2021 IL App (1st) 200200-U

THIRD DIVISION
September 30, 2021

Nos. 1-20-0200 & 1-20-0206 (consolidated)

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRIAN MARLER, Plaintiff-Appellee-Cross-Appellant, v. ZACHARY WULF and BOS GROUP, LLC, an Illinois corporation, Defendants-Appellants-Cross-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County 2015-L-001645 Honorable Diane M. Shelley, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Justices Ellis and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: After a joint bench-and-jury trial, the circuit court properly rejected numerous arguments to disturb the judgment against minority partner in a proprietary trading firm where the evidence indicated that he lied to majority partner in order to induce business termination contract and closure in order to free up resources for minority owner's use. On cross-appeal, majority owner failed to show that he was entitled to duplicative awards for single injury or that he was contractually entitled to attorney fees when he did not prevail on breach of contract claim.

¶ 2 Plaintiff Brian Marler and defendant Zachary Wulf were 60/40 partners for three years in a successful proprietary trading software business known as MW Capital LLC (MW Capital). Marler largely prevailed on claims that Wulf tricked him into closing the business so that Wulf

could use its software, office, equipment, and staff for his own company, defendant BOS Group, LLC (BOS Group). Marler was granted a $1.78 million judgment in compensatory and punitive damages against Wulf and BOS Group. In appeal no. 1-20-0200, Wulf presents numerous arguments for overturning the final judgment that was entered after a joint bench-and-jury trial and post-trial motions. In what was a separate appeal that has been consolidated, 1-20-0206, Marler asks to reinstate an additional $1.33 million in damage awards which the trial court vacated as duplicative and which would contractually entitle Marler to $383,023 in attorney fees. Marler also asks for a constructive trust over BOS Group's revenue until further order of the court.

¶ 3 We first confirm our jurisdiction. The trial court entered a memorandum order and opinion on December 31, 2019 which disposed of Wulf and BOS Group's post-trial motions; Wulf filed a notice of appeal within 30 days on January 29, 2020; and Marler filed a notice of appeal, also within 30 days of the post-trial order, on January 30, 2020. Accordingly, we have jurisdiction. *See* Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. Jan. 1, 2015).

¶ 4 We next outline the facts and procedural history necessary to resolve this appeal. Unless otherwise indicated, the following account is undisputed.

¶ 5 Marler and Wulf met in 2007 when they were in their 20s and employed by a proprietary trading firm in Chicago. Marler began trading independently in 2009 using software he had written and Wulf began trading on his own in 2010 with traditional, non-automated methods. Later in 2010, they pooled their funds to trade using Marler's program. After a few months of refining their trading strategies and having success together, they formalized their business relationship by creating two limited liability companies. Prude Technologies, LLC, owned the

software. MW Capital, LLC used the parties' funds, trading strategies, and software. MW Capital generated additional revenue by allowing other traders to use the software and MW Capital's funds in exchange for royalty payments of 20-80% of their gains. Marler and Wulf were the sole managing members of the companies. Wulf's father, an attorney, advised the partners on tax and legal matters. We will refer to the two companies collectively as MW Capital.

¶ 6 While operating MW Capital, Marler, the 60% owner, continued to develop the software and supervised the computer programmers the partners hired. Wulf, the 40% owner, managed the traders they hired and handled administrative responsibilities, such as payroll and health insurance matters. Success enabled the partners to hire more staff, negotiate lower brokerage fees, and, by the end of 2012, stop paying for office space and move into their broker's office suite, rent-free. Between 2010 and 2013, the partnership generated $4.5 million in revenue and $2.4 million in net profit. 2011 was the most profitable year. Marler thought that he had a "great" relationship with Wulf and was pleased with the trading strategies they had jointly implemented to generate low-risk, reliable income. Marler considered the companies' lower revenue in 2012 to be "stable" but Wulf thought it was "disappointing." Wulf testified that he could not persuade Marler to change strategies and decided that working with Marler was "untenable." Marler and Wulf disagree as to when they first discussed ending the partnership. It is undisputed that when Wulf proposed shutting down, Marler opposed the idea.

¶ 7 The parties' lawyers exchanged drafts of a business termination agreement until the final version was executed on November 27, 2013. The key provisions of the contract include paragraph 3.1, in which Marler and Wulf agreed "not to engage in any further business of the

Companies *** and, in general, wind up the Companies' affairs in the ordinary course of business." Paragraph 10.1 contains claims release and full disclosure clauses:

> "10.1 Mutual Release of Claims. Except for the obligations set forth herein, each Party, on behalf of himself *** and [his] representatives (collectively, the 'Releasing Parties'), do hereby remise, release and forever discharge the other Party and his affiliates, and representatives (collectively, the 'Released Parties') of and from any and all manner of action, *** claims, and demands, whatsoever, in law or in equity ('Claims'), that the Releasing Parties have, had or will have against the Released Parties as the result of any act or omission and/or event, in each case, that is known or unknown by the Releasing Party as of the Effective Date, from the beginning of time through the Effective Date. Notwithstanding the foregoing release, the Parties reserve and do not release their claims for enforcement of the provisions contained in this Agreement, including, but not limited to, the right to indemnification under paragraph 10.2 below. Each Party hereby represents and warrants to the other Party that he has disclosed to the other Party (in reasonable detail) all facts, events and circumstances known by such Party to be in existence (as of the Effective Date) as a direct or indirect cause of such Party's actions or inaction, in each case, that could reasonably be expected to have a materially adverse effect on the assets, reputation and/or prospects of the other Party."

¶ 8 In paragraph 4, Marler and Wulf distributed MW Capital's assets. They gave each other equal ownership in MW Capital's software, equal rights to use and modify MW Capital's software, and unrestricted rights to transfer or assign their individual rights to a third party, but no rights to any modifications made by the other party. The parties also divided the company's

hardware and office equipment according to Marler and Wulf's 60/40 ownership and specified that the property had to be removed from the company's office by November 27, 2013. During the negotiations on November 25, 2013, Wulf's attorney stated in an e-mail to Marler's attorney that Wulf sold his share of the "equipment" to their broker-landlord, Lightspeed, and counsel listed the prices that Lightspeed would pay Marler for his share of the computers, monitors, stands, and servers. In addition, "the Companies will no longer use the office space at 200 South Wacker Drive in Chicago after [3 p.m. on] November 27, 2013." According to Marler, on the last afternoon, the five employees responded to his questions about their job prospects, none of which included working for Wulf; they handed their key cards to Wulf and everyone left the premises. On December 2, 2013, Wulf's lawyer dissolved MW Capital.

¶ 9 According to Wulf, he broached the topic of dissolution as early as October 1, 2013, and never said that he wanted to leave the proprietary trading industry. However, according to Marler, Wulf secretly took steps for about a month to set up his own company, finally disclosed on November 1, 2013 that he wanted to end the partnership, and said that he was uncertain about his plans but intended to leave the field. Marler recalled Wulf saying on more than one occasion that because he planned to leave the industry, he wanted to have " 'no ties,' " and that this meant they needed to dissolve MW Capital. Marler testified that he asked Wulf to change his mind or at least let Marler buy out Wulf's interests. Also, Marler asked MW Capital's employees to stay with the company even if Wulf was leaving the industry. This angered Wulf. He threatened to spend MW Capital into ruin and reiterated that he had no plans for the future other than closing MW Capital.

¶ 10 It is undisputed that on October 4, 2013, Wulf e-mailed MW Capital's payroll service,

ADP, to ask about switching the account to a new limited liability company; on or about October 15, 2013, Wulf met with an attorney to discuss dissolving MW Capital; on October 21, 2013, Wulf's father incorporated BOS Group on October 22, 2013 (purportedly creating the company without Wulf's knowledge, even though Wulf testified that he created the name "BOS" as an anacronym for "Best on the Street"); on October 22, 2013, Wulf retained business termination counsel; and on November 25, 2013, the Internal Revenue Service assigned BOS Group an Employer Identification Number. Also, although the parties discussed selling MW Capital's equipment to their landlord, Marler later learned that Wulf bought the equipment for BOS Group's use. MW Capital's last day of incorporation was December 2, 2013 and also the day when Wulf's father finalized BOS Group's Member Sharing Agreement giving Wulf 99% ownership and his father 1% ownership in a partnership that was formed "for strategic purposes, to engage in the business of trading financial products." On December 2, 2013, a broker whose office was in MW Capital's former office building texted Marler that MW Capital appeared to still be operating in its former office; on December 5, 2013, after MW Capital's e-mail accounts had been deleted, incoming messages indicating that a programmer was actively working on the trading software source code were forwarded to MW Capital's e-mail administrator, Marler. On December 13, 2013, Wulf contracted with the MW Capital's payroll administrator, ADP, to service a "Spinoff" business. On February 10, 2014, Wulf signed an Operating Agreement that made MW Capital's former employees minority owners in BOS Group with Wulf retaining 90% ownership. BOS Group's sources of revenue were the same as MW Capital's sources of revenue: automated trading income and royalties from others who were permitted to use the software.

¶ 11 The lawyer who negotiated the termination of MW Capital on Wulf's behalf did not learn

about BOS Group until May 2014, which was months after BOS Group was operating. Marler's lawyer mailed and e-mailed Wulf a letter indicating Marler was aware of Wulf's deceit and demanding that Wulf give 60% of the revenue to Marler and stop using the software.

¶ 12 Marler filed suit in February 2015. In Count I of his six-count amended complaint, Marler alleged Wulf committed fraud during the business termination negotiations in November 2013 by misrepresenting or failing to disclose his formation of BOS Group and intent to continue using MW Capital's equipment, employees, and software for himself; and by falsely proclaiming in paragraph 10.1 of the business termination agreement that he had disclosed "all facts, events and circumstances known by [Wulf] to be in existence *** that could reasonably be expected to have a materially adverse effect on the assets, reputation and/or prospects of [Marler];" so that Marler would agree to disband MW Capital and enable Wulf to gain exclusive control over the corporate resources, and Marler would no longer take 60% of the profits. In Count II, Marler alleged Wulf breached the termination contract by continuing to conduct MW Capital's business by using its equipment, employees, and software under the banner of a company that he had formed alone. In Count III, Marler alleged Wulf breached his fiduciary duties of loyalty, honesty, and good faith by using MW Capital's "property, data, and information to help start and promote" BOS Group. Count IV sounded in promissory estoppel and indicated Marler reasonably relied on Wulf's misrepresentations and omissions when he executed the termination agreement and wound up MW Capital only to learn that Wulf continued to operate the same business under a different name without Marler. In Count V, Marler alleged Wulf misappropriated MW Capital's trade secrets by acquiring, disclosing and/or using its software. In the concluding count, Count VI, Marler sought a constructive trust over BOS Group's revenue.

¶ 13 Wulf's answer included a counterclaim sounding in breach of contract, which was based on the first sentence of paragraph 10.1, in which the parties mutually released any claims against each other. Wulf contended Marler's breach warranted shifting attorney fees to Marler.

¶ 14 The trial court granted summary judgment against Marler as to Count IV, promissory estoppel. He was then given leave to add a spoliation of evidence claim as Count VII.

¶ 15 A joint jury-and-bench trial was conducted. The witnesses included Marler, Wulf, their respective business termination attorneys, and one of the MW Capital employees who went to work for BOS Group. By the time the trial was conducted in 2019, Wulf's father–the lawyer who advised the parties about MW Capital and later created BOS Group–was deceased.

¶ 16 As to Count I, fraud, the jury returned a verdict in Marler's favor and awarded Marler $1.4 million in compensatory damages from Wulf, $380,000 in punitive damages from Wulf, and $380,000 in punitive damages from BOS Group. As to Count II, breach of contract, the jury's verdict was for Marler and its award was $350,000. By prevailing on the breach of contract claim, Marler became contractually entitled to reasonable attorney fees, which the trial judge determined totaled $383,023. With respect to Wulf's counterclaim for breach of contract, which would entitle Wulf to attorney fees, the jury found that Wulf failed to perform his obligations under the contract and it rejected his counterclaim.

¶ 17 The remaining counts were resolved by the judge. As to count III, breach of fiduciary duty, the judge ruled in Marler's favor and awarded $1 million in compensatory damages. Count IV, promissory estoppel, had already been resolved in Wulf's favor by summary judgment. On Count V, misappropriation of trade secrets, the judge ruled in Wulf's favor. Count VI, constructive trust over BOS Group's revenue, was rejected as being a remedy rather than a

separate cause of action. The judge concluded Count VII, negligent spoliation of evidence, by a directed verdict in Wulf's favor.

¶ 18 Thus, after the joint trial, Marler held a judgment in excess of $3 million. Wulf and BOS Group filed post-judgment motions which were granted in part and denied in part as to Counts I, II, and III. As to Count I, fraud, the judge granted judgment for BOS Group and vacated the compensatory and punitive damage awards as to that entity. The judge did not, however, disturb the $1.4 million compensatory damage and $380,000 punitive damage awards against Wulf. The judge specified, "This shall constitute the sole judgment entered in this cause." As to Count II, breach of contract, the judge vacated the jury's $350,000 award for compensatory damages and the judge's $383,023 award of attorney fees. And, as to Count III, breach of fiduciary duty, the judge vacated the $1 million award as being duplicative.

¶ 19 Although Wulf and BOS Group succeeded on post-judgment motions that substantially reduced Marler's judgment, Wulf now argues on appeal that he is entitled to judgment notwithstanding the verdict (JNOV) or a new trial as to Marler's claims of fraud, breach of contract, and breach of fiduciary duty (Counts I, II, and III), and BOS Group contends it is entitled to judgment as to the breach of fiduciary duty count (Count III). Marler cross-appeals to reinstate the verdicts and ruling which were upset by the post-judgment motions and which entitled him to compensatory and punitive damages and attorney fees.

¶ 20 Wulf first argues that the jury verdicts on the breach of contract and fraud claims are inherently inconsistent because it would have been illogical for the jury to conclude that Marler was fraudulently induced to enter into a contract that prohibited Wulf from operating BOS Group. "According to Black's Law Dictionary, a 'legally inconsistent verdict' is one 'in which

the same element is found to exist and not to exist, as when a defendant is acquitted of one offense and convicted of another, even though the offenses arise from the same set of facts and an element of the second offense requires proof that the first offense has been committed.' Black's Law Dictionary 1592 (8th ed. 2004)." *Redmond v. Socha*, 216 Ill. 2d 622, 649 (2005). Wulf does not specify any fact the jury was required to find on one claim that would have contradicted a finding that the jury was required to make on the other claim. Nevertheless, he contends the trial judge was "confused" during the proceedings and "never reconciled the inherently inconsistent factual findings necessary for the jury to reach a Plaintiff's verdict on both Count I-Fraud and Count II-Contract." Wulf contends this is an error that entitles him to a new trial.

¶ 21 Marler responds that there is no inconsistency between (1) a verdict that Marler was defrauded when Wulf persuaded him to close MW Capital because he wanted to leave the proprietary trading industry and (2) a verdict that Wulf not only breached paragraph 10.1 of the business termination contract by representing that he had disclosed all material facts, but also breached paragraph 3.1 of the contract by subsequently continuing "the business of the companies" as BOS Group.

¶ 22 Whether two verdicts are legally inconsistent is a question of law subject to *de novo* review. *Redmond*, 216 Ill. 2d at 642. A party is entitled to a new trial due to legally inconsistent verdicts only if the jury's basis for one finding is contradicted by another finding the jury was required to make. *Redmond*, 216 Ill. 2d at 642. "[A]ll reasonable presumptions" must be exercised in favor of the verdict or verdicts. *Redmond*, 216 Ill. 2d at 643. Verdicts are legally inconsistent only if "absolutely irreconcilable" and unsupported "by any reasonable hypothesis."

Redmond, 216 Ill. 2d at 643-44.

¶ 23 Wulf primarily relies on the following statement in *Wilbur v. Potpora*, 123 Ill. App. 3d 166, 171-72 (1984):

> "One induced to contract through fraud may at his election rescind the contract and recover the consideration that he has paid or affirm the contract and recover the difference between the property received and what he would have received but for the fraud. If the defrauded party elects to rescind, he must place the other party in *status quo* [*ante*] by restoring the property that he has accepted."

¶ 24 Wulf misapprehends *Wilbur*'s relevance, as it involved property that could be restored to the possession of the other contracting party, while Wulf's dispute with Marler involved an agreement to cease doing business. *See Wilbur*, 123 Ill. App. 3d at 167 (regarding sale of four franchises) (*citing In re Estate of Neprozatis*, 62 Ill. App. 3d 563, 570 (1978) (regarding sale and installation of a gas furnace and other home improvements) (*citing Siltz v. Springer*, 236 Ill. 276, 277 (1908) (regarding sale of two $1000 promissory notes))). *Wilbur* is not on point and it does not support Wulf's contention that the jury must have reached inherently inconsistent factual findings on the fraud and breach of contract claims in order to return verdicts in Marler's favor.

¶ 25 The quoted language is an outline of the doctrine of election of remedies and could be construed as Wulf's argument that Marler was compensated more than once for a single injury and not entitled to duplicative damages. Under the doctrine of election of remedies, a claimant who could pursue inconsistent remedies based on the same set of facts chooses between those remedies in order to prevent double recovery for a single wrong. "For instance, a remedy based on the affirmance of a contract (*e.g.*, damages) is generally inconsistent with one based on the

disaffirmance of the contract (*e.g.*, rescission).” *Lempa v. Finkel*, 278 Ill. App. 3d 417, 424 (1996). “The prosecution of one remedial right to judgment or decree constitutes an election barring subsequent prosecution of inconsistent remedial rights. *** Thus, the election of either remedy is an abandonment of the other.” *Lempa*, 278 Ill. App. 3d at 424; *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶ 79 (“The election of remedies doctrine seeks to prevent double recovery by prohibiting a plaintiff from obtaining specific performance of a contract while also recovering damages for the breach of the same contract.”); *Douglas Theater Corp. v. Chicago Title & Trust Co.*, 288 Ill. App. 3d 880, 886-87 (1997) (“While a plaintiff may pursue a remedy at law for damages and alternatively seek specific performance of the contract, plaintiff cannot have it both ways. Plaintiff cannot affirm the contract, obtain specific performance and, in essence, erase the breach, yet also seek damages at law for breach of contract.”).

¶ 26 Nevertheless, Wulf negates his reference to the election of remedies theory, by stating:

> “The trial court “*incorrectly* [(emphasis added)] framed Defendants’ post-trial arguments as follows:
>
> > ‘Wulf also contends that the fraud count was duplicative of the breach of contract count, and that relief under both counts cannot stand. Wulf concludes that everything merged into the Termination Agreement dissolving the company, which Marler has chosen to enforce under the breach of contract count.’ ”

¶ 27 Wulf has not made clear to this court why he quotes *Wilbur*, 123 Ill. App. 3d 166, and considers the case compelling.

¶ 28 Nevertheless, to the extent that Wulf has argued that Marler could be compensated either for (1) fraudulent inducement to enter into the termination contract (Wulf’s false statements

about quitting the proprietary trading industry when he actually intended to continue the business of the companies with MW Capital's resources) or (2) breach of paragraph 3.1 of the termination contract (Wulf's wrongful continuation of the business of the companies with MW Capital's resources), but not both claims, because the claims were duplicative, the trial court was persuaded by this argument. Post-trial, the trial court vacated the breach of contract award, reasoning that it was against the manifest weight of the evidence to grant duplicative compensatory damages. Marler was certainly entitled to plead claims in the alternative. *See, e.g.*, *Mueller by Math v. Community Consolidated School District 54*, 287 Ill. App. 3d 337, 340 (1997) (section 2-613(a) of the Code of Civil Procedure permits a party to plead as many causes of action as he or she may have and section 2-613(b) permits a party to state alternative causes of action, regardless of whether they are contradictory or inconsistent). More specifically, the existence of a remedy in breach of contract did not bar Marler from seeking recovery for fraud in the inducement. *Concord Industries, Inc. v. Harvel Industries Corp.*, 122 Ill. App. 3d 845, 850 (1984) ("Concord desires leave to [seek] recovery for fraud in the inducement. It is clear that the pleading of such a cause of action is permissible in Illinois. The existence of a remedy in breach of contract does not bar a party from seeking recovery for fraud in the inducement.") Even so, Marler was not entitled to be compensated on both claims as they concern one injury, and so it was proper for the trial court to leave the jury's fraud judgment intact and vacate the duplicative damages which the jury awarded for breach of contract. *Pippen v. Pedersen & Houpt*, 2013 IL App (1st) 111371, ¶ 29 (entering judgment on breach of fiduciary duty and attorney negligence claims that were based on same operative facts and resulted in same injury was in error; pleading in the alternative is generally permitted, but duplicate claims are not permitted); *see also Neade*

v. Portes, 193 Ill. 2d 433, 445 (2000) (affirming dismissal of breach of fiduciary duty claim arising from same operative facts and resulting in same injury as medical malpractice claim).

¶ 29 In addition to *Wilbur*, 123 Ill. App. 3d 166, Wulf misplaces reliance on *Wottowa Insurance Agency, Inc. v. Bock*, 104 Ill. 2d 311 (1984), in which there were mutually exclusive claims for fraud and breach of contract. The jury reached legally inconsistent verdicts; the first being a verdict rendered for the defendants because they were acting as agents of corporations, rather than as individuals; and the second being a verdict that the defendants were liable, as individuals, for fraud based on same transaction. Here, there is no such inconsistency between Marler's claims or the jury's verdicts. Here, there are duplicative claims and consistent verdicts.

¶ 30 Wulf's third case is also distinguishable. One of the claims in *Action Construction & Restoration, Inc. v. West Bend Mutual Insurance Co.*, 322 Ill. App. 3d 181, 182 (2001), required the jury to determine that the parties' conversation resulted in a meeting of the minds sufficient to form an oral contract which the defendant had allegedly breached.

> "Basic contract law requires that in order for an oral contract to be binding and enforceable, its terms must be definite and certain. When it appears that the language used or the terms proposed are understood differently by the parties, there is no meeting of the minds and no contract exists between the parties." *Trittipo v. O'Brien*, 204 Ill. App. 3d 662, 672 (1990).

The plaintiff's other claim, however, required the jury to determine that the defendant fraudulently concealed a material fact during that conversation, that is, that there could not have been a meeting of the minds. *Action Construction*, 322 Ill. App. 3d at 184. In other words, there were incompatible claims and entering verdicts for the plaintiff on both claims would have been

factually inconsistent. *Action Construction*, 322 Ill. App. 3d at 184. In the case at hand, however, neither party contended that an oral contract existed. Instead, the jury was given a copy of Marler and Wulf's written contract and instructed with regard to Count II, "The parties agree that the November 27, 2013 Termination Agreement is a contract between the parties." Because the jury was not asked to decide whether there was an oral contract, *Action Construction* is not on point and lends no support to Wulf's contention that there was an inconsistent verdict. There was no inconsistency between the claims and the jury's verdict that Wulf committed fraud (Count I) when he obtained Marler's agreement to terminate MW Capital by failing to disclose material facts about his plans to use MW Capital's resources for himself immediately after the dissolution and that Wulf breached paragraph 3.1 of the parties' contract (Count II) when he continued the business of the companies by using all of MW Capital's resources under a new corporate banner. Rather than being inconsistent, the fraud and breach of contract verdicts were consistent and overlapping, and the trial court remedied the duplication by vacating the latter award. We reject Wulf's primary argument on appeal.

¶ 31 Wulf's second appellate argument is that he is entitled to a new trial because the jury awarded different compensatory damages for fraud, $1.4 million, and breach of contract, $350,000, and the judge awarded a third compensatory amount, $1 million, for breach of fiduciary duty. Wulf contends that since lost net profits was the measure of damages for all three counts, the amounts awarded should have been identical. He cites a single case, *McGuckin v. Chicago Union Station,* 191 Ill. App. 3d 982, 994 (1989), for the general proposition that "the same jury hearing a single set of facts and circumstances cannot reach two distinct conclusions of fact as [expressed] in their verdicts, unless those inconsistent conclusions are reconcilable

under an applicable rule of law." Wulf attributes the inconsistency to Marler's failure to give the jury the evidence it needed to calculate the difference between profits and expenses in order to arrive at net lost profits. Wulf made a motion for a directed verdict and later sought JNOV on the grounds of the sufficiency of Marler's evidence.

¶ 32 Marler responds that *McGuckin*, 191 Ill. App. 3d 982, has nothing to do with the types of claims or damage awards at issue here because it addressed whether a jury's verdict against a building owner on a negligence claim under the theory of *res ipsa loquitor* was consistent with the jury's verdict in favor of a tenant. More importantly, Wulf never proposed that the verdict forms contain only one line for damages, did not ask that the jury be instructed not to apportion damages between the fraud and breach of contract claims, and failed to raise the "inconsistent verdicts" issue after the jury returned but before it was discharged.

¶ 33 This is an additional argument that we will address *de novo*. *Redmond*, 216 Ill. 2d at 642 (whether two verdicts are legally inconsistent is a question of law addressed *de novo*).

¶ 34 It is undisputed that the jury was properly instructed on the fraud claim and then again on the breach of contract claim that if its verdict was for Marler, then the jury's next step was to determine his damages, consisting of "lost 'net profits' which is the difference between gross profits and all the expenses that would be incurred in acquiring such profits." Nevertheless, the verdict forms supplied to this jury permitted it to award different amounts on the two claims. The breach of contract verdict form led the jury through a series of YES/NO questions which limited it to calculating damages as "lost 'net profits.' " The form stated in relevant part:

> "(4) Did Brian Marler prove he sustained damage as a result of Zachary Wulf's breach of the contract?

____ YES

____ NO

If your answer to question (4) is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict D at the end of this verdict and sign it. If your answer to question (4) is YES, you should then answer question (5).

(5) Did Brian Marler prove he sustained damages?

____ YES

____ NO

If your answer to question (5) is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict D at the end of this verdict and sign it. If your answer to question (5) is YES, you should then answer question (6).

____ YES

____ NO

(6) Did Brian Marler prove these damages were caused by Zachary Wulf's breach of the contract? If your answer to question (6) is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict D at the end of this verdict and sign it. If your answer to question (6) is YES, you should then answer question (7).

(7) Did Brian Marler present evidence from which you can determine the fair and reasonable value of the loss?

> If your answer to question (7) is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict D at the end of this verdict and sign it. If your answer to question (7) is YES, you should then answer question (8).
>
> (8) To determine Direct Damages: The lost 'net profits' which is the difference between gross profits and all the expenses that would be incurred in acquiring such profits.
>
> $_____
>
> TOTAL DAMAGES = [8]
>
> $_____."

¶ 35 However, the breach of contract claim was Count II, and the fraud was Count I. The fraud verdict form allowed the jury to fill in a blank line with any dollar amount it considered appropriate, by stating only: "We, the jury, assess the amount of compensatory damages in the amount of: $_____."

¶ 36 We find that Wulf waived the issue of "inconsistent" damage awards by waiting until after the jury had completed verdict forms that permitted two different damage awards. When a party fails to make a specific objection during the jury instruction conference or when the verdict form is read to the jury, and also fails to submit remedial instructions or verdict forms, the party waives the right to object on appeal as to the instructions or verdict forms. *Baumrucker v. Express Cab Dispatch, Inc.*, 2017 IL App (1st) 161278, ¶ 63; *Marek v. Stepkowski*, 241 Ill. App. 3d 862, 870 (1992) (finding waiver on appeal due to the defendants' failure to object to verdict form during instruction conference or at any time before jury returned verdict.) A party cannot fail to act in the trial court and then gain an advantage on appeal by obtaining reversal based on

his own failure to act. *Baumrucker*, 2017 IL App (1st) 161278, ¶ 63. Waiver occurred here because the record does not indicate Wulf tendered a remedial instruction which would have told the jury that its awards on the two claims had to be identical amounts or that he submitted verdict forms which would have avoided what he now contends is an inconsistency in the two damage awards. Objecting on a timely basis and submitting remedial instructions or more specific jury forms would have assisted the trial court in correcting the supposed problem. *Baumrucker*, 2017 IL App (1st) 161278, ¶ 63.

¶ 37 Wulf's third argument is that the trial court erred in denying his motion for JNOV on the fraud, breach of contract, and breach of fiduciary duty claims (Count I, II, and III) because Marler failed to put on sufficient evidence of damages in the form of lost net profits. Wulf contends that the parties were not competent to testify about the numbers on their corporations' 2010, 2011, 2012, and 2013 federal and state tax returns and that there should have been a "witness with an understanding of how to interpret tax returns." Wulf secondary contention is that the four tax returns showing gross receipts and deductible business expenses should have been supplemented with evidence of nondeductible business expenses. Wulf contends the three different damage awards are indicative of the speculation that must have occurred because there was insufficient evidence from which to estimate lost profits for the roughly five-year period between MW Capital's closure in late 2013 and the trial that took place in early 2019.

¶ 38 Marler responds that his evidence was sufficient and that the awards were well within the range supported by the evidence.

¶ 39 A motion for JNOV poses " 'a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the

plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case.' [Citation.]" *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006). Because the standard for entering JNOV is high, the motion should not be granted if " 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' [Citation.]" *York*, 222 Ill. 2d at 178. The denial of JNOV is reviewed *de novo*. *York*, 222 Ill. 2d at 178.

¶ 40 The " 'determination of damages is a question reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court.' " *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 247 (2006) (quoting *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997)). Unless the record clearly indicates that the jury failed to follow the law, considered erroneous evidence, or entered a verdict that was obviously based on passion or prejudice, the jury's determination of damages will not be disturbed on appeal. *Tri-G*, 222 Ill. 2d at 247. The plaintiff bears the burden of presenting competent evidence to support its claims. *Santorini Cab Corp. v. Banco Popular North America*, 2013 IL App (1st) 122070, ¶ 19.

¶ 41 Wulf does not cite authority substantiating that he and Marler were incompetent to testify about the contents of their companies' tax returns and that Marler should have brought in an expert witness. To the contrary, in *In Re Marriage of Hassiepen*, 269 Ill. App. 3d 559, 568 (1995), the court ruled that a father could rely on four years of tax returns as competent evidence of his income for purposes of setting child support, provided that the father testified about the returns, instead of using the Fifth Amendment to rebuff cross-examination. In the subsequent case of *R.J. Management Co. v. SRLB Development Corp.*, 346 Ill. App. 3d 957 (2004),

corporate tax returns and other financial records about management fees were the basis for determining the profitability of a residential development project in Round Lake Beach, Illinois. Although one party argued a need to access underlying documents, such as invoices and receipts, the court deemed that was unnecessary. *R.J. Management*, 346 Ill. App. 3d at 960. The court confirmed that "tax returns are customarily used [in the real estate industry] to measure profit," and were a "reasonably and sufficiently reliable" basis for an accountant to opine that the development was not sufficiently profitable to trigger a bonus compensation clause. *R.J. Management*, 346 Ill. App. 3d at 970. Also, in both *Tri-G*, 222 Ill. 2d at 248-50, and *Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082, 1085-86 (2007), business owners testified about business records which showed their prior income. As the owners of MW Capital, Marler and Wulf were competent to testify from their corporate tax returns, despite Wulf's self-serving testimony that he did not have the ability to prepare the returns himself and could not interpret the returns other than to read the numbers. In addition, Marler and Wulf responded to cross-examination. No additional witness was necessary.

¶ 42 Although Wulf contends that Marler should have tendered evidence of nondeductible meals and entertainment expenses, Wulf does not dispute Marler's response that (1) "Wulf never asked one question at trial about nondeductible expenses, proving they are a non-issue" and (2) MW Capital's four tax returns showed *de minimus* nondeductible expenses ranging from $0 to $466.

¶ 43 Furthermore, Marler did not have to prove lost profits to the precise penny. He was required only to " 'approximate the claimed lost profits by competent evidence.' " *Tri-G*, 222 Ill. 2d at 248 (quoting *Barnett v. Caldwell Furniture Co.*, 277 Ill. 286, 289 (1917)). In *Barnett*, the

plaintiff prevailed on allegations that his former employer, a North Carolina furniture manufacturer, breached a contract providing that he would receive 6% of the price of the merchandise he sold. *Barnett*, 277 Ill. 286. He had been employed for more than three years and his evidence of damages consisted of proof of the amount of sales he made during the months prior to his discharge from employment. *Barnett*, 277 Ill. at 289. This was a sufficient basis to estimate his probable earnings in the future. "All the law requires in cases of this character is that the evidence shall, with a fair degree of probability, tend to establish a basis for the assessment of damages." *Barnett*, 277 Ill. at 289. *Accord*, *Santorini Cab*, 2013 IL App (1st) 122070, ¶ 19 (lost profits are allowed as compensation when they can be shown with reasonable certainty); *Vulcan Metal Products, Inc. v. Schultz*, 180 Ill. App. 3d 67, 73 (1989) (remote and speculative evidence of lost profits should not be considered); *Tri-G*, 222 Ill. 2d at 248 (evidence of past profits in an established business may satisfy a plaintiff's burden of "proving with a reasonable basis or with reasonable certainty damages for claimed lost profits").

¶ 44 Marler's proof consisted of four years of federal and state corporate tax returns which included K-1 forms showing the income that each partner received from the companies. The evidence showed that between 2010 and 2013, the two companies generated $4.5 million in revenue. From these amounts, Marler's net annual profits were approximately $1.33 million ($111,689 in 2010, $699,938 in 2011, $328,885 in 2012, and $189,106 in 2013), which was an annual average of $332,405 for Marler. The authority we discussed indicates that the tax returns, testimony, and submission to cross-examination were a sufficient basis for estimating Marler's probable earnings if MW Capital had remained in operation. This evidence of Marler's past earnings from an established business would "tend to establish a basis for the assessment of

damages," "with a fair degree of probability." *Barnett*, 277 Ill. at 289. At the conclusion of the trial, Marler's counsel suggested that $200,000 was a "conservative" estimate of Marler's annual net loss for the five years he was claiming damages between MW Capital's closure and the trial. On the fraud claim, the jury awarded Marler $1.4 million, which was more than the proposed "conservative" figure and slightly more than the $332,405 annual average Marler had been earning, multiplied for the five years at issue.

¶ 45 The additional awards on the breach of contract claim and the breach of fiduciary duty claim were vacated as duplicative pursuant to Wulf's post-trial motion.

¶ 46 We reiterate the standard that Marler needed to only *approximate* the claimed lost profits by competent evidence, rather than show an exact loss; and that unless the record clearly indicates the jury failed to follow the law, considered erroneous evidence, or entered a verdict that was obviously based on passion or prejudice, the jury's determination of damages is not to be disturbed on appeal. *Tri-G*, 222 Ill. 2d at 247-48. Wulf's contention that the jury lacked evidence of nondeductible meals and entertainment expenses does not persuade us that "there was a total lack of evidence to prove damages." Wulf has not demonstrated that the jury panel resorted to speculation when it awarded $1.4 million for fraud and he has no specific argument about the awards for breach of contract and breach of fiduciary duty, which were vacated as duplicative pursuant to his post-trial motion. He has also failed to show that this case is comparable to *Santorini Cab*, 2013 IL App (1st) 122070, ¶ 20, in which, as a discovery sanction, the plaintiff was barred from relying on documents that would show its revenue, expenses, and before-tax profits, and thus, had incomplete information from which to prove its lost profits. We reject Wulf's contention that he was entitled to JNOV on Counts I, II, and III.

¶ 47 Wulf's fourth contention concerns the fraudulent misrepresentation portion of Marler's fraud claim. Wulf contends Marler could not have reasonably relied on Wulf's alleged misrepresentations because paragraph 11.7 of the business termination agreement contains a non-reliance clause which Wulf asserted in motions for summary judgment, directed verdict, and JNOV. He proposes that even if summary judgment is not reviewable on appeal, the other rulings can be addressed, and that he is now entitled to judgment as a matter of law.

¶ 48 Fraudulent misrepresentation is a form of common law fraud. *Johnson v. Waterfront Services Co.*, 391 Ill. App. 3d 985, 992 (2009). At issue is the fourth element of a fraudulent misrepresentation claim. The elements of fraudulent misrepresentation consist of: (1) a false statement of material fact, (2) the defendant's knowledge that the statement was false, (3) the defendant's intent that the statement induce the plaintiff to act; (4) the plaintiff's reliance on the truthfulness of the statement; and (5) damages that result from relying on the statement. *Johnson v. Waterfront Services Co.*, 391 Ill. App. 3d 985, 992 (2009); *Napcor Corp. v. JP Morgan Chase Bank, NA*, 406 Ill. App. 3d 146, 153-54 (2010). The plaintiff's reliance on the defendant's misrepresentations must have been reasonable. *Johnson*, 391 Ill. App. 3d at 993. Reasonable reliance is generally a fact question. *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 652 (2001). "In determining whether reliance was justifiable, all of the facts which the plaintiff knew, as well as those facts the plaintiff could have learned through the exercise of ordinary prudence, are taken into account." *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 125 (1995). "A person may not enter into a transaction with his eyes closed to available information and then charge that he has been deceived by another." *Adler*, 2711 Ill. App. 3d at 125-26.

¶ 49 On the fraud claim, Marler contended that Wulf falsely represented that he "wanted to get out of the proprietary trading industry," "did not know what he wanted to do next," and "had no idea what he was going to do," which induced Marler to contract with Wulf and shut down MW Capital. Wulf was actually concealing that "he had plans, and had taken steps, to form another proprietary trading company."

¶ 50 Paragraph 11.7 of Marler and Wulf's contract stated:

> "11.7 Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, representations, warranties, statements, promises, and understandings, whether oral or written. The use of headings in this Agreement is merely for convenience and shall have no legal effect, and such headings shall not be referred to in construing any provisions of this Agreement. None of the Parties hereto shall be bound by or charged with any oral or written agreements, representations, warranties, statements, promises or understandings with respect to the subject matter hereof, not specifically set forth or referred to in this Agreement."

¶ 51 Wulf argues that paragraph 11.7 contains non-reliance language that made it unjustifiable for Marler to rely on Wulf's oral representations. A non-reliance or anti-reliance clause indicates that a party is not relying on the other party's representations or warranties. *Vigortone AG Products, Inc. v. PM AG Products, Inc.*, 316 F.3d 641, 644 (7th Cir. 2002). A fraud claim based on misrepresentations outside a contract can be precluded by a non-reliance clause. *Schrager v. Bailey*, 2012 IL App (1st) 111943, ¶ 22. " 'This is a logical rule, given that it is hardly justifiable for someone to rely on something that they have agreed not to rely on, and without justifiable

reliance there can be no fraud.' " *Schrager,* 2012 IL App (1st) 111943, ¶ 22 (quoting *Greer Advanced Equities, Inc.*, 2012 IL App (1st) 112458, ¶ 9).

¶ 52 The first sentence of paragraph 11.7 is an integration clause. An integration clause is also known as a merger clause (*Integration Clause*, Black's Law Dictionary (11th ed. 2019)), and provides that the contract to be signed represents the final agreement, merges all prior versions and supersedes any prior discussion or version. *See Magnus v. Lutheran General Health Care System*, 235 Ill. App. 3d 173, 182 (1992). An integration clause prevents claims based on agreements reached during the negotiations that led to the signing of the contract which were not written into the contract itself. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464 (1999). "During contract negotiations, a party may propose terms, conditions, and provisions which are ultimately rejected in order to reach a compromise with the other party. That other party, of course, may do the same. The integration clause makes clear that the negotiations leading to the written contract *are not* the agreement." *Air Safety*, 185 Ill. 2d at 464. Generally, an integration clause does not bar a fraud suit. *W.W. Vincent & Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 760 (2004) (collecting cases); *Vigortone.*, 316 F.3d at 644 (the majority rule is that an integration clause does not preclude a fraud claim). This is the general rule because:

> " '[F]raud is a tort, and the parol evidence rule is not a doctrine of tort law and so an integration clause does not bar a claim of fraud based on statements not contained in the contract. Doctrine aside, all an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do with whether the contract was induced *** by

> fraud.' " *W.W. Vincent*, 351 Ill. App. 3d at 760 (quoting *Vigortone*, 316 F.3d at 644).

¶ 53 *Accord Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, 2021 IL App (1st) 191937, ¶ 32 ("standard integration clauses without specific antireliance language, are not effective [in barring a contracting party from asserting a claim for fraud based on representations outside the four corners of an agreement]").

¶ 54 The last sentence of 11.7 is a non-reliance clause as Wulf argues. It does not, however, have the effect that Wulf would like it to have. This sentence does not negate reliance on representations made in the contract, including the representations Wulf held himself to in paragraph 10.1:

> "Each Party hereby represents and warrants to the other Party that he has disclosed to the other Party (in reasonable detail) all facts, events and circumstances known by such Party to be in existence (as of the Effective Date) as a direct or indirect cause of such Party's actions or inaction, in each case, that could reasonably be expected to have a materially adverse effect on the assets, reputation and/or prospects of the other Party."

Together, these clauses indicate that Marler's fraud claim was not barred as a matter of law. See *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 637 (2008) (contracts are to be read as a whole). In paragraph 10.1, Wulf represented that he had disclosed activity such as his BOS Group activity before the dissolution of MW Capital.

¶ 55 In addition to paragraph 10.1, when the contract was signed, the parties were in a fiduciary relationship, and owed a duty of full disclosure of material facts that were adverse to

the interests of the other party or to the interests of their company. *Happy R Securities, LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509, ¶ 44 (fiduciaries have a positive duty to disclose material facts and a failure to do so is constructively fraudulent). The trial judge determined that, in the context of the parties' fiduciary relationship, the non-reliance clause did not foreclose Marler's fraud claim and that the fraud claim's element of reasonable reliance was a triable issue. See *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 21-25 (2003) (general releases do not release unknown claims which the party could not have contemplated releasing at the time, fraud may invalidate a release, partners in a fiduciary relationship owe each other full disclosure of material facts when obtaining a release); *ICD Publications*, 2014 IL App (1st) 133277, ¶ 65 (fiduciaries owe a duty of full disclosure of material facts when making a settlement and obtaining a release; an agreement is voidable if one party withheld facts material to the agreement); *Jordan v. Knafel*, 378 Ill. App. 3d 219, 229 (2007) (fraud in the inducement of a contract is a defense that renders the contract voidable at the election of the injured party).

¶ 56 Wulf relies upon *Greer v. Advanced Equities*, 2012 IL App (1st) 112458, ¶ 12, and *Benson v. Stafford*, 407 Ill. App. 3d 902, 926 (2010), claiming that the non-reliance clause is dispositive here. However, neither of the contracts at issue in those decisions contained obligations set forth in the mutual release of claims, described in paragraph 10.1. And, the pertinent language of paragraph 11.7 expressly excludes the representations Wulf agreed to, that he had disclosed "all facts, events and circumstances known" to Wulf that could reasonably be expected to have an adverse effect on Marler. Further, and as noted above, Wulf as a fiduciary owed a duty of full disclosure of material facts when obtaining the above paragraph 10.1 release. *Happy R Securities, LLC*, 2013 IL App (3d) 120509, ¶ 44.

¶ 57 Because of the provisions of the contract and the fiduciary relationship here, Wulf cannot show that the fraud claim should have been resolved as a matter of law in Wulf's favor due to any of the language in paragraph 11.7. Wulf is not entitled to JNOV.

¶ 58 Wulf's fifth argument also concerns the fraud claim set out as Count I. Wulf's argument is unclear, but it appears to be the same as his fourth argument and based on other paragraphs of the contract. He contends that there was no reasonable reliance as a matter of law (on Wulf's statements that he wanted to shut down MW Capital because he no longer wanted to be in the industry and that he did not have plans for the future) due to "¶ 4.1 [which] allowed either party to use the software without interference for any business purpose," "¶ 4.1.2 [which] provided that either could own, operate, or manage any business," "¶ 4.1.3 [which] contemplated either party could modify the programs to which the other would possess no right," and "¶ 8 [which] released Marler, Wulf and [MW Capital]'s employees from any implied or express non-competition." "Based on the foregoing, no trier of fact could find that Marler reasonably relied on the alleged Wulf statements." This is the full extent of Wulf's argument regarding the additional contract language set out in paragraphs 4 and 8. These provisions do not permit Wulf, who was in a fiduciary relationship with Marler when the parties negotiated and executed the shutdown of MW Capital, to conceal his true reason for shutting down MW Capital and his intention with respect to using MW Capital's resources immediately after the closure. *See Thornwood*, 344 Ill. App. 3d at 21-25 (partners in a fiduciary relationship owe each other full disclosure of material facts when obtaining a release); *ICD Publications*, 2014 IL App (1st) 133277, ¶ 65 (fiduciaries owe a duty of full disclosure of material facts when making a settlement and obtaining a release).

¶ 59 We are unable to address Wulf's additional contention in the fifth section of his brief that "¶¶ 3.1.1, 3.1.2, and 4.3 specifically referenced Wulf's $250,000 trading account that remained in his name," Marler had a "mistaken belief the contract prevented Wulf from operating a company like [BOS Group]," and Marler's "reasonable reliance was against the manifest weight of the evidence." This three-sentence paragraph appears in Wulf's brief under the heading, "There is No Reasonable Reliance as a Matter of Law." Missing from this paragraph is an explanation as to how references in the contract to Wulf's trading account balance could arguably excuse him from his fiduciary duty to fully disclose material facts to his then-partner regarding why Wulf wanted to shut down MW Capital, that he was already setting up BOS Group, and how he intended to use MW Capital's resources. Also, Wulf's initial statement that Marler did not reasonably rely on the statement *as a matter of* law conflicts with Wulf's conclusion that reasonable reliance was *against the manifest weight of the evidence*. Wulf's contention is not only unclear and conflicted, but he did not cite and apply any authority regarding the manifest weight of the evidence, in violation of the rule that an appellant must support his or her contentions with reasoned argument and citations to authority. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 12 (mere contentions, lacking argument or citation to supporting authority, do not merit consideration); *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 207 (2007) (same). The rule is consistent with the principle that "[a] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented *** , and it is not a repository into which an appellant may foist the burden of argument and research." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). The procedural rules governing the content

and format of appellate briefs are mandatory. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8. It is not our role to create an appellate argument, research the issue, and then apply the relevant authority to the facts in order to determine whether the appeal has merit. Undertaking these tasks would not only shift the appellant's burden to this court, but also deprive the appellee of a meaningful opportunity to respond to the theory. Wulf's contention falls well short of the rule and has been waived.

¶ 60 Wulf includes a third contention under the heading that there was no reasonable reliance as a matter of law: "Moreover, 805 Ill. Comp. Stat. Ann. 180/15-3(e) provides that a member does not violate a duty or obligation to the entity merely because the member's conduct furthers the member's own interest." This is apparently Wulf's invitation for this court to construe and apply the Limited Liability Company Act, specifically 805 ILCS 180/15-3(e), which concerns the standards of member conduct in a limited liability company. 805 ILCS 180/15-3(e) (West 2012). Wulf fails to quote the statute, cite principles of statutory interpretation, and apply those principles of construction to the legislature's language. The one case that he cites, *Cooper Linse Hallman Capital Management, Inc. v. Hallman*, 368 Ill. App. 3d 353, 358, 856 N.E.2d 585, 590 (2006), does not fill any of those gaps in Wulf's brief and concerns a general corporation rather than a limited liability company. Furthermore, the specific page that Wulf pinpoints in the opinion, page 358, addresses the manifest weight of trial evidence that was presented in that case. *Cooper Linse*, 368 Ill. App. 3d at 358. The case has no apparent connection to the statute. Wulf has waived our consideration of the statute. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *Hall*, 2012 IL App (2d) 111151, ¶ 12; *Obert*, 253 Ill. App. 3d at 682.

¶ 61 Wulf's sixth argument is that the jury's verdict as to Count II, breach of contract, must be vacated and judgment entered in Wulf's favor. We will not address this argument because, as discussed above, Marler's fraud and breach of contract claims resulted in duplicative damages which the trial judge remedied by vacating the jury's award for breach of contract. Further analysis of Count II is unwarranted. " 'A party cannot complain of error which does not prejudicially affect it, and one who has obtained by judgment all that has been asked for *** cannot appeal from the judgment.' " *Strategic Energy, LLC v. Illinois Commerce Comm'n*, 369 Ill. App. 3d 238, 245 (2006) (quoting *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 386 (1983)). "The appellate forum is not afforded to successful parties who may not agree with the reasons, conclusions, or findings below." *Strategic Energy*, 369 Ill. App. 3d at 245.

¶ 62 The arguments under Wulf's seventh heading return us to the fraud claim designated as Count I. Wulf argues that it was an abuse of discretion for the trial judge to submit the question of punitive damages to the jury without making a threshold finding that Wulf's fraudulent representations and concealment were wantonly made. Wulf relies on *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1138 (2004), which states in part:

> "The trial court submits the issue of punitive damages to the jury when it determines that, as a matter of law, the evidence will support an award of punitive damages. [Citation.] In other words, the trial court may submit the issue of punitive damages to the jury only if the plaintiff has made out a *prima facie* case for such damages. [Citation.] This decision to submit the question to the jury is a matter reserved to the trial court and will not be reversed absent abuse of discretion. [Citation.]"

¶ 63 An abuse of discretion occurs only where the trial court's ruling can be deemed arbitrary, fanciful, or unreasonable, or where no reasonable person would take the same view as the trial court. *Lovell v. Sarah Bush Lincoln Health Center*, 397 Ill. App. 3d 890, 899 (2010).

¶ 64 We point out the difference between Wulf's contention that the trial judge is to determine that the jury will be awarding punitive damages and *Franz*'s statement that the trial judge is to determine that the evidence is capable of supporting a jury award. *Franz*, 352 Ill. App. 3d at 1138. The additional cases he cites are consistent with *Franz*, 352 Ill. App. 3d at 1138. *See Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 179 (2008) (addressing whether "the trial court abused its discretion by failing to make a finding that plaintiffs established a *prima facie* case for the recovery of punitive damages"); *Blount v. Stroud*, 395 Ill. App. 3d 8, 21 (2009) (same).

¶ 65 Wulf also contends that the trial judge failed to use the correct definition of "willful and wanton conduct" because she did not adhere to the definition in the pattern jury instruction that she read to the jury: "When I use the expression 'willful and wanton conduct; I mean a course of action which shows *actual or deliberate intention to harm or which, if not intentional, shows an utter indifference to or conscious disregard for others.*" (Emphasis added). Illinois Pattern Jury Instructions, Civil, No. 14.01 (3rd ed. 1993). *Franz* indicates, "The purposes of punitive damages are punishment of a specific defendant and both general and specific deterrence, and such damages will be awarded only where the defendant's conduct is *willful or outrageous due to evil motive or a reckless indifference to the rights of others*." (Emphasis added.) *Franz*, 352 Ill. App. 3d at 1127. The phrases we italicized in the pattern jury instruction and *Franz* are essentially the same and we find that the distinction Wulf argues is of no consequence. Furthermore, the hearing transcript shows that the trial judge relied on *Franz*'s wording and made the appropriate finding

of law that the evidence was sufficient for the jury *to consider* awarding punitive damages:

> "[WULF'S ATTORNEY]: So that's why I'm saying [Wulf's conduct] doesn't rise to the level of willful and wanton conduct.
>
> [MARLER'S ATTORNEY]: One last point.
>
> "THE COURT: No, it's not necessary, Counsel. I think the attorneys have fully advised the Court on this issue. As I stated before, it's the Court that must make the preliminary finding. Now, it's the jury that finds whether or not the defendant acted willfully or maliciously. That's not something that the Court decides at this time. All I have to look at is whether or not there's been evidence offered that could arguably support the claim that the defendants' conduct was outrageous either because the defendants' acts were done with an evil motive or because they were reckless or indifferent to the rights of others.
>
> Now, [Wulf's] counsel argues that *** the wording of the contract does not afford [Marler] the kind of protection that he's now asserting in his claim, but that's not the issue that the Court must look at in deciding whether or not there's been fraud that would support punitive damages. I must look at whether or not there's been sufficient evidence of a misrepresentation that was the inducement into entering into the contract. And on that note, I will find that punitive damages should go to the jury over your strenuous objection.
>
> Thank you, Counsel."

¶ 66 Wulf has failed to persuade us that it was error to allow the jury to consider awarding punitive damages.

¶ 67 Wulf's next contention is that "the jury's finding of willful and wanton conduct is against the manifest weight of the evidence." By failing to cite and apply supporting authority about a jury's award that was against the manifest weight of the evidence, Wulf has waived this additional argument about the punitive damages. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *Hall*, 2012 IL App (2d) 111151, ¶ 12; *First National Bank of LaGrange*, 375 Ill. App. 3d at 207; *Obert*, 253 Ill. App. 3d at 682.

¶ 68 Wulf's eighth argument is that the trial court improperly admitted hearsay evidence by letting Marler testify about his conversations with MW Capital employees (who became BOS Group employees and owners) about their plans after MW Capital closed. Wulf contends the conversations were irrelevant to Marler's fraud or contract claims and so prejudicial to Wulf that he should have been granted a mistrial. A mistrial should be granted where an error so grave has occurred that it affects the fundamental fairness of the trial. *Lovell*, 397 Ill. App. 3d 899. Wulf bases his argument on the proposition that " 'out-of-court statements that explain a [person's] course of conduct should be admitted only to the extent necessary to provide that explanation and should not be admitted if they reveal unnecessary and prejudicial information.' " *In Re Zariyah A.*, 2017 IL App (1st) 170971, ¶ 89 (quoting *People v. O'Toole*, 226 Ill. App. 3d 974, 988 (1992)).

¶ 69 The record indicates that after Marler recalled what the employees said to him, his testimony continued:

> [MARLER'S ATTORNEY]: And based on what you observed on that last day, did you see anything that would lead you to believe that any of those people would be back in that office space after the key cards were all turned in?

[MARLER]: No. They all turned them in. Well, Justin Lee actually left his computer there, and he said that his mom was coming–

[WULF'S ATTORNEY]: Objection as to hearsay, your Honor.

THE COURT: Sustained.

[MARLER'S ATTORNEY]: Anything other than Justin Lee's computer that you saw there that led you to believe that any of those people would be back in that office space after the key cards were turned in?

[MARLER]: No."

¶ 70 This record indicates that Marler's testimony was admissible because it was not hearsay and not implicated by the legal principle he presents from *In Re Zariyah A.*, 2017 IL App (1st) 170971.

"Under the rules, ' "[h]earsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted' (Ill. R. Evid. 801(c) (eff. Oct. 15, 2015)) and is generally not admissible unless a specific exception applies (Ill. R. Evid. 802 (eff. Jan. 1, 2011)). 'However, testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not "hearsay." ' *People v. Williams*, 181 Ill. 2d 297, 313, 692 N.E.2d 1109 (1998). 'Statements that are offered to show their effect on [a] listener or to explain the listener's subsequent course of conduct,' for example, are not considered hearsay. *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 76, 8 N.E.3d 1116." *In re Zariyah A.*, 2017 IL App (1st) 170971, ¶ 88.

¶ 71 The statements were not hearsay because Marler did not offer them in order to prove

what the employees intended to do or did after the partnership ceased doing business. Marler testified about the statements to show the effect the words had on him. The employees' statements were part of the circumstances surrounding Wulf's fraud and specifically whether Marler's reliance on Wulf's earlier statements about his reasons for shutting down MW Capital was reasonable. Reasonable reliance is generally a fact question. *Miller*, 326 Ill. App. 3d at 652. "In determining whether reliance was justifiable, all of the facts which the plaintiff knew, as well as those facts the plaintiff could have learned through the exercise of ordinary prudence, are taken into account." *Adler*, 271 Ill. App. 3d at 125; *James v. Lifeline Mobile Medics*, 341 Ill. App. 3d 451, 457 (2003) (fraudulent representations must be viewed "in light of all the facts of which the injured party had actual knowledge and also such as he might avail himself of by the exercise of ordinary prudence). The employees' statements were consistent with Wulf's fraudulent representations that he "wanted to get out of the proprietary trading industry," "did not know what he wanted to do next," and "had no idea what he was going to do," which induced Marler to contract and shut down MW Capital. Wulf had fraudulently concealed that "he had plans, and had taken steps, to form another proprietary trading company." Wulf contends that statements made on the last day of MW Capital's operations were not part of Marler's decision to sign the business termination agreement. Again, however, the statements were not hearsay because they were not offered to prove what the individuals actually intended to do or did after MW Capital ceased operating. More importantly, Marler's fraud claim and request for damages were not only about his decision to execute the contract, but also about transferring the valuable computer code to Wulf and relinquishing the office space, equipment, and employees which Wulf incorporated into BOS Group over the subsequent months.

¶ 72 Wulf's ninth argument is that he is entitled to a new trial because four evidentiary rulings were individually prejudicial or because they cumulatively denied him a fair trial. The trial court's evidentiary rulings are reviewed under the abuse of discretion standard. *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 39 (2009). An abuse of discretion occurs only where the trial court's ruling can be deemed arbitrary, fanciful, or unreasonable, or where no reasonable person would take the same view as the trial court. *Lovell*, 397 Ill. App. 3d at 899. Where it appears that an error occurred but did not affect the trial's outcome, or where the reviewing court can see from the entire record that no harm has been done, the judgment will not be disturbed. *Jackson v. Pellerano*, 210 Ill. App. 3d 464, 471 (1991). In other words, reversal on the basis of an evidentiary error is justified only when it has caused substantial prejudice and affected the outcome of a trial. *Jackson*, 210 Ill. App. 3d at 471.

¶ 73 In the first ruling, the trial judge overruled Wulf's objection to testimony from Marler's business termination attorney about counsel's "understanding" that "Zach was going to go sit on a beach or go to school or do something else. He certainly wasn't planning on–." Wulf argues the "understanding" testimony was in violation of a motion *in limine* which barred Marler from eliciting testimony that during the business termination negotiations Wulf's attorney told Marler's attorney that Wulf was not going to stay in the proprietary trading business. This argument is not persuasive because Wulf opened the door to the admission of testimony that otherwise would have been excluded by the *in limine* ruling. *Rush v. Hamdy*, 255 Ill. App. 3d 352, 366 (1993). Wulf's trial attorney used "apple stands" in a hypothetical while cross-examining Marler's business termination attorney about non-compete clauses, but objected during redirect when Marler's business termination attorney explained why the MW Capital

dissolution was not like selling an apple stand. Counsel's "understanding" was relevant to what he would have included in the business termination agreement if he had known about BOS Group.

¶ 74 The second set of evidentiary rulings concerned the use of Wulf's answer and interrogatory answers as impeaching during cross-examination. In Count III, Breach of Fiduciary Duty, Marler alleged, "64. Defendant Wulf owed Plaintiff Marler certain fiduciary duties, including the fiduciary duty of loyalty, honesty, and good faith." Wulf denied this allegation. An interrogatory answer may be used for impeachment as long as the prior statement "is sufficiently inconsistent with the witness' trial testimony and relates to a material matter." *Palumbo v. Kuiken*, 201 Ill. App. 3d 785, 790 (1990). Wulf contends paragraph 64 was part of a non-jury count and did not relate to a material matter under the jury's consideration. However, Wulf's denial of an obligation to be loyal, honest, and act in good faith with Marler was material because it indicated that Wulf denied and tried to evade his responsibilities to his business partner. The denial was inconsistent with Wulf's trial defense that he had done nothing wrong and had abided by his partnership responsibilities and with the representations and rights that were set out in the business termination agreement. Wulf had the opportunity to address Marler's use of the answer to paragraph 64. Wulf's lawyer argued to the jury, "In real time, do you think this 26-year-old guy, 25-, 26-year-old guy who is scrambling to run his business had any clue to what the legal definition of loyalty is?"

¶ 75 The interrogatory answers that Wulf addresses on appeal are ones in which he identified BOS employees and misstated their employment dates to include three years of MW Capital's existence. Wulf contends the interrogatory answers should not have been used because there was

no dispute as to when BOS Group came into existence or whether the employees worked simultaneously for both companies. He contends Marler misused the interrogatory answers as proof that Wulf violated paragraph 3.1 of the contract, in which Marler and Wulf agreed "not to engage in any further business of the Companies *** and, in general, wind up the Companies' affairs in the ordinary course of business." He cites the following exchange as an indication of that misuse:

"Q. Mr. Wulf, the reason that you listed the dates of employment of the MW folks and the BOS folks as being the whole period of time that they worked at MW Capital and at BOS is because in your mind BOS Group is in the same business of the companies MW Capital and Prude Technology? Isn't that right?

A. You're entitled to your opinion.

THE COURT: If you can[,] answer the question yes or no.

***

A. Can you rephrase the question so I may be able to answer it yes or no, please?

THE COURT: You don't understand the question, sir?

A. *** He wants me to answer what he wants me to say, but that's not the truth, so–

THE COURT: Madame Court Reporter, can you read back the question for the witness?

(Record read as requested.)

***

A. That's not why I did that, no.

THE COURT: Thank you, sir."

¶ 76 Wulf argues that the prejudicial inference that he violated paragraph 3.1 is shown by a juror's question which the trial judge read to Wulf: "Why did you indicate on your discovery response, that during the time frame of 2010 and beyond, for [BOS] Group, you had employees when [BOS] Group did not come into existence until 2013?" Wulf answered the juror's question as follows:

> "[WULF]: Yeah. I think that's just, you know, [my] thoughtless error in thinking about when my relationship with these guys existed. I certainly did not expect ever to remotely come close to being here [at trial]. So right now, if you're looking back, that may seem like a serious error. But at the time, I answered [the interrogatory] to the best I could, and I made a mistake on that. And that's really all it is."

¶ 77 Marler responds that he used the interrogatory answers as part of his argument that Wulf acted in his own interests and viewed the MW Capital traders as his friends and personal employees from the start of MW Capital through the operation of BOS Group.

¶ 78 Wulf has failed to cite any portion of the record in which Marler expressly connected the interrogatory answer to a violation of paragraph 3.1, and we perceive no prejudice. Marler's use of the discovery response is nothing like the improper use of discovery answers in the case Wulf cites, *Tolman v. Wieboldt Stores*, 38 Ill. 2d 519, 526 (1967). That case involved a customer suing a Chicago Loop storeowner after being injured on an escalator. *Tolman*, 38 Ill. 2d at 527. In answer to interrogatories, the storeowner categorically denied any knowledge of prior incidents on the escalator, yet indicated that it had received what it deemed " 'hearsay evidence' " that there had been other incidents while the escalator was under the control of the former owner. *Tolman*, 38 Ill. 2d at 527. Rather than investigating this " 'hearsay' " about a prior owner, the

customer simply offered it as evidence of the current owner's negligence, which the appellate court deemed was error. *Tolman*, 38 Ill. 2d at 527.

¶ 79 The third supposedly prejudicial evidentiary ruling occurred with the admission of the May 2014 letter from Marler's business termination attorney to Wulf indicating Marler had become aware of BOS Group's existence and demanding that Wulf compensate Marler according to their 60/40 split and cease using the proprietary software. Wulf argues that the trial judge failed to understand the rudimentary rules of evidence and admitted an irrelevant document, and that any reference to the attorney's letter was barred by Wulf's unopposed motion *in limine* to prohibit any questioning regarding attempts to compromise.

¶ 80 Each side is entitled to present evidence that is relevant and material to its theory of the case and evidence which tends to show conduct that is inconsistent with the other side's theory is also admissible. *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 600 (2008). The letter was admitted because a foundation had been established; it was relevant to the Marler's theory that Wulf engaged in fraud and other wrongs; and it showed that after Wulf was confronted, he did not contact Marler to explain any misunderstanding, which was contrary to Wulf's litigation position that the suit was based on Marler's misunderstanding of their conversations and rights. On the subject of the letter, Marler's attorney and Wulf engaged in the following exchange:

> "Q. After you got the letter, did you call up Brian Marler on the phone and ask him about what [the lawyer] was saying in his letter?
>
> * * *
>
> A. Did I call up Brian Marler after he had an attorney send an aggressively threatening e-mail to me? No. I passed it on to my attorney. Did Brian call me up before

he sent this letter? No."

¶ 81 Furthermore, there is no plausible way that the attorney's written confrontation, demands, and threat to sue Wulf in order to protect Marler's rights and interests and prevent Wulf from continuing to use the software could be construed as an attempt at compromise. The letter was not encompassed by the order *in limine* that Wulf obtained.

¶ 82 Wulf next argues there was no foundation for the admission of the ADP payroll processor's sales order dated December 13, 2013, which showed that BOS Group was a "Spinoff." However, Wulf's attorney stipulated that the document was produced in response to Marler's document request for any and all contracts between Wulf or BOS Group and ADP or other companies. Wulf then testified as an adverse witness and acknowledged that in December 2013, he was responsible for contracting on BOS Group's behalf. Wulf acknowledged placing the order with ADP and receiving the sales form with the "Spinoff" wording and was questioned regarding his understanding of what "Spinoff" meant in this context. He also testified that the ADP document indicated he was to input BOS Group's payroll data by December 23 in order to generate monthly paychecks on the last day of the month. The stipulation and testimony that the ADP document produced during discovery was generated at Wulf's behest were a sufficient basis for admitting the document into evidence. See *Union Tank Car Co. v. NuDevco Partners Holdings, LLC*, 2019 IL App (1st) 172858, ¶ 37 (testimony that party relied on the accuracy of invoices to make payments to third party "diminishes the concern that they are inaccurate or falsified, which forms the basis of the general rule prohibiting hearsay evidence"); *Argueta v. Baltimore & Ohio Chicago Terminal R. Co.*, 224 Ill. App. 3d 11, 21 (1991) (where a third party is authorized by a business to generate a document, the document is of no use to the business

unless it is accurate and, therefore, the record bears sufficient indicia of reliability to qualify as a business record under the hearsay rule). Moreover, even if the document had been admitted without sufficient foundation, it would have been harmless error. *Argueta*, 224 Ill. App. 3d at 21. The jury heard other testimony that before Marler and Wulf negotiated the business termination agreement, Wulf e-mailed ADP on October 4, 2013, about switching MW Capital's account to a new limited liability company. The ADP form would have been merely cumulative evidence that Wulf took steps to conduct proprietary trading, using MW Capital's resources, without sharing any of the business revenue with the majority owner of MW Capital. *Argueta*, 224 Ill. App. 3d at 21. A harmless error does not entitle a party to reversal. *Jackson*, 210 Ill. App. 3d at 471.

¶ 83 Wulf has waived his contention that the four supposed evidentiary errors cumulatively entitle him to a new trial. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *Hall*, 2012 IL App (2d) 111151, ¶ 12 (mere contentions, lacking argument or citation to supporting authority, do not merit consideration); *First National Bank of LaGrange*, 375 Ill. App. 3d at 207.

¶ 84 Wulf's tenth argument concerns four of the jury instructions, beginning with Marler's 14C regarding his fraud claim. Wulf argues the phrase we italicized below, "provide Zachary Wulf with MW Capital trading software programs," misled the jury as to whether Marler or MW Capital owned the automated trading software that Marler and Wulf agreed each could use after MW Capital was dissolved. The jury was instructed:

> "In Count I, Brian Marler claims that Zachary Wulf and BOS Group LLC made the following statements:
>
> Zachary Wulf wanted to get out of the proprietary trading industry.
>
> Zachary Wulf did not know what he wanted to do next.

Zachary Wulf had no idea what he was going to do.

Brian Marler further claims that the statements were false statements of material facts.

Brian Marler further claims that Zachary Wulf and BOS Group LLC knew the statements were false or believed the statements to be false or made the statements in reckless disregard, of whether they were true or false.

Brian Marler further claims that Zachary Wulf and BOS Group LLC made the statements with the intent to induce Brian Marler to agree to shut down the MW Capital business, sign the Termination Agreement and *provide Zachary Wulf with the MW Capital trading software programs*.

Brian Marler further claims that he reasonably believed the statements and agreed to shut down the MW Capital business, sign the Termination Agreement and *provide Zachary Wulf with the MW Capital trading software programs* in justifiable reliance on the truth of the statements.

Brian Marler further claims that he sustained damages as the result of his reliance.

Zachary Wulf and BOS Group LLC deny that Zachary Wulf made false statements of facts, deny that any claimed statements were material, deny that Zachary Wulf knew or believed the claimed statements to be false, deny that any claimed statements were made in reckless disregard of the statements' truth or falsity, deny that Zachary Wulf intended to induce Brian Marler to agree to shut down the MW Capital business, sign the Termination Agreement and provide Zachary Wulf with the MW Capital trading software, denies that Brian Marler reasonably believed the claimed statements or agreed

> to shut down the MW Capital business, sign the Termination Agreement and *provide Zachary Wulf with the MW Capital trading software programs* in justifiable reliance on the truth of the statements and denies that damage resulted to Brian Marler from his reliance." (Emphasis added.)

¶ 85 Wulf contends that 14C falsely told the jury that MW Capital's software was Marler's to give to Wulf, because "provide" is a transitive verb meaning to "to supply or make available (something wanted or needed)." Wulf acknowledges that the distinction he is drawing is "minor" and "slight" but contends he was "seriously prejudiced." He proposed a more general instruction indicating he had denied making "a false statement intended to induce Brian Marler to enter in the November 27, 2014 Termination Agreement."

¶ 86 Jury instructions must convey the correct principles of law applicable to the evidence presented. *Northern League of Professional Baseball Teams v. Gozdecki, Del Giudice, Americus & Farkas, LLP*, 2018 IL App (1st) 172407, ¶ 69. The trial court has considerable discretion to determine which issues have been raised by the trial evidence and whether a particular instruction should be given. *Northern League*, 2018 IL App (1st) 172407, ¶ 69; *Hajian v. Holy Family Hospital*, 273 Ill. App. 3d 932, 937 (1995). Furthermore, "[j]ury instructions are to be 'considered as a whole and where the jury has not been misled and the [complainant's] rights have not been prejudiced by minor irregularities, those alleged errors cannot serve as a basis for [error].' " *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1136 (2000) (quoting *Konieczny v. Kamin Builders, Inc.*, 304 Ill. App. 3d 131, 137 (1999)).

¶ 87 Wulf's argument is not persuasive. "[T]he test of the correctness of an instruction is not what meaning the ingenuity of counsel can attribute to it, but how and in what sense, under the

evidence before them and the circumstances of the trial, ordinary persons acting as jurors will understand the instruction." *Schultz*, 201 Ill. 2d at 280, 775 N.E.2d at 976. Marler's 14C could not have been misleading, because during the trial both litigants consistently indicated they united their assets in 2010 to form MW Capital; shared MW Capital's ownership, resources, management and profits for years; and could shut down MW Capital only by mutually agreeing to dissolve the business. Marler and Wulf's trial presentations indicated that their partnership owned the software and other resources; that during the years of operations, their team of programmers revised the company's software, and that the rights to use the company's resources would cease once their company ceased existing, unless Marler and Wulf contracted for a different arrangement. Neither party claimed, testified, or argued that he had individual ownership or exclusive rights to any MW Capital resource during or after the partnership. There were no grounds and no reasonable likelihood at the end of the trial that the jury would be misled by Marler's 14C into thinking that Marler kept exclusive ownership of the software he initially wrote and contributed to MW Capital in 2010 but which had been revised for the next few years under Marler and Wulf's direction. Furthermore, Wulf could not have been prejudiced, let alone "seriously prejudiced," by the phrase he has isolated in Marler's 14C. Regardless of whether the software belonged to Marler individually or MW Capital, Wulf could not have used the software after MW Capital closed unless Marler had "provide[d]" his agreement that Wulf could use the software. "Provide" was not a term that would mislead the jury and prejudice Wulf's defense. It was an accurate description of what Marler did by executing the business termination agreement.

¶ 88 Wulf argues it was an abuse of discretion to use Marler's 16A, which was based on Illinois Pattern Jury Instructions, Civil 800.09A (2006) (hereinafter, IPI Civil 2006), instead of

Wulf's 9, which was based on IPI Civil 800.09B to instruct the jury about Marler's burden of proof on the fraud count. The court is to use an Illinois Pattern Jury Instruction "when it is applicable in a civil case after giving due consideration to the facts and the prevailing law, unless the court determines that the instruction does not accurately state the law." *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002).

¶ 89 The two pattern instructions appear identical other than that 800.09A requires a plaintiff to prove the first two elements of fraud by clear and convincing evidence and prove that the remaining elements were more probably true than not true, while 800.09B requires a plaintiff to prove all the elements of fraud by clear and convincing evidence. A proposition that has been found to be more probably true than not true has been proven by a preponderance of the evidence. *Bazydlo v. Volant*, 164 Ill. 2d 207, 213 (1995). Clear and convincing is a higher standard than preponderance of the evidence and is defined as "the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question." *Bazydlo*, 164 Ill. 2d at 213. Thus, the pattern instruction that was used stated:

> "800.09A Fraud and Deceit–Burden of Proof on the Issues–Alternative One–Fraudulent Concealment–One Plaintiff and One Defendant–Clear And Convincing Evidence Only as to Certain Elements
>
> The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:
>
> First, the defendant knowingly [concealed] [withheld] from the plaintiff [a] material fact[s];
>
> Second, that the defendant [concealed] [withheld] the fact[s] with the intent to

deceive the plaintiff and induce the plaintiff to [act] [describe what the plaintiff did, e.g., "buy the farm"].

The plaintiff has the burden of proving each of the following propositions is more probably true than not true:

Third, the plaintiff [acted] [describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the facts as he knew them;

Fourth, the plaintiff's damages resulted from the [concealment] [withholding] of [a] material fact[s] by the defendant.

If you find from your consideration of all the evidence that propositions First and Second have been proved by clear and convincing evidence and that propositions Third and Fourth are more probably true than not true, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved as required in this instruction, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that only the first two elements of the cause must be proved by clear and convincing evidence. If the court requires all elements to be proved by clear and convincing evidence, then use IPI 800.09B. The committee makes no recommendation with respect to which burden of proof instruction should be given.

IPI 20.01 (meaning of burden of proof) should not be given with this instruction; it is already included. No definition of "clear and convincing" has been prepared by the

committee. *See* comment to IPI 800.03." Illinois Pattern Jury Instructions, Civil No. 800.09A (2006)."

¶ 90 The pattern jury instruction that was rejected stated:

"800.09B Fraud and Deceit–Burden of Proof on the Issues–Alternative Two–Fraudulent Concealment–One Plaintiff and One Defendant–Clear and Convincing Evidence

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant knowingly [concealed] [withheld] from the plaintiff [a] material fact[s];

Second, that the defendant [concealed] [withheld] the fact[s] with the intent to deceive the plaintiff and induce the plaintiff to [act] [describe what the plaintiff did, e.g., "buy the farm"];

Third, the plaintiff [acted] [describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the facts as he knew them;

Fourth, the plaintiff's damages resulted from the [concealment] [withholding] of [a] material fact[s] by the defendant.

If you find from your consideration of all the evidence that each of these propositions has been proved by clear and convincing evidence, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved by clear and convincing evidence, then your verdict should be for the defendant.

Notes on Use

> This instruction should be given when the court has ruled that each element of the case must be proved by clear and convincing evidence. If the court rules that only the first two elements of the cause must be proved by clear and convincing evidence, then use IPI 800.09A. The committee makes no recommendation with respect to which burden of proof instruction should be given." Illinois Pattern Jury Instructions, Civil No. 800.09A (2006).

¶ 91 Wulf proposes that 800.09B is controlling because in 1941, 1977, and 1983, the Supreme Court used the enhanced burden of the clear and convincing standard in fraud claims: *Racine Fuel Co. v. Rawlins*, 377 Ill. 375, 380 (1941), *Ray v. Winter*, 67 Ill. 2d 296, 303 (1977), *Hofmann v. Hofmann*, 94 Ill. 2d 205, 222 (1983). Wulf contrasts the higher court's opinions with intermediate appellate court decisions filed in 1982 and 1981 which used 800.09A's split burden of proof of clear and convincing for some elements of fraud and preponderance of the evidence for the other elements: *Gordon v. Dolin*, 105 Il. App. 3d 319, 324 (1982); *Oltmer v. Zamora*, 94 Ill. App. 3d 651 (1981). Wulf argues that we must follow the decisions of this state's highest court.

¶ 92 Wulf seems unaware that the Illinois Supreme Court Committee on Pattern Jury Instructions wrote both of the pattern instructions and included "Notes on Use" stating that (1) the instructions were based on prevailing case law, (2) the committee was not recommending one instruction over the other, and (3) it was within the trial court's discretion to determine which instruction to use. *See* Illinois Pattern Jury Instructions, Civil No. 800.09A (2006); Illinois Pattern Jury Instructions, Civil No. 800.09B (2006).

¶ 93 In *Napcor*, 406 Ill. App. 3d at 157, 938 N.E.2d at 1191, the court addressed whether the

trial court should have chosen Pattern Jury Instruction 800.02A over 800.02B, which are similar to the pattern instructions at issue here. Here, as in *Napcor,* the record indicates that the trial judge reviewed the facts and law, confirmed that either instruction was supported by prevailing case law, and then exercised her discretion in determining which instruction to use. *Napcor*, 406 Ill. App. 3d at 157. Here, as in *Napcor,* there is no indication that the trial judge abused that discretion. *Napcor*, 406 Ill. App. 3d at 157. Accordingly, we reject Wulf's contention that judgment in his favor is warranted because the trial judge did not choose Wulf's preferred jury instruction and accepted one that Marler submitted. *Napcor*, 406 Ill. App. 3d at 157.

¶ 94 Wulf next argues there was no need to give Marler's 18B, which was a non-pattern instruction regarding the effect of the parties' liability release clause on Marler's fraud claim. Marler's 18B instructed the jury: "In considering the claims in Count I (Fraud), the Termination Agreement [¶] 10.1) states the parties agree to release certain claims against each other. A release is not enforceable if material facts were misrepresented, concealed or withheld in making the agreement." Wulf argues the instruction was unnecessary because he did not plead the affirmative defense of a release from liability and that it is an abuse of discretion to give an irrelevant instruction.

¶ 95 Marler's 18B was relevant because the jury was charged with evaluating the fraud claim as well as the parties' contract which included the release language. "[I]t is within the trial court's discretion to determine which issues are raised by the evidence and whether an instruction should be given." *Northern League*, 2018 IL App (1st) 172407, ¶ 69. Wulf fails to cite authority indicating a release instruction is appropriate only in the context of an affirmative defense. He is not arguing that 18B is an inaccurate statement of the law. Our review of the

record and authority that Marler cited during the jury instruction conference confirms that 18B was implicated by the evidence presented. *See Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 21-25 (2003) (general releases do not release unknown claims which the party could not have contemplated releasing at the time, fraud may invalidate a release, partners in a fiduciary relationship owe each other full disclosure of material facts when obtaining a release), *ICD Publications*, 2014 IL App (1st) 133277, ¶ 65 (fiduciaries owe a duty of full disclosure of material facts when making a settlement and obtaining a release; an agreement is voidable if one party withheld facts material to the agreement); *Jordan*, 378 Ill. App. 3d at 229 (fraud in the inducement of a contract is a defense that renders the contract voidable at the election of the injured party).

¶ 96 Wulf contends that Marler's 21B regarding paragraph 10.1 of the contract should have been tempered by the inclusion of paragraph 11.7 of the contract. Since we have already determined the non-reliance clause contained in paragraph 11.7 specifically excluded representations Wulf agreed to under the provisions of paragraph 10.1, this clause in 11.7 was not relevant to the question of reasonable reliance before the jury. As a result, it was not an abuse of the court's discretion to exclude a reference to the non-reliance clause in tendered instruction 21 B. See *Northern League*, 2018 IL App (1st) 172407, ¶ 69 (trial court has considerable discretion to determine which issues have been raised by the evidence and whether a particular instruction should be given); *Hajian*, 273 Ill. App. 3d at 937 (same).

¶ 97 Our next consideration is whether Wulf was prejudiced when Marler's 36-A Verdict Form as to the fraud count differed from the format that the trial judge approved during the jury instruction conference. The clean copy given to the jury included an extra punitive damage line

that allowed the jury to award punitive damages against Wulf individually and BOS Group vicariously. The original version stated in pertinent part:

"We, the jury, assess punitive damages against Zachary Wulf.

____ YES

____ NO

We, the jury, assess punitive damages against BOS Group LLC.

____ YES

____ NO

We, the jury, assess punitive damages in the amount of:

$_____."

¶ 98 The version the jury completed stated:

"We, the jury, assess punitive damages against Zachary Wulf.

____ YES

____ NO

If 'Yes' assess the amount of punitive damages awarded against Zachary Wulf.

$_____

We, the jury, assess punitive damages against BOS Group LLC.

____ YES

____ NO

If 'Yes' assess the amount of punitive damages awarded against BOS Group LLC.

$_____."

¶ 99 After awarding $1.4 million in compensatory damages against Wulf and BOS Group for

fraud, the jury wrote $380,000 on each of the two punitive damage lines. (As discussed below in Marler's cross-appeal, the trial judge vacated the $380,000 punitive award against BOS Group.)

¶ 100 Wulf cites *McIntyre v. Balagani*, 2019 IL App (3d) 140543, ¶ 120, for its indication that vicarious liability is only a basis for indemnity, not for apportionment of damages between a principal and agent. The case does not concern verdict forms, but it is the only authority Wulf cites. He concludes that the verdict form created "serious implications," although he does not elaborate on why apportioning damages is a grave concern. Accordingly, we find the argument is waived. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *Hall*, 2012 IL App (2d) 111151, ¶ 12); *First National Bank of LaGrange*, 375 Ill. App. 3d at 207; *Obert*, 253 Ill. App. 3d at 682.

¶ 101 Waiver aside, since there is no way of knowing how the jury determined the amounts it wrote on the separate lines of the incorrect verdict form, there is no basis for concluding that the defense suffered any prejudice. *McHale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 113 (holding "even though the jury should not have received the verdict form providing for individual awards to Stacey's husband and children, [we cannot know how the verdict form impacted the jury's damage award, and] use of the incorrect form does not warrant a new trial"); *Jones*, 316 Ill. App. 3d at 1137 (holding there was no support for claim of prejudice from verdict form that provided for separate awards as there was "no evidence the separate lines inflated the overall award, especially since, *** the amount[] awarded *** was significantly less than the amount requested"); *Barry v. Owens-Corning Fiberglas Corp.*, 282 Ill. App. 3d 199, 217 (1996) (holding no prejudice resulted from verdict form providing for individual awards to each survivor as the appellate court was left with only speculation since it could not "know how the jury determined the amounts it placed on the separate lines" and there was "no reason to

conclude that the use of separate lines somehow inflated the total wrongful death award"). The use of the verdict form was not prejudicial error.

¶ 102 Wulf's eleventh and twelfth arguments–that it was an abuse of discretion to deny leave to file an affirmative defense of lack of standing and judgment on the breach of fiduciary claim was against the manifest weight of the evidence–have been waived by Wulf's failure to state the facts necessary to understand what occurred in the trial court. Ill. S. Ct. R. 341(h)(6) (eff. May 25, 2018). It is the appellant's duty to present the issues fully and clearly. *Village of Barrington v. Lageschulte*, 323 Ill. 343, 346 (1926). We will not search the record to find reasons to reverse the judgment.

¶ 103 BOS Group argues "Judgment on Count III-Fiduciary Duty should [be entered] in BOS' Favor Pursuant to SCR 329." BOS Group seeks an order stating that the trial court vacated the breach of fiduciary duty judgment as to BOS Group. Marler agrees that the trial court vacated the breach of fiduciary duty award as to BOS Group. Based upon the record, we find that there is no judgment as to BOS Group as to Count III and that no further relief can be granted to BOS Group as to Count III. A party cannot appeal an issue which has been resolved in its favor. *Strategic Energy*, 369 Ill. App. 3d at 245.

¶ 104 On cross-appeal, Marler's first of four arguments is to reinstate the jury's fraud verdict and $380,000 punitive damages award against BOS Group, which the trial judge vacated pursuant to Wulf's motion for JNOV. We review orders granting JNOV under a *de novo* standard. *Gaffney v. City of Chicago*, 302 Ill. App. 3d 41, 48 (1998). Nevertheless, this first argument is cursory and warrants little discussion. For instance, Marler cites *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 590 (2009), which addressed when knowledge of an agent is

imputed to a principal. Marler's fraud claim was not based on any knowledge that Wulf obtained and which benefitted his principal. Marler states that the punitive damage award against BOS Group was warranted "based on the evidence in the record," but he does not elaborate on that statement or cite any pages of the record on appeal. He cites a pattern jury instruction, Illinois Pattern Jury Instructions, Civil, 35.02 (2011), which the Notes on Use indicate should be given when a "submissible case for punitive damages has been made and such damages are sought against a corporate defendant." Pattern jury instructions are presumed to be accurate statements of Illinois law and a jury is instructed using an approved pattern instruction if the trial court determines that it is applicable to the circumstances of the case. *Hana v. Illinois State Medical Inter-Insurance Exchange Mutual Insurance Co.*, 2018 IL App (1st) 162166, ¶ 36. Nevertheless, pattern instructions are not themselves law. *Hana*, 2018 IL App (1st) 162166, ¶ 36. In other words, a model jury instruction is not binding authority and should not be cited for that reason. Marler next contends:

> "Numerous cases stand for the proposition that, to be liable for fraud, one must have been a participant or had some knowledge of the same. *Beaver v. Union Nat. Bank & Tr. Co.*, 92 Ill. App. 3d 503, 506 (3d Dist. 1980). The evidence viewed in the requisite light most favorable to Marler established that BOS Group directed, participated in and accepted the fraudulent conduct."

Here, Marler again fails to cite any particular evidence in the record on appeal and we decline to take up that task for him. His citation to *Chiurato v. Dayton Estates Dam & Water Company*, 2017 IL App (3rd) 160102, ¶ 33, is perplexing because it is not about fraud claims or damage awards. That paragraph states in its entirety:

> "Second, it is well settled in Illinois that for-profit corporations are not liable for debts contracted for services rendered under a contract with its incorporators prior to its organization unless the corporation has expressly promised to undertake the liability after its organization. *Erd v. Rapid Transit Co.*, 206 Ill. App. 351, 354-55 (1917). A preincorporation contract may be binding upon a corporation only if the contract is specifically ratified by the board of directors. *Brownholtz v. Providers Life Assurance Co.*, 329 Ill. 42, 46, 160 N.E. 127 (1928). The same logic applies to preincorporation liability of a not-for-profit company." *Chiurato*, 2017 IL App (3d) 160102, ¶ 33.

¶ 105 Marler's rationale for reinstating the fraud judgment against BOS Group is unconvincing.

¶ 106 Marler also seeks reinstatement of the damage award on the breach of fiduciary duty award, which the trial judge vacated as being duplicative of the fraud award. Our review of the pleadings confirms that Marler's fraud and breach of fiduciary duty claims concerned a single injury. Thus, our earlier discussion of the duplication between Marler's fraud and breach of contract counts is also applicable here. Marler contends that reinstating the judge's $1 million award or at least increasing Marler's judgment would not amount to a prohibited second recovery for a single injury, because on a breach of fiduciary duty claim, the normal measure of damages would be forfeiture and disgorgement of the compensation that Wulf began obtaining in 2013 when he breached his duties. He supports this contention about the normal measure of damages with citation to several cases, including *Vendo Company v. Stoner*, 58 Ill. 2d 289, 314 (1974). He does not, however, cite any authority for the proposition that a different amount of damages renders his two counts substantively different. Marler was not entitled to be compensated on both claims as they concern one injury. See *Pippen v. Pedersen & Houpt*, 2013

IL App (1st) 111371, ¶ 29 (entering judgment on breach of fiduciary duty and attorney negligence claims that were based on same operative facts and resulted in same injury was in error; pleading in the alternative is generally permitted, but duplicate claims are not permitted).

¶ 107 Marler's third argument is for reinstatement of the attorney fees award that was based on a clause in the business termination agreement:

> "9. **Failure to Comply with Agreement**. In the event that a Party fails to comply with this Agreement and the other Party prevails in enforcing the terms of this Agreement through negotiation, litigation or otherwise, then the Party against whom the Agreement has been enforced shall be responsible for all reasonable costs of enforcement, including any reasonable attorneys' fees, court costs, and/or any other related expenses reasonably incurred by the other Party in enforcing the obligations of this Agreement that entitled the prevailing party in disputes over enforcement of the contract to an award of reasonable attorney fees and costs."

¶ 108 Under Illinois law, a party will not be awarded attorney fees unless the fees are specifically authorized by statute or provided for by contract between the parties. *Quick & Reilly, Inc. v. Zielinski*, 306 Ill. App. 3d 93, 101 (1999). A question of whether a court has authority to award attorney fees is a question of law and is addressed *de novo*. *Grate v. Grzetich*, 373 Ill. App. 3d 228, 231 (2007).

¶ 109 Marler cites authority which defines the term "prevailing party" for purposes of awarding attorney fees as being successful on a "significant issue and achiev[ing] some benefit for bringing suit." *Peleton, Inc. v. McGivern's Inc.*, 375 Ill. App. 3d 222, 227 (2007). However, contractual provisions for attorney fees are strictly construed (*Jackson v. Hammer*, 274 Ill. App.

3d 59, 70 (1995)), and to recover attorney fees under this contract, Marler did not have to be the "prevailing party," he had to "prevail[] in enforcing the terms of this Agreement through negotiation, litigation, or otherwise." Marler did not prevail in enforcing the terms of the contract through litigation because judgment in his favor on his breach of contract claim was vacated as being duplicative of his fraud judgment. As we discussed above, this was an appropriate ruling. While it is true that Marler prevailed on his claims generally and successfully opposed Wulf's counterclaim for attorney fees based on paragraph 9, neither of these outcomes amounts to enforcing the terms of the contract. We find that the trial judge properly vacated the attorney fees award because there was no basis for the award.

¶ 110 Marler's last argument is that he is entitled to a constructive trust over BOS Group's revenue since 2013, because he proved that he was defrauded out of an active and profitable business which Wulf continues to run. "A constructive trust is an equitable remedy that may be imposed to redress unjust enrichment caused by a party's wrongful conduct." *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.*, 114 Ill. 2d 278, 293 (1986). Marler contends the fraud judgment establishes that he is suffering an ongoing harm rather than a discreet injury and that Wulf and BOS Group are being unjustly enriched on an ongoing basis. He wants a constructive trust that continues until further order of the court, so that he benefits from the new organization's profits. He contends that without that equitable award, he will "have to continue to sue Wulf and BOS Group indefinitely just to try to get the lost profits they obtained unlawfully."

¶ 111 The trial judge found that Marler had an adequate remedy at law in the form of the lost profits that were awarded. An adequate remedy at law is " 'one which is clear, complete and as

practical and efficient to the ends of justice and its prompt administration as the [proposed] equitable remedy.' " *Hill v. Names & Addresses, Inc.*, 212 Ill. App. 3d 1065, 1082 (1991) (quoting *Cross Wood Products v. Suter*, 97 Ill. App. 3d 282, 286 (1981)). When a plaintiff's legal remedy is adequate, the imposition of a constructive trust is erroneous. *Hagshenas v. Gaylord*, 199 Ill. App. 3d 60, 78 (1990) (constructive trust on profits earned from plaintiff corporation's former customers by disloyal fiduciary were denied because plaintiff was adequately compensated by legal damages for reduction in value). Whether to grant a constructive trust is generally a matter of discretion. *National Union Fire Insurance Co. of Pittsburgh v. DiMucci*, 2015 IL App (1st) 122725, ¶ 78. We reiterate that an abuse of discretion occurs only where the trial court's ruling can be deemed arbitrary, fanciful, or unreasonable, or where no reasonable person would take the same view as the trial court. *Lovell*, 397 Ill. App. 3d at 899.

¶ 112 Marler points to no particular facts which would undermine the trial judge's conclusion that the damage awards adequately compensate Marler for Wulf's misconduct, even for the profits that Wulf and BOS Group garner after the trial. In his reply brief, he argues that he is not being compensated for Wulf and BOS Group's ongoing use of the proprietary software:

> "[T]he imposition of equitable relief is needed to assist the parties in ending their dispute once and for all.
>
> For example, going forward, with the final judgment and imposition of equitable relief, Marler and Wulf have a chance to cut a fair and transparent deal to permit Wulf to use the trading software as he sees fit by paying a reasonable royalty just like MW Capital and BOS Group contractors pay reasonable royalties for using the trading

software. See Pl.Br., p. 9.

Alternatively and as another example, going forward, with the final judgment and the imposition [of] equitable relief, Marler and Wulf have a chance to cut a fair and transparent deal to permit Wulf to buy out Marler's share in the trading software outright and avoid the need to pay future royalties or lost profits altogether.

These are not the only possible options. However, awarding equitable relief should not be optional. Accordingly, this Court should reverse the trial court's order denying equitable relief and remand the case to the trial court for entry of an appropriate equitable order."

¶ 113 Marler's argument that he should be compensated for Wulf and BOS Group's use of the software is a new argument, raised for the first time in Marler's reply brief. In his complaint, "COUNT VI–CONSTRUCTIVE TRUST," Marler sought only "funds generated by BOS Group" and "funds generated from the operations of Defendant BOS Group:"

"WHEREFORE, Plaintiff Marler respectfully requests this Court to enter an order imposing a constructive trust on by either: (a) directing the parties to deposit the funds generated by BOS Group with the court or Clerk of the Court subject to further order of the Court and/or resolution of the present suit; or (b) directing the parties to transfer funds generated from the operations of Defendant BOS Group to an independent trust account unrelated to any of the parties under terms that are mutually agreed upon by the parties."

¶ 114 After the verdicts, Marler filed a motion for a constructive trust. However, in this document, Marler again asked only for a constructive trust over the new company's "revenue" and "assets" and made no mention of BOS Group's royalty-free use of the trading software.

More specifically, Marler indicated in his post-verdict motion:

> "5. In addition, based on the jury's verdicts on the fraud claim, a constructive trust should be imposed over the revenue generated by BOS Group pending further order of court.
>
> ***
>
> 7. Here, based on the jury's verdicts for Plaintiff on the fraud claim, a constructive trust should be imposed over BOS Group's assets, including the revenue BOS Group generated since 2013, pending further order of court.
>
> WHEREFORE, Plaintiff respectively seeks entry of an order granting this motion and any other relief the Court deems necessary and just."

¶ 115 The argument regarding the ongoing use of the software is a new argument. Arguments which are raised for the first time in a reply brief are waived. *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 19.

¶ 116 Furthermore, Marler's contention that he will be suing Wulf and BOS Group indefinitely and that "[a]bsent equitable relief, Marler is left with the grim consequence of having to continually seek damages from Wulf and BOS Group," is contrary to the doctrine of *res judicata*. *See River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998) (under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action).

¶ 117 And, finally, in *Hill*, 212 Ill. App. 3d at 1073, which Marler cites for the proposition that both monetary damages and a constructive trust may be granted, the court awarded those two

forms of relief as alternatives from which the plaintiff could choose. *Hill*, 212 Ill. App. 3d at 1073 ("The court awarded NAI alternative remedies: (1) to accept the imposition of a constructive trust on gains wrongfully realized by GDR and Hill, or (2) to receive damages equal to NAI's lost profits resulting from GDR's and Hill's actions.").

¶ 118 For these reasons, Marler's argument for imposition of a constructive trust is not persuasive.

¶ 119 Having considered and rejected all of the appellant and cross-appellant's arguments about the trial court's rulings, we affirm the judgment on appeal.

¶ 120 Affirmed.