motor Sales, U.S.A., Inc.*, 179 Md. App. 693, 720 (2008) (Holding that a manufacturer's Safety Recall Notice was not admissible evidence to prove the existence of a defect.).[14]

Rather, the bulletin merely provides a procedure for fixing a heating issue that may ordinarily occur in 2017 Hyundai Elantras. On numerous occasions, Massey Hyundai performed this procedure on Ms. Giles-Simmons's vehicle when she complained about a lack of heat. Apparently unsatisfied with results of this procedure, Ms. Giles-Simmons complained of a more specific problem: that two of her dashboard vents would not blow out heat when her vehicle was idling in below zero temperatures and the heat was set to the max setting. That specific "issue"—if it even amounts to an issue—is also addressed by the bulletin, which states: "[i]t is normal for some heat loss with lower engine speeds when the heater is being used at max blower speed;" that "[t]he Engine Temperature can drop up to 85°f at idle w/ blower on Max Heat, while in Heat or Defrost mode, in below freezing weather[.]" Thus, contrary to Ms. Giles-Simmons's assertion, the bulletin

[14] Hyundai Motor has argued that the bulletin would have been excluded from the evidence under Maryland Rule 5-407 as a subsequent remedial measure. We decline to address this point.

indicates that the alleged defect complained of by Ms. Giles-Simmons may, in reality, be an aspect typically associated with vehicles of the kind she owns.[15]

Finally, as to the fourth and fifth factors, Ms. Giles-Simmons has not eliminated any other causes of the HVAC issue, nor has she demonstrated that the issue occurs without the presence of a defect.

Thus, these factors weigh against Ms. Giles-Simmons's argument. Once Hetherington's testimony was excluded, the evidence remaining is not sufficient to prove that a defect existed in Ms. Giles-Simmons's vehicle at the time she purchased it. In other words, there was nothing in the record that "rises above surmise, conjecture, or speculation." *Laing*, 180 Md. at 160.

Ms. Giles-Simmons's remaining piece of evidence is that Massey Hyundai performed repairs on her vehicle under the vehicle's warranty.

A similar argument was made by the plaintiff in *Laing* regarding a "hesitation" problem in his vehicle. On appeal, the plaintiff "suggested that, by virtue of replacing the computer parts and the fuel pump in an unsuccessful attempt to repair the hesitation, the dealer conceded that hesitation was caused by some mechanical component malfunctioning." 180 Md. App. at 163. Observing that no causal link was ever made between the repairs and the hesitation problem complained of by the plaintiff, we held that

[15] Hyundai Motor's expert seems to support this conclusion, who, his report, explained that "[t]he higher the fan speed the more the vent temperature would drop due to the increased air passing over the heater core which removes more heat from the engine."

"[t]o generate an issue for the jury, appellant was required, at a minimum, to show that the hesitation problem was related to a specific malfunctioning component[,]" and that "[b]ased on all of the evidence adduced, a jury could not determine that there was a defect and that the defect existed at the time of sale. To do so would require the jury to engage in speculation and conjecture." *Id*.

We apply the same reasoning in this case. That the servicer replaced the thermostat in Ms. Giles-Simmons's vehicle and performed the "bleeding" procedure several times does not, in and of itself, prove the existence of a *defect*. Even if Hetherington had been permitted to testify, Ms. Giles-Simmons would have been unable to point to "a specific malfunctioning component," which is necessary to submit an automotive warranty case to the jury.

This brings us back to the basis of the trial court's decision, which was that Maryland law requires expert testimony as part of a plaintiff's case in an automotive warranty case. As we have explained, the Maryland cases certainly stand for the proposition that expert testimony is usually required in cases of this nature, especially in cases, such as the present one, where the vehicle in question is not new or in near-new condition. But no decision of either of this court or the Court of Appeals holds that expert testimony is required as a categorical, absolute and unvarying rule. Thus, technically, the trial court's decision to grant summary judgment was based on an error of law. We generally reverse such judgments because to do other would interfere with a trial court's discretion to defer the issue to trial. *Young Electrical*, 459 Md. at 383.

In the present case, however, affirming the trial court's decision on a slightly different ground will not interfere with the court's discretion because the circuit court, albeit through a different judge, had already exercised its discretion to defer the issues to trial. There was certainly nothing inappropriate in the trial judge's revisiting the motion for summary judgment after a portion of Ms. Giles-Simmons' case and after it had ruled on the motion in limine.

For the reasons that we have explained, we conclude that expert testimony was required for Ms. Giles-Simmons to take her case to the jury. The trial court did not err in granting summary judgment.

THE JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.