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THIRD DIVISION  
September 28, 2011

No. 1-10-0107

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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ANTONIO VERNON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 02 L 15749
	)	
UNIVERSITY OF CHICAGO, UNIVERSITY OF	)	
CHICAGO GRADUATE SCHOOL OF BUSINESS,	)	
and PROFESSOR MILTON HARRIS,	)	Honorable
	)	Ronald F. Bartkowicz,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE SALONE delivered the judgment of the court.  
Justices Murphy and Neville concurred in the judgment.

**ORDER**

*HELD:* Where plaintiff failed to provide an adequate record of the privileged material challenged on appeal, and plaintiff's modified jury instruction did not accurately state the law, we affirm the trial court.

¶ 1 This appeal arises from a suit for breach of contract between plaintiff Antonio Vernon,

then a student in the Ph.D. program of defendant University of Chicago. Initially, plaintiff was warned by university officials that carrying a martial arts knife to class and on campus violated the university's policy against dangerous weapons. Ultimately, plaintiff was suspended for two quarters for what the university considered harassment of university officials because of plaintiff's repeated inquiries regarding the university's policy against carrying dangerous weapons. The record on appeal contains extensive communications between plaintiff and various university officials, however, we have limited the facts below to those relevant to the issues on appeal.

### *Background*

¶ 2 In November of 2001, plaintiff displayed a martial arts weapon, commonly referred to as a butterfly knife, in class and during a social event on the campus of the University of Chicago, a private university. Following these events a classmate emailed plaintiff and told plaintiff that he was making students uncomfortable. Plaintiff replied, "[O]ne thing you should know about me is that I do not care who I offend carrying weapons."

¶ 3 Following this exchange the student complained to the director of the Office of Student Affairs and, plaintiff was summoned to a meeting with defendant Dr. Milton Harris, then Associate Dean of Ph.D. studies and Roberta Bernstein, then Associate Dean of Students for the Ph.D. program. At that meeting plaintiff was informed that it was against university policy to carry such a weapon on campus and he turned the weapon over to Dr. Harris.

¶ 4 Days later plaintiff was notified in writing by Dr. Harris and Bernstein that Grace Chan, Assistant Dean of Students for the university, had determined that the weapon was prohibited from being carried on campus because they university considered it to be a dangerous weapon.

In response, plaintiff emailed Chan protesting her determination and included Illinois case law and statutes regarding dangerous weapons.

¶ 5 In the weeks that followed, plaintiff emailed Margo Marshak, the Vice-President and Dean of Students of the University, Assistant Dean Chan, and two Associate General Counsels of the University requesting an explanation of what type of knife he would be permitted to carry with him to class.

¶ 6 On December 21, 2001, Assistant Dean Chan replied to plaintiff's email, informing him that the university considered the matter closed and that he should not contact her or any other university officials regarding this matter. On December 31, 2001, plaintiff emailed the president of the University, stating,

"I am in receipt of Grace Chan's correspondences regarding the [u]niversity's decision on knife possession \*\*\* [a]lthough I am not challenged myself, I am ashamed that the institution I am so proud to be affiliated with opposes devices for the physically challenged. I hope you have the decency and sensitivity to share my sentiment and take action. I have notified Senator Bob Dole's office that the [u]niversity discriminates against the only legal pocketknife for opening by individuals with one hand, while permitting Swiss Army knives, which are designed for two hands."

¶ 7 On January 6, 2002, plaintiff sent the same letter to Vice-President Marshak, who

responded advising plaintiff that the university was a private institution and was permitted to have more restrictive policies regarding weapons permitted on campus.

¶ 8 On January 15, 2002, Dr. Harris and Dean Bernstein sent plaintiff a letter reminding him that he was instructed on December 21, 2001, to cease contacting university officials regarding this matter and that if he continued "it will be considered harassment and a violation of the Standards of Scholarship and Professionalism \*\*\* resulting in disciplinary action[.]"

¶ 9 Plaintiff responded that he would continue to contact Vice-President Marshak and attached a letter to his email explaining that he was seeking to "understand the discrimination policy for pocketknives [*sic*]." Thereafter, plaintiff continued to email Dr. Harris, Dean Bernstein through February when he was informed by Dr. Harris and Dean Bernstein to cease all correspondence on the issue because the university determined that matter was closed.

¶ 10 In April 2002, plaintiff then emailed the president of the university again. This time plaintiff referred to the graduate school of business officials as "meddling" and attached photos of various knives. The president's office, in turn informed plaintiff that he should not contact them again and that the matter was being forwarded to the university's legal department. The legal department informed plaintiff that the matter was being forwarded back to the graduate school of business and that they would no longer acknowledge receipt of, nor respond to, plaintiff's inquiries.

¶ 11 Plaintiff was formally notified that he was being charged with harassment of university officials in a letter dated April 9, 2002. On July 2, 2002, following a hearing, plaintiff was suspended from summer and fall quarters for harassment of university officials. Plaintiff's appeal of the decision was denied on August 19, 2002.

¶ 12 In December 2002, plaintiff filed a verified complaint and, following his third amended complaint in May 2006, proceeded alleging, *inter alia*, that the university breached express and implied contracts with plaintiff by suspending him for pursuing his rights under the university student manual and the graduate school of business student handbook.

¶ 13 During discovery defendants withheld 52 email messages and attachments from production, claiming that they were subject of attorney-client privilege. The trial court granted defendants' motion for summary judgment on six of the nine counts and plaintiff proceeded on his claims of breach of express contract for failing to follow the universities policies. Plaintiff then objected to defendants' privilege log and asked the trial court for an *in camera* review to determine whether attorney-client privilege applied.

¶ 14 The trial court initially ruled that six of the documents in question were completely privileged and five more were partially privileged and subject to production following redaction. Defendants filed objections to the court's ruling, and the court ordered defendants to produce an amended privilege log, which included the names and positions within the university of those who sent and received the emails claimed to be privileged.

¶ 15 Following a second *in camera* review with the additional information provided by defendants, the trial court ruled that an additional 29 documents were not discoverable based on attorney-client privilege. The trial court stated that its decision to modify its findings was based on the reasoning set forth in *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill., 2007). The court ordered defendants to produce the remaining documents.

¶ 16 Plaintiff proceeded to a jury trial on the remaining counts. Plaintiff's proposed jury instruction regarding his breach of express contract claim was as follows:

"As stated in Instruction 1, the first element of a contract claim Plaintiff Antonio Vernon must prove is that he substantially performed all obligations required of him under the contract. To recover on his claim, Plaintiff Antonio Vernon must prove that he substantially complied with the terms and conditions set forth in the University Student Manual, the GSB Handbook, and the GSB Disciplinary Procedures."

¶ 17 Plaintiff's proposed instruction was a modified version of the Illinois Pattern Jury Instruction number 700.07. The pattern instruction, however, does not include the word "substantially" in reference to plaintiff's compliance.

¶ 18 Plaintiff also proposed modifying Illinois Pattern Jury Instruction number 700.10, by adding the word substantially to the text as follows:

" \*\*\* In determining whether the University's actions were proper, you must consider whether the University *substantially* complied with the disciplinary procedures set forth in the 2001-2002 University of Chicago Student Manual of University Policies\*\*\*

If you find that the University *substantially* complied with its disciplinary procedures, then your verdict must be for the University.

If you find that the University acted arbitrarily,

capriciously, and in bad faith in violation of its rules  
and regulations, then your verdict must be for Plaintiff  
Antonio Vernon."

¶ 19 The trial court rejected plaintiff's modified instruction regarding his substantial compliance, but accepted plaintiff's modified instruction regarding defendant's substantial compliance.

¶ 20 On September 29, 2008, the jury returned verdicts in favor of defendants on all counts. Thereafter, the trial court entered judgment on that verdict on October 3, 2008. On November 3, 2008, plaintiff filed a motion for a new trial and it was set for hearing on November 13, 2008. Plaintiff's attorney failed to appear on the date of the hearing and the trial court ordered the motion stricken due to counsel's failure to appear.

¶ 21 On November 14, 2008, plaintiff filed a "Re-Notice of Motion and of Filing" requesting that the motion for a new trial be heard on November 24, 2008. Defendants responded contending that the court lacked jurisdiction because there was no longer a timely filed motion before the court. The trial court, in ruling on the merits of plaintiff's motion, considered the motion labeled 'Re-Noticed' as a motion to vacate the November 13, 2008, order striking plaintiff's motion for a new trial. The trial court stated that it was granting plaintiff's motion to vacate the order and, on December 14, 2009, denied plaintiff's motion for a new trial on its merits. Plaintiff filed his notice of appeal on January 8, 2010.

¶ 22 On appeal, plaintiff contends that the trial court erred in ruling that certain emails were privileged and erred in rejecting plaintiff's modified instruction. Defendant responds that this court lacks jurisdiction because plaintiff's appeal was filed more than 30 days following the

disposition of plaintiff's post-trial motion. We begin our analysis with the threshold issue of jurisdiction.

### *Jurisdiction*

¶ 23 We initially acknowledge that this court has an independent duty to consider jurisdiction. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). Illinois Supreme Court Rules 301 (eff. February 1, 1994) and 303(a)(1) (eff. June 4, 2008) make the timely filing of a notice of appeal jurisdictional and mandatory, (*Secura Insurance Co.* 232 Ill. 2d at 213), and Rule 303(a)(1) provides an appellant 30 days from the date of the last pending post-judgment motion to file an appeal.

¶ 24 Defendant contends that the trial court lost its jurisdiction, such that its decision to vacate the prior order striking the motion for a new trial is invalid, and plaintiff's subsequent appeal is untimely because it was more than 30 days from the date the circuit court struck plaintiff's motion. We disagree.

¶ 25 The decision to grant or deny a motion for a new trial rests in the sound discretion of the trial court. *Belluomini v. Lancome*, 207 Ill. App. 3d 583, 585-86 (1990). Where the trial court strikes a motion for a new trial, but the record is clear that it did not deny that motion, it may remain pending, subject to the trial court's discretion. *Belluomini*, 207 Ill. App. at 585-86. Such is the case here, where the trial court made it clear that it intended to strike the motion from the court call and would review the motion on its merits upon plaintiff's re-noticed motion. Thus, the last pending post-judgment motion was disposed of on December 14, 2009. *Belluomini*, 207 Ill. App. 3d at 586. Plaintiff's notice of appeal was filed on January 8, 2010, within 30 days of the denial of his motion for a new trial, such that it was timely filed and this court properly has

jurisdiction. *In re Application of the County Treasurer*, 214 Ill. 2d 253, 261-62 (2005).

*Privileged Communications*

¶ 26 We now turn to plaintiff's contention regarding the trial court's error in finding certain communications privileged. On appeal, plaintiff contends that the trial court misapplied the reasoning in *Muro*, which held that email strands forwarded to counsel can be withheld as privileged, where the included prior emails are otherwise included in discovery. *Id.* Plaintiff claims that *Muro* is distinguishable because in this case, unlike *Muro*, the included emails were never disclosed to plaintiff.

¶ 27 Usually, we review a court's discovery decision for an abuse of discretion, however, decisions regarding whether a privilege applies is reviewed *de novo*. *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 463 (2010). On appeal, the appellant bears the burden of presenting a sufficiently complete record "to review in order to determine whether there was the error claimed by the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Where, as here, the claim of error involves matters claimed to be privileged, reviewing courts are authorized to receive the contested information from the trial court under seal and preserve the *in camera* record pending substantive review. *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 1002 (2004).

¶ 28 Here, plaintiff has failed to provide the *in camera* record for our review. Accordingly, we have no basis to determine whether the error he claims occurred. *Foutch*, 99 Ill. 2d at 391. We must therefore presume that the order entered is in conformity with the law and has sufficient factual basis, because any doubts which arise from an incomplete record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. Thus, we find no error in the trial court's ruling that the emails at issue were privileged.

*Modified Jury Instruction*

¶ 29 We now turn to plaintiff's contention that the trial court erred in refusing to accept plaintiff's proposed jury instruction. Plaintiff contends that the trial court erred because its refusal to use plaintiff's modified jury instruction gave the jury a false impression of the standard of performance required of plaintiff. Defendant responds that the instructions as a whole accurately stated that law, such that no error occurred.

¶ 30 Pursuant to Illinois Supreme Court Rule 239(a), pattern instructions are to be used, unless the trial court determines that the applicable instruction does not accurately state the law. Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999). Generally, we review a trial court's decision to grant or deny a jury instruction for an abuse of discretion, unless the issue raised is whether the applicable law was accurately conveyed through the instruction, which we review *de novo*. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶13. Here, plaintiff's essential contention is that the trial court did not accurately convey the law because it misstates his burden for compliance, thus we review the trial court's decision *de novo*.

¶ 31 Illinois courts have recognized a cause of action for breach of contract between a student and private university. *Raethz v. Aurora University*, 346 Ill. App. 3d 728, 732 (2004). That cause of action is unique due to the unique relationship of the parties and "cannot be strictly categorized or characterized in purely contractual terms." *Id.* Thus, a student may recover under a breach of contract theory, "only if that decision was made arbitrarily, capriciously, or in bad faith." *Id.* The court, in *Raethz*, explained that the articulated standard means that a private university's decision should not be disturbed "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not

actually exercise professional judgment." *Raethz*, 346 Ill. App. 3d at 732, quoting *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

¶ 32 Here, we find that the instructions regarding plaintiff's burden do not accurately state the applicable law. As recognized in *Raethz*, Illinois law does not treat student-university breach of contract claims the same as traditional breach of contract claims, for which an inquiry into plaintiff's compliance is required. Thus, it was error for the trial court to include the instruction, regarding plaintiff's compliance in the jury instructions. Ill. S. Ct. R. 239(a). This does not end our inquiry, however, where reversal is only warranted if the error resulted in "serious prejudice" to plaintiff's right to a fair trial. *Studt*, 2011 IL 108182, ¶28. We hold that no serious prejudice occurred.

¶ 33 The record shows the trial court did include the accurate legal standard in the modified instruction for defendants' compliance which stated, "[i]f you find that the University *substantially* complied with its disciplinary procedures, then your verdict must be for the University. If you find that the University acted arbitrarily, capriciously, and in bad faith in violation of its rules and regulations, then your verdict must be for Plaintiff Antonio Vernon." Thus, the jurors were given the correct instruction regarding the applicable law for defendants' compliance in plaintiff's breach of contract claim. *Raethz*, 346 Ill. App. 3d at 732. Under these circumstances, we hold that no serious prejudice occurred, such that reversal of the judgment of the trial court is not warranted. *Studt*, 2011 IL 108182, ¶31.

¶ 34 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.