

700.16 (2005) as the exclusive instruction on damages where the defendants failed to tender said instruction to the court, as said instruction was not even in existence at the time of the trial. The circuit court did not abuse its discretion in the amount of attorney fees it awarded the plaintiffs where the fee petition contained the requisite information and the record shows the circuit court gave due consideration to the time itemization tendered by the plaintiffs and made a determination of what hours were reasonably spent working on the plaintiffs' claims against these defendants, even if some of those hours also served to make a case against codefendants as well.

¶ 2 The defendant, Laura J. Williams, individually and as the administrator of the estate of Thomas Eugene Williams, Jr., deceased (the Williamses), appeals the March 24, 2004, order of the circuit court of Madison County which entered a judgment against her after a jury verdict in the amount of \$35,500 on the breach of contract claim filed by the plaintiffs, Michael Pickett and Juanita Redfern. In addition, the Williamses appeal the July 6, 2004, order of the circuit court of Madison County which ordered them to pay the plaintiffs' attorney fees in the amount of \$70,000 and costs in the amount of \$8,631.29. On appeal, the Williamses argue that the jury was improperly instructed on how to calculate the amount of damages, that the verdict form failed to provide for an apportionment of the compensatory damages between the Williamses and their codefendants, and that the amount of attorney fees the circuit court awarded was excessive. For the following reasons, we affirm.

¶ 3 **FACTS**

¶ 4 On October 2, 2003, the plaintiffs filed a second amended complaint in the circuit court of Madison County. The complaint alleged that the plaintiffs entered into a contract with the Williamses to sell their property located at 130 Emerald Way East in Granite City. According to the complaint, the Williamses breached the contract by failing to tender the purchase price.¹ The complaint also alleged that Diana Naney, a real estate agent in the

¹Laura J. Williams and Thomas Eugene Williams, Jr., were both originally named as defendants. Thomas Williams died on March 31, 2004, and Laura Williams was substituted as the administrator of his estate.

employ of Royce Realty, induced the Williamses to purchase a different house so as to obtain a 6% commission on the sale. Counts I and II of the complaint alleged a cause of action for a breach of contract against the Williamses. The remaining counts alleged causes of action against Diana Naney and Royce Realty for intentional interference with a contractual relationship, and requested punitive damages.

¶ 5 A jury trial was commenced on December 8, 2003, but ended in a mistrial. A second jury trial commenced on March 15, 2004. Evidence adduced at trial made clear that the plaintiffs were not claiming a loss of profit as a result of the Williamses' failure to purchase their property. The plaintiffs conceded that the contract price was less than the fair market value of the property. At the time of trial, the plaintiffs had not yet found another buyer for the property and one of the plaintiffs was residing there. The plaintiffs introduced evidence of the mortgage interest, taxes, insurance, maintenance, and utilities that they had to pay since the time of the Williamses' breach of the contract to purchase real estate, and the plaintiffs' counsel requested in closing argument that the jury award this amount as damages.

¶ 6 At the jury instruction conference, the plaintiffs tendered Illinois Pattern Jury Instructions, Civil, No. 700.13 (2000) (hereinafter IPI Civil (2000) No. 700.13), the general instruction on contract damages, which, as tailored to fit the facts of the case, stated as follows:

"If you decide for the plaintiffs on their claim for breach of contract, you must fix the amount of money which would reasonably compensate the plaintiffs for all loss naturally arising from the breach. In addition, if special circumstances existed which caused unusual loss to the plaintiffs and those special circumstances were within the reasonable contemplation of the parties at the time the contract was entered into, the plaintiffs may recover for such unusual loss. In calculating the plaintiffs' damages, you should determine that sum of money that will put the plaintiffs in as good a

position as they would have been in if both plaintiff and defendant had performed all their promises under the contract.

The elements of damage claimed by the plaintiffs in this case are:

1. The difference between the interest payable on the loan, the real estate taxes payable, and the homeowners insurance, maintenance, and utilities on 130 Emerald Way after July 12, 2002, minus the fair rental value of the property. Whether the evidence has proved any of these elements of damage is for you to determine."

¶ 7 The Williamses, along with Diana Naney and Royce Realty (the real estate agent defendants), objected to this instruction, contending that it stated an improper measure of damages. According to the Williamses at the time of the conference, the only proper measure of damages for a breach of a real estate contract is the difference between the contract price and the fair market value of the property at the time of the breach. Either the Williamses or the real estate agent defendants tendered an alternative jury instruction to this effect, which the circuit court refused. The plaintiffs' tendered IPI Civil (2000) No. 700.13 was given to the jury over the Williamses' objection.

¶ 8 Also during the jury instruction conference, the plaintiffs tendered the following proposed verdict form A:

"1. As to Counts I and II, We, the Jury, find for Juanita Redfern and Michael Pickett and against Thomas and Laura Williams. We assess Juanita Redfern and Michael Pickett's damages in the sum of:

_____	Interest
_____	Taxes
_____	Insurance
_____	Maintenance
_____	Utilities

Subtotal

2. As to Counts III and V, does, [sic] the Jury, find for Plaintiffs Juanita Redfern and Michael Pickett, and against Defendant Diana Naney and Royce Realty Inc., d/b/a Century 21 Royce Realty?

_____ Yes or _____ No

If the Jury finds marks [sic] 'Yes' to #2 above, move to #3 below. If the Jury marks 'No' to #2 above, move to #6 below.

3. As to Counts IV and VI, does, [sic] the Jury, find that justice and the public good require an award of punitive damages against Diana Naney and Century 21 Royce Realty?

_____ Yes or _____ No

If the Jury marks 'Yes' to #3 above, move to #4 below. If the Jury marks 'No' to #3 above, move to #6 below [sic]

4. As to Count IV, We, the Jury, find for Juanita Redfern and Michael Pickett, and Against [sic] Diana Naney, in addition to actual damages listed above, and award punitive damages in the sum of:

\$ _____.

5. As to Count VI, We, the Jury, find for Juanita Redfern and Michael Pickett, and Against [sic] Royce Realty Inc., d/b/a Century 21 Royce Realty, in addition to actual damages listed above, and award punitive damages in the sum of:

\$ _____.

6. We the jury, after totaling the above listed damages, award total damages to Plaintiffs Juanita Redfern and Michael Pickett in the amount of

\$ _____."

¶ 9 The Williamses, along with the real estate agent defendants, objected to the plaintiffs'

proposed verdict form A, on the basis that it did not reflect the correct measure of damages, that the damages should not be itemized, and that there was no place to reduce the damages by fair rental value. However, it does not appear from the record that either the Williamses or the real estate agent defendants tendered an alternative verdict form A to the circuit court for consideration. The circuit court accepted the plaintiffs' proposed verdict form A, and it was given to the jury for use in rendering a verdict.

¶ 10 Following the trial, the jury rendered a verdict in favor of the plaintiffs. In paragraph one of verdict form A, the jury entered itemized damages as follows: \$27,000 for "Interest," \$6,000 for "Taxes," \$2,500 for "Insurance," \$0 for "Maintenance," and \$0 for "Utilities," for a "Subtotal" of \$35,500. In paragraph two of verdict form A, the jury checked "Yes," signifying a finding of liability on the part of the real estate agent defendants, for tortious interference with the contract. In paragraph three, the jury checked "Yes," signifying a finding that justice and the public good require an award of punitive damages against the real estate agent defendants. In paragraph four, the jury assessed \$60,000 in punitive damages against Diana Naney, and in paragraph five, the jury assessed \$120,000 in punitive damages against Royce Realty. In paragraph six, the jury entered the total amount of assessed damages as \$215,500. On March 24, 2004, the circuit court entered judgment on the jury's verdict.

¶ 11 On March 31, 2004, the plaintiffs filed a petition for attorney fees and costs against the Williamses pursuant to the contract to purchase real estate, requesting a total of \$180,372.24. The plaintiffs attached records showing itemized billing entries totaling 554.58 hours in attorney time and 33.33 hours of paralegal time. According to the plaintiffs' petition, attorney time was billed at \$300 per hour. It was also clear from the time entries that the plaintiffs' attorneys' work in prosecuting the claims against the real estate agent defendants was included in the petition for attorney fees and costs.

¶ 12 At a subsequent hearing on the plaintiffs' petition for attorney fees and costs, the Williamses called attorney Donald Metzger as an expert witness. Mr. Metzger testified that it was his opinion that the number of hours the plaintiffs' attorneys spent on the case was unreasonable, that it was unnecessary for two attorneys to appear at trial, and that \$300 per hour was an unreasonable fee considering the plaintiffs' attorneys' experience. Tom Maag testified on behalf of the plaintiffs to lay a foundation for the plaintiffs' petition for fees and costs and accompanying exhibits. Mr. Maag testified that \$300 per hour was a reasonable fee. However, on cross-examination, Mr. Maag admitted that the time entries included work he performed in prosecuting the claims against the real estate agent defendants and that \$250 per hour is a fee that he had been paid in the past. The plaintiffs also produced the affidavit of Juanita Redfern in support of their petition for fees and costs, wherein Redfern attested that the amount of time the attorneys had spent on her case was reasonable.

¶ 13 Before the completion of the hearing on the plaintiffs' petition for fees and costs against the Williamses, the parties stipulated that the plaintiffs' attorneys spent 100 hours working solely on the case against the Williamses, 154 hours working solely on the case against the real estate agent defendants, and 300 hours of work on the case where there could be no differentiation between defendants. On July 6, 2004, the circuit court entered an order finding \$200 per hour to be a reasonable rate and 350 hours to be a reasonable time to spend on the case against the Williamses. Accordingly, the Williamses were ordered to pay \$70,000 in attorney fees and \$8,631 in costs to the plaintiffs.

¶ 14 While the proceedings to determine attorney fees and costs were pending, the Williamses filed a posttrial motion for a judgment notwithstanding the verdict and an alternative motion for a new trial. On August 20, 2004, the circuit court entered an order denying the posttrial motions. All of the defendants filed timely notices of appeal. While the appeal was pending, the Williamses filed a suggestion of bankruptcy. Accordingly, the

Williamses appeal was stayed, and the appeal brought by the real estate agent defendants was severed and proceeded to disposition.

¶ 15 On April 3, 2006, this court entered an order reversing the judgment against the real estate agent defendants and remanding for a new trial. *Pickett v. Williams*, No. 5-05-0137 (2006) (unpublished order under Supreme Court Rule 23). We found that the punitive damage awards against the real estate defendants could not stand because verdict form A did not provide a place for the jury to assess compensatory damages against the real estate agent defendants. In *dicta*, this court noted the following "for the retrial of this matter":

"[T]he elements of compensatory damages should be reconsidered. Under verdict form A used at the trial, the sellers were allowed to seek damages for interest, taxes, insurance, maintenance, and utilities. However, the latest pattern jury instruction on the issue of damages after a breach of contract provides that if the contract contains a provision which sets forth damages for breach of contract, as the contract does in this case, no other instruction regarding the measure of damages may be given to the jury. Illinois Pattern Jury Instructions, Civil, No. 700.16 (2005)." *Pickett*, No. 5-05-0137, order at 7.

¶ 16 Following remand, the circuit court entered an order dismissing the case against the real estate agent defendants pursuant to a stipulated dismissal for settlement. Accordingly, the case against the real estate agent defendants was never retried. On October 18, 2011, this court entered an order lifting the stay of the Williamses appeal of the judgment against them, which is the subject of this disposition.

¶ 17

ANALYSIS

¶ 18 On appeal, the Williamses first argue that the circuit court erred in denying their motion for a new trial because the jury was improperly instructed as to the proper measure of damages and the verdict form did not provide a means for the jury to apportion the

compensatory damages between the Williamses and the real estate agent defendants. The determination of whether jury instructions are proper is within the sound discretion of the circuit court, and we will not disturb the circuit court's determination absent an abuse of discretion. *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1025-26 (2005). A new trial will be granted based on improper jury instructions only when the refusal amounts to a serious prejudice to a party's right to a fair trial. *Id.* at 1026.

¶ 19 Here, the Williamses argue that because the verdict form failed to provide a place where the jury could apportion the compensatory damages between the Williamses and the real estate agent defendants, they should be afforded a new trial. However, the Williamses never objected to the verdict form on this basis, and never tendered an alternative verdict form that provided for apportionment of compensatory damages. In addition, the Williamses did not raise the issue of apportionment in their posttrial motion. Failure to raise an objection at trial or in posttrial proceedings constitutes a waiver of right to raise the issue on appeal. *Rub v. Consolidated R. Corp.*, 331 Ill. App. 3d 692 (2002); see also Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994). Accordingly, we will not grant the Williamses a new trial on the basis that the verdict form did not provide a means for the jury to apportion the compensatory damages.

¶ 20 The Williamses contend that because this court, in its previous order disposing of the real estate agent defendants' appeal, found the verdict form to be improper for failure to allow for apportionment of fault, collateral estoppel requires this court to reverse the judgment against them on this basis as well. However, in order for collateral estoppel to apply, the issue decided in the prior proceeding must be identical to the issue to be decided in the current proceeding. *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001). Our review of our previous order reveals that while we noted that the verdict form could have provided for apportionment of fault between the defendants, we

did not reverse the judgment against the real estate agent defendants on this basis. Rather, we reversed the judgment against the real estate agent defendants on the basis that there were no compensatory damages assessed against them, making punitive damages improper. We are not bound by the doctrine of collateral estoppel to address the issue of apportionment of fault, which was waived by the Williamses.

¶ 21 In addition to the failure of the verdict form to provide for an apportionment of fault, the Williamses argue that they are entitled to a new trial because the jury was incorrectly instructed on the proper measure of compensatory damages. At the jury instruction conference and in their posttrial motion, the Williamses argued that the only measure of damages for a breach of contract to purchase real estate is the contract price minus the market price. We find this to be an incorrect statement of the law. As noted in our current Illinois Pattern Jury Instructions, Civil, No. 700.15 (2011) (hereinafter IPI Civil (2011) No. 700.15), the plaintiffs are entitled to direct damages for a breach of a contract to purchase real estate, which would be calculated, as the Williamses contend, by deducting the market price of the property from the contract price. Here, the plaintiffs did not contend that they were directly damaged by the Williamses' breach of the contract to purchase real estate. Rather, they admitted that the contract price of the property was less than the market price. However, under Illinois law, the plaintiffs are also entitled to special damages, which are reasonably foreseeable expenses incurred as a result of the breach. IPI Civil (2011) No. 700.15. Although IPI Civil (2011) No. 700.15, which specifically governs damages for a buyer's breach of a contract to purchase real estate, was not specifically available at the time of the trial, we find that it is comparable to the general Illinois Pattern Jury Instruction on breach of contract damages that was used at the time of trial, which also provided for special damages that were reasonably contemplated by the parties and provided for a listing of the damages claimed. IPI Civil (2000) No. 700.13. We do not find an abuse of discretion in the

circuit court's determination that a jury could find taxes, insurance, and interest on the plaintiffs' mortgage to be expenses that were reasonably contemplated by the parties in the event of a breach. Accordingly, the circuit court did not abuse its discretion in giving IPI Civil (2000) No. 700.13 and including an itemized list of the special damages claimed by the plaintiffs which had some basis in the evidence.

¶ 22 The Williamses also take issue with the fact that the jury was not instructed to deduct from the damages award the value of the plaintiffs' beneficial use of the property since the breach. However, we find that the jury was so instructed. As part of IPI Civil (2000) No. 700.13, the general instruction on contract damages used at the time of trial, the jury was instructed that, should it find the Williamses breached the contract, damages would consist of "the difference between the interest payable on the loan, the real estate taxes payable, and the homeowners insurance, maintenance, and utilities on 130 Emerald Way after July 12, 2002, minus the fair rental value of the property." We also note that it appears from the record that the Williamses introduced no evidence regarding fair rental value. In any event, we cannot find that the verdict form's deficiency in this regard seriously prejudiced the Williamses right to a fair trial when the jury was instructed to take the fair rental value into consideration in awarding the damages.

¶ 23 As an alternative to the arguments the Williamses made in objection to the instructions on damages at the jury instruction conference and in their posttrial motion, on appeal, the Williamses argue that the circuit court erred in not giving, to the exclusion of all other damages instructions, Illinois Pattern Jury Instructions, Civil, No. 700.16 (2005) (hereinafter IPI Civil (2005) No. 700.16), which provides that:

"In their contract, the parties agreed to the following:

[state here the contract terms regulating damages]

This agreement is binding, and in the course of applying these instructions, you

must abide by this agreement in determining the amount of damages, if any, in this case.

You will address these issues in question _____ on your verdict."

¶ 24 The "Notes on Use" section of IPI Civil (2005) No. 700.16 state that "this instruction should be given where the contract at issue contains a provision[-]setting forth damages for breach of the contract. When this instruction is given, no other instruction on damages can be given." The Williamses direct this court's attention to our disposition of the real estate agent defendants' appeal, wherein, in *dicta*, we noted that this instruction should be taken into consideration *upon retrial*. *Pickett v. Williams*, No. 5-05-0137 (2006) (unpublished order under Supreme Court Rule 23). However, the instruction was not in existence at the time of the first trial, and needless to say, the Williamses did not tender such an instruction to the circuit court. Accordingly, the Williamses have waived the issue on appeal. Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994).

¶ 25 Having found no reversible error in the damages instructions, we will now review the order granting attorney fees to the plaintiffs. The Williamses contend that the amount of fees the circuit court ordered was excessive. In cases where a provision in a contract allows for an award of attorney fees, only those fees which are reasonable will be allowed. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987). The determination of which fees are reasonable is left to the sound discretion of the circuit court, and the decision of the circuit court will not be reversed absent an abuse of discretion. *Id.* at 983-84. The party seeking fees bears the burden to present sufficient evidence from which the circuit court can decide their reasonableness, and so the petition for fees must specify the following: (1) the services performed, (2) by whom they were performed, (3) the time expended thereon, and (4) the hourly rate charged therefor. *Id.* at 984. In conjunction with these facts, the circuit court should consider a variety of additional factors in making its award, including

(1) the skill and standing of the attorneys, (2) the nature of the case, (3) the novelty and/or difficulty of the issues and work involved, (4) the importance of the matter, (5) the degree of responsibility required, (6) the usual and customary charges for comparable services, (7) the benefit to the client, and (8) whether there is a reasonable connection between the fees and the amount involved in the litigation. *Id.* With these principles in mind, we consider the reasons set forth by the Williamses that the fee award is excessive.

¶ 26 First, the Williamses contend that the fee petition was deficient because it failed to state which of the plaintiffs' two attorneys, Thomas Maag or Charles Armbruster, performed the work set forth in the fee petition. However, in its order granting the fees, the circuit court found that both attorneys performed the work set forth in the petition, and both attorneys had the same reasonable hourly rate of \$200 per hour. Accordingly, we find that the fact that the itemized list of time entries does not specify which attorney performed which work is insignificant in determining whether the fees were excessive.

¶ 27 Next, the Williamses point out that the fee petition failed to distinguish which entries were attributable to the case against them as opposed to the case against the real estate agent defendants. At the fee hearing, the parties stipulated that 100 hours were attributable solely to the case against the Williamses, 154 hours were attributable solely to the case against the real estate agent defendants, and 300 hours could not be distinguished. In its order awarding fees, the circuit court determined that 350 hours of the time the attorneys worked on this case could reasonably be attributed to the case against the Williamses. In so doing, it appears that the circuit court determined that of the 300 hours that could not be distinguished, 250 hours of that time was reasonable and necessary to prosecuting the claim against the Williamses, irrespective of whether it also served to make the case against the real estate agent defendants. We see how this may be the case with regard to much of the work performed by the attorneys with regard to discovery and other preparation. It appears from the circuit

court's order that it considered all of the relevant factors in making its fee award, and we find no abuse of discretion.

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, the March 24, 2004, order of the circuit court of Madison County which entered a judgment against the Williamses in the amount of \$35,500 on the breach of contract claim filed by the plaintiffs is affirmed. In addition, the July 6, 2004, order of the circuit court of Madison County which ordered the Williamses to pay the plaintiffs' attorney fees in the amount of \$70,000, and costs in the amount of \$8,631.29, is affirmed.

¶ 30 Affirmed.