2015 IL App (2d) 140813-U
Nos. 2-14-0813 & 2-14-0814 cons.
Order filed June 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THOMAS HARMER,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff and Counterdefendant-Appellant and Cross-Appellee,	)	
	)	
v.	)	Nos. 10-CH-3696
	)	11-L-313
	)	13-L-346
	)	
MICHAEL POLANSKY,	)	
	)	Honorable
Defendant and Counterplaintiff-Appellee and Cross-Appellant.	)	John T. Elsner,
	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Regarding Harmer's direct appeal, (1) Harmer was not entitled to a new trial on Polansky's claim of fraudulent horse training charges. (2) Similarly, the jury's determination that Harmer breached his fiduciary duty was not against the manifest weight of the evidence. However, the jury's $400,000 damage award on this claim was against the manifest weight of the evidence because it bore no reasonable relationship to the loss Polansky suffered. Therefore, we reversed the trial court's ruling denying Harmer's motion for a new trial on this issue, we vacated the award, and we remanded for a new trial limited to the issue of damages for breach of fiduciary duty. (3) The jury's determination that Harmer breached the parties' contribution agreement was not against the manifest weight of the evidence. Still, its award of $68,000 for the difference the parties

contributed under the agreement was against the manifest weight of the evidence, and we reduced this award to $44,000. We affirmed the portion of the jury's verdict awarding $32,000 for the difference in distributions to the parties after the contribution agreement was signed.

Regarding Polansky's cross-appeal, (4) the trial court did not err in denying his motion to dismiss Harmer's 2013 complaint. (5) Polansky was not entitled to judgment notwithstanding the verdict or a new trial on his claims of intentional representation and (6) fraud, or for (7) Harmer's claim for unpaid horse training services. (8) Finally, Polansky's request for a setoff could be revisited on remand, as the trial court apparently did not realize that it had the discretion to order a setoff of the awards.

Therefore, we affirmed in part, reversed in part, vacated in part, modified in part, and remanded.

¶ 2 Plaintiff and counterdefendant, Thomas Harmer, was hired by defendant and counterplaintiff, Michael Polansky, to train many of Polansky's race horses. The parties also became co-owners of a business that sold harness racing bikes for standardbred horses. After Polansky brought suit against Harmer for claims largely relating to the business, Harmer sued Polansky for money he allegedly owed for horse training services. The cases were later consolidated. Following a jury trial, each party received some verdicts in his favor, though damages to Harmer totaled $79,000 and awards to Polansky totaled $765,000. On appeal, both men challenge the verdicts against them. We affirm in part, reverse in part, vacate in part, modify in part, and remand.

¶ 3 I. BACKGROUND

¶ 4 A. Pleadings

¶ 5 Harmer filed a complaint against Polansky on March 22, 2011. He filed an amended complaint on April 14, 2011, alleging as follows. Harmer was a professional horse trainer residing in Illinois, while Polansky lived in New York. In about June 2003, they entered into an oral contract whereby Harmer agreed to train horses owned in whole or part by Polansky, in

exchange for Harmer's usual and customary fees. Pursuant to this agreement, from June 2003 to the present, Harmer trained Polansky's horses at places such as Maywood Park Racetrack in Illinois and Pompano Park Racetrack in Florida. Harmer sent Polansky an invoice at the beginning of each month for the previous month's services. Polansky regularly paid these invoices from 2003 through December 2009 by sending a check or having Harmer's account credited with race winnings or proceeds from horse sales. However, Polansky failed and/or refused to pay the invoices for January 2010 through the time of filing, and he owed over $100,000. Harmer alleged breach of contract and several alternative legal theories.

¶ 6 On June 27, 2011, Polansky was given leave to file a counterclaim alleging as follows.[1] In about June 2003, Polansky agreed to hire Harmer to train horses in which Polansky had an ownership interest. From that time to about January 2010, the horses were stabled in Harmer's facilities in Illinois and Florida, and Harmer assumed responsibility for all aspects of their training and care. In January 2004, Harmer approached Polansky about investing in Evolution Racing, LLC, a company that sold harness horseracing bikes, called sulkies, along with related equipment and services. Polansky agreed and paid Harmer an additional $200,000 to purchase ownership interests in horses formerly owned by Carl Calfin; Harmer and/or Ciara Stable (a company owned by Harmer) had the co-ownership interest in these horses. All purse earnings (race winnings) from co-owned horses were paid directly to Harmer by the racetrack. For all horses that Harmer trained for Polansky, including those Harmer co-owned, Harmer received a percentage of the winnings as the trainer.

[1] Polansky was given leave to file an amended verified counterclaim on March 22, 2012. The substance of the counterclaim remained the same.

¶ 7 Polansky further alleged as follows. Harmer charged Polansky a daily fee for his training services. He also charged Polansky for various a la carte goods and/or services, such as blacksmith charges, tack, veterinary charges, vitamins, workmen's compensation, liability insurance, equipment rental, "stake payments & entry fees, 'groom's holiday bonus,' 'miscellaneous expenses,' " and trainer fines. For the co-owned horses, Polansky paid a percentage of total training charges commensurate with his ownership interest. In December 2009, Polansky discovered that Harmer had been consistently billing for services and goods that were not actually performed or were otherwise overstated. Until December 2009, Harmer paid Polansky's training bills out of Polansky's distributions from Evolution Racing and race earnings, and occasionally Polansky made direct payments. Harmer's accounting method was a ploy to prevent Polansky from discovering the false and overstated charges associated with the horse training.

¶ 8 In his counterclaim, Polansky alleged fraud in the training services, fraud in horse sales, unfair and deceptive trade practices, breach of fiduciary duty for undisclosed commissions in the purchase and sale of horses, unjust enrichment regarding charges for worker's compensation and liability insurance, and conversion for not paying Polansky his share of purse winnings for horses that he co-owned.

¶ 9 Polansky had previously brought an action against Harmer for an accounting and other relief in connection with Evolution Racing on June 29, 2010.[2] On November 15, 2011, Polansky

[2] Harmer filed a motion to dismiss that case. On March 17, 2011, the trial court dismissed counts IV and V with prejudice; dismissed count I without prejudice, and denied the motion as to count II. Polansky subsequently filed an amended complaint and a second amended complaint. We summarize the second amended complaint later in ¶ 11.

filed a motion to consolidate that case with Harmer's case against him. The trial court granted the motion to consolidate on December 12, 2011.

¶ 10 Meanwhile, Polansky filed several motions to compel Harmer to comply with outstanding discovery, and the trial court granted some of them. On April 12, 2012, the trial court dismissed Harmer's complaint against Polansky without prejudice as a discovery sanction. It denied Harmer's motion to vacate the sanction order on August 29, 2012.

¶ 11 Polansky filed a second amended complaint against Harmer and Evolution Racing on May 2, 2013. Polansky alleged as follows, in relevant part. On January 9, 2004, Polansky and Harmer entered into an agreement whereby Polansky paid Harmer $500,000 for a one-half undivided membership interest in Evolution Racing, which previously belonged to Calfin. He additionally paid $200,000 to purchase ownership interests in horses formerly owned by Calfin. Harmer intentionally misrepresented that Polansky was paying the fair and actual market value for these interests. At the same time Harmer was negotiating with Polansky, he was negotiating the purchase of Calfin's interests. Polansky made the $700,000 payment on December 13, 2003. Three days after the payment, Calfin entered into an agreement with Harmer in which he sold his one-half interest in Evolution Racing to Harmer for $350,000 and his ownership interest in the horses for $150,000. "Harmer kept the additional $200,000 that Polansky overpaid for the Company and horses for himself without disclosing the additional monies to either Polansky or Calfin." Harmer was designated as Evolution Racing's president, CEO, and/or managing partner or member, and he agreed that he would owe Polansky " 'full fiduciary obligations in terms of fair dealing, disclosure and accounting.' "

¶ 12 Polansky alleged that when he purchased the 50% interest in Evolution Racing, he also engaged Harmer to provide horse training services for horses Polansky owned in whole or part,

including the equine interests he purchased from Calfin. As Evolution Racing's manager, Harmer would use Polansky's distributions from the company to pay himself for Polansky's training bills, which were unrelated to Evolution Racing's business. Harmer consistently fraudulently overcharged Polansky for training services and/or failed to perform services as claimed, thereby converting Polansky's distributions for Harmer's personal use.

¶ 13 Polansky alleged that Evolution Racing charged its customers for shipping racing bikes and the related equipment they purchased from the company. Actual shipping expenses were reflected on customer invoices. However, the shipping charges on Evolution Racing's books and records were grossly inflated. As a result, Harmer received distributions that were surreptitiously characterized as shipping expense reimbursements but that did not correspond with any actual shipping charges customers paid. Harmer further instructed his employees to use Evolution Racing credit cards for expenses unrelated to the company's business.

¶ 14 Polansky alleged that on March 24, 2009, he and Harmer entered into a partners' additional contribution agreement. They agreed to each contribute $100,000 to Evolution Racing to satisfy accounts payable to Aerospoke, Inc., and to make new castings for the " 'Safe T' " model sulky. The agreement further provided that they would each receive equal distributions from Evolution Racing's profits until they both recovered their $100,000 contributions. Polansky contributed his $100,000, but Harmer did not. Even then, Harmer received distributions from Evolution Racing totaling $62,002 in 2010 and $11,500 in 2011 without corresponding distributions to Polansky. On November 1, 2011, without Polansky's knowledge, Harmer effectively ceased Evolution Racing's operations and agreed to give or assign the rights to sell and collect payment for its racing bikes to Aerospoke.

¶ 15 Polansky asserted counts of unjust enrichment, breach of fiduciary duties, and breach of contract (the 2009 contribution agreement).

¶ 16 On July 2, 2013, Harmer filed an answer to Polansky's second amended complaint and asserted the affirmative defense of "set off." He also filed a counterclaim for money due for his horse training services for Polansky. The counterclaim mirrored his amended complaint that had been dismissed. In response, Polansky filed a motion to strike, dismiss, and enforce the discovery sanction. Polansky requested that the trial court strike Harmer's affirmative defense, dismiss the counterclaim, and enforce the order dismissing the 2011 action without prejudice. The trial court denied the motion on June 26, 2013.

¶ 17 Harmer also made identical claims in a case that he re-filed in Du Page County on April 17, 2013.[3] Shortly afterwards, Polansky filed a motion to dismiss the action and for sanctions. On June 26, 2013, the trial court denied Polansky's motion.

¶ 18 Harmer sought to consolidate his 2013 case with the current cases, and the trial court granted the motion. Polansky filed an answer that also asserted the affirmative defenses of failure to perform the contract; fraud by overstatement of services performed; fraud by misapplication of credits to account; offset for non-performance; unclean hands; failure to state a claim; failure to mitigate; and rescission/reformation.

¶ 19 On November 4, 2013, the trial court granted a motion that Polansky had filed for discovery sanctions, and it ordered Harmer to pay certain attorney fees.

¶ 20 B. Trial

¶ 21 A jury trial took place from March 24 to 26, 2014. We summarize the witness testimony.

[3] Harmer had first re-filed the action in Cook County in 2012, but the trial court there dismissed it on the basis that the case should be in Du Page County.

¶ 22 1. Thomas Harmer

¶ 23 Harmer testified as follows. He began training standardbred horses, which were used for harness racing, after graduating from high school in 1969. Harmer raced under a stable named Ciara Stables. In 2003, Polansky was seeking a new trainer for three of his horses in Illinois. Harmer became their trainer, and ultimately he trained 30 or 40 horses for Polansky in both Illinois and Florida. Harmer would see Polansky about six or seven times a year and spoke to him on the phone often. Polansky was a "hands-off" owner, and he put his faith in Harmer to train the horses to run the best races that they could.

¶ 24 Harmer's and Polansky's agreement for training the horses was similar to the agreements of the 50 to 75 other owners for whom Harmer had trained horses. Harmer and Polansky agreed that for each horse, Harmer was to receive a $50 daily fee and 5% of the horse's purse winnings. The parties agreed that Harmer would also charge for expenses, though they did not go into detail about what the expenses would be. For Harmer, expenses included things like tack, blacksmith charges, veterinary expenses, vitamins, grooms' holiday bonuses, and insurance. These were customary expenses in the industry. Vitamins came in buckets, and Harmer would simply charge clients a set rate for those. Harmer believed in taking horse shoes off the horses for a period of time between races, even though 90% of trainers might disagree with that philosophy. When the shoes were off, a horse would wear down its feet to a natural level, and it helped in pumping blood through the foot, which in turn healed any soreness or lameness. Harmer would pull shoes off frequently and charge the work to Polansky. Harmer would also charge a rental fee for things he owned, such as harnesses, rack bikes, blankets, and pitchforks. Harmer had an accountant, Wally Caplan, who had been working for him for about 45 years.

Harmer provided training expense information to Caplan, who would then send Polansky monthly bills. All of Harmer's clients were billed in this manner.

¶ 25 Horses would race for money, and up to fifth place winners would get a check. If there were multiple owners, the check would go to the first entity on the ownership, which for Harmer was always Ciara Stables. Harmer would credit any winnings Polansky received for the month against horse training charges he owed. Polansky would pay the horse training bills through purse money, out of Evolution Racing distributions, or by personal check. The first year, when Polansky had three or four horses, the training charges were around $10,000 per month, and the second year on, when he had about 30 horses, the charges were about $60,000 to $70,000 per month.

¶ 26 One horse that both Ciara Stables and Polansky co-owned was called Just A Little Respect. The horse became lame after one or two races. However, horses with good bloodlines could be used for breeding; the term used was "brood mare." When Harmer told Polansky that the horse could not race anymore but could be used as a brood mare, Polansky said he had enough brood mares and was tired of the breeding business. Harmer said that he would take the horse, and Polansky said to go ahead. Harmer signed Polansky's name to a form that transferred the ownership interest because he had Polansky's permission; Harmer had signed Polansky's name about 85 other times during their relationship, with his permission. Just A Little Respect ultimately had an offspring called No Respect which made a couple of hundred thousand dollars racing.

¶ 27 Similarly, around 2008 a co-owned horse named My Metallica could no longer race. Polansky was not interested in having her as a brood mare and said that Harmer could have her.

Harmer bred her and did not charge Polansky any boarding fees for her or her offspring. The offspring became successful. Polansky then demanded one third of the horse and foal.

¶ 28 Pujols was a horse that was racing well at the time Harmer looked into purchasing it for Polansky. Polansky was originally willing to buy the horse for $300,000, but Harmer said to wait to get him for less. Polansky ultimately purchased the horse for about $250,000. Harmer did not tell Polansky that the owners received $15,000 to $20,000 less than the total amount. Harmer denied he received the difference as a commission, but in his deposition he testified that he did. At trial, he said that the money went to the horse's trainer as a commission, and he did not receive anything. Harmer purchased around 20 horses total for Polansky. They did not discuss commissions and Harmer denied receiving commissions, but in his deposition he testified that there were horses in addition to Pujols for which he received a brokerage fee or commission.

¶ 29 Evolution Racing was a company Harmer started with Calfin. They developed a sulky for the harness racing industry that ended up being extremely popular because it allowed the horse to get closer to the rail. When Harmer and Calfin decided to go their separate ways, there were about 25 of their sulkies winning races. Harmer mentioned the opportunity to enter into the business to Polansky. Harmer charged Polansky $500,000 for a one-half interest in the company, and he used part of that money to buy out Calfin's one-half interest for $350,000. Polansky also agreed to pay $200,000 for horses that Harmer acquired from Calfin for $150,000. However, Calfin had owed Harmer some money for those horses, such as $5,000 to $8,000 for stud fees, training bills for the previous 1½ months, and part of the purchase price for three or four of the horses.

¶ 30 Harmer was Evolution Racing's president and managing party because he was doing the training and was at the race tracks. The parties' agreement stated that Harmer would "owe full fiduciary obligations in terms of fair dealing, disclosure and accounting."

¶ 31 The sulkies were made at a company called Aerospoke located in Michigan. Purchasers had to pay for shipping, which was done by Fed Ex or through a Harmer employee. From a bookkeeping perspective, Harmer would ask Caplan "to give [him] money based on shipping." Harmer would designate some personal purchases on the Evolution Racing credit card as shipping because Caplan said that personal charges could not be made on the credit card. During one of Harmer's trips to the United States Trotting Association (USTA), he used the Evolution Racing credit card for his flight and hotel, but "as a rule, [he] paid [his] own way."

¶ 32 The company's business model was to be paid for the bikes upon delivery. The company did well in 2004 and 2007, but 2005 and 2006 were "terrible." In 2009, Harmer made a capital call because Evolution Racing was indebted to Aerospoke. The agreement was to each put in $100,000, which Polansky did. Harmer put in around $30,000 and obtained a note from Aerospoke for the balance, which he had not yet paid. The note would be due when the safety model sulky was approved, which had not yet happened.

¶ 33 Polansky received $275,000 in distributions from Evolution Racing in 2004, $0 in 2005, $17,000 in 2006, $180,000 in 2007, $40,000 in 2009, and $0 in 2010. Polansky's total distributions were about $683,000,[4] whereas Harmer's total distributions were $136,000. Polansky paid training bills from the distributions, and he only questioned a bill one time,

[4] We note that the amounts Harmer specified total $512,000. However, Polansky agreed in his testimony that he was credited for $683,000 in distributions from Evolution Racing, and Polansky's accountant testified that Polansky received $683,500.

regarding holiday bonuses. During the same period, Polansky received $4 to $5 million in purse money. This money was also applied to the training bills.

¶ 34 In 2004, Evolution Racing did very well and sold several hundred bikes. However, in January 2005, one of the sulkies broke due to a design flaw. Harmer said that he wanted to fix the problem, and Polansky agreed. They issued a recall and picked up 150 bikes, fixed them, and sent them back out. However, there was another design flaw, and they ended up fixing 500 bikes. They sold another 1,300 after that. However, eventually sales started to fall off because pretty soon everybody in the business had their bike. Harmer had an idea for a third, better sulky, which passed "the test," but the USTA did not approve it. Harmer had been fighting with the association for about three months when he and Polansky had their falling out.

¶ 35 Harmer spent 60 to 70 hours per week on work for Evolution Racing, but his only compensation was for delivering the bikes. Due to the recalls, they shipped the same bikes several times. For the first three years, Harmer deposited all of the shipping payments in the Evolution Racing account. Afterwards, Harmer received over $500,000 in shipping reimbursements from Evolution Racing and declared this money as income for taxes.

¶ 36 Evolution Racing was still in existence at the time of trial but was inactive. Harmer denied that one of the reasons it was so far behind in paying Aerospoke was because Harmer donated some of the bikes, but he acknowledged offering such testimony in his deposition. In 2009, Polansky raised financial concerns about the company. They ultimately broke up their relationship, and Polansky asked Harmer to send his horses to other trainers. Polansky had been paying his training bills through 2009 and never indicated that he would not pay a bill that he thought was reasonable. When Polansky was picking up his horses in December 2009 and January 2010, Harmer told him that he could not let the horses go unless he paid his training

bills. Polansky gave Harmer his word that he would pay, but he did not. He currently owed $129,926.04 for November and December 2009 and part of January 2010. The bill for December 2009, after credits, was $24,000.

¶ 37 Harmer kept the horses that they jointly owned and trained them for about 1½ years. However, Polansky never paid for his partnership interest in those horses, even though he collected his share of the purse money from the racetrack for those horses, which totaled about $50,000 or $60,000. Harmer did not recall Polansky telling him to sell the jointly-owned horses in January 2010. Harmer was not seeking training charges for the co-owned horses.

¶ 38 There was a horse sale in March 2011 pursuant to a Florida court order, and Polansky had an interest in 16 of those horses. Notice for that sale was sent out appropriately. When the sale was about to start, Polansky and an attorney showed up and served papers showing that they had already paid bond money to the court to take eight horses out of the sale. Harmer asked about the other eight, and the attorney said that Polansky did not want them, and Harmer could do what he wanted with them. Harmer never received a portion of the bond money that Polansky had paid.

¶ 39 Harmer employed Jonathan Frasure for two months in 1985; four months in 2005; and eight months in 2006. Harmer gave Frasure a $10,000 bonus in 2005 because he had a horse that did very well.

¶ 40 2. Walter Caplan

¶ 41 Caplan testified as follows. He was an accountant and had worked in the accounting field for the city of Detroit and the state of Michigan. He also did independent accounting work for individuals in the standardbred horse industry, including Harmer. Caplan paid the bills for both the stable side of Harmer's business and for Evolution Racing, and he also prepared their

tax returns. The vast majority of Evolution Racing's expenses were for the bike's manufacture by Aerospoke. Caplan took Harmer at his word regarding the expenses he listed for horse training. Caplan had worked for other trainers, and they always charged blacksmith, vet, and tack to the owner. Caplan acknowledged that in his deposition, he testified that Harmer was the only trainer who added these charges. There was a system of credits given to Polansky for his training bills if he was receiving distributions from Evolution Racing. Caplan and his wife would also sign Polansky's name to checks from horse winnings, and Polansky was aware of this, though there was never an explicit discussion about it.

¶ 42 A 2008 tax return showed $181,389 in shipping charges for Evolution Racing. Most of that money went to Harmer. Over the years, Harmer had over $500,000 payable to him from Evolution Racing for shipping. Harmer had a certain shipping charge per bike, though Caplan did not know what that was. Shipping payments to Harmer in 2008 totaled around $140,000 as compared to the $180,000 shown on the tax return for that year. There was a great deal of shipping involved, all of which Harmer was responsible for, because of the recalls.

¶ 43 For the Evolution Racing credit card, Harmer always differentiated his personal charges as opposed to charges for Evolution Racing. If Harmer made personal charges, Caplan would pay them but count them against Harmer's shipping reimbursement. In 2005, an employee needed a $15,000 bail bond, and Evolution Racing paid it. The company received credit back through shipping reimbursements due to Harmer.

¶ 44 3. Michael Polansky

¶ 45 Polansky provided the following testimony. He developed an interest in harness racing at an early age because his grandfather would take him to the track. Polansky became a lawyer but also decided to get into the harness racing business. Polansky had some horses in Saratoga, New

York, for years. Around 2003 or 2004, he acquired three horses in Illinois. Through word-of-mouth, he ended up with Harmer as their trainer. Harmer said that the daily rate would be $50 per horse, along with 5% of the purse winnings. Polansky knew that there would be some additional charges beyond the daily rate but did not expect all of the extra charges. He questioned Harmer early on but then said that he trusted him. Eventually Polansky agreed to send some of his New York horses to Harmer for training, and he visited them monthly.

¶ 46 Throughout Polansky's dealing with Harmer, horses would be bought and sold. Harmer never disclosed that he would take a commission or brokerage fee. For example, Harmer told Polansky to send him a check for $262,500 in his name for Pujols, and Polansky thought that all of the money was going to the horse's owner. Polansky did not learn that Harmer got a commission on that horse until Harmer's deposition.

¶ 47 Polansky had practiced law for 15 years and had a master's degree in economics. He had had five trainers and had sued the last trainer that he had in Illinois, before Harmer. Polansky had spent $1,756,000 to buy horses in Illinois. He thought that he was paying what the horses were worth, and he agreed that he read up on the horses' pedigrees and backgrounds. However, the ultimate amount he paid was based on Harmer's recommendation.

¶ 48 Harmer approached Polansky about investing in the sulky business because Calfin wanted to leave. Polansky agreed to pay $500,000 for Calfin's one-half interest in the company and $200,000 for the equine interests that Calfin had owned at the time. Polansky did not know that Harmer was keeping some of the money. Polansky understood that his role was to supply money for the company, and that Harmer's duties were to manage the LLC. Polansky's understanding was that they would be equal partners in the entire deal. Harmer told Polansky that Evolution Racing's profits would pay Polansky's training bills, and the horses' winnings

would all be "gravy." However, there was only one month where Evolution Racing distributions covered the entire training bills, and Polansky wrote checks all of the other months.

¶ 49 Over the years, Polansky deposited $828,034 into Evolution Racing. At one time, Harmer said that they had to come up with $200,000 right away or the company would be closed. He said that they would both put up $100,000, which Polansky did. Polansky was shocked that Aerospoke was not getting paid because there were many customers buying the bikes. From listening to testimony, it sounded like 553 sulkies were recalled. He did not know what the cost of fixing the sulkies was and whether customers had to pay shipping for the recalls.

¶ 50 Polansky paid the training bills for many years because he trusted Harmer. He went to his barn and was impressed with how well the horses were taken care of. The horses were also racing well. Further, the overcharges were "masked" by all of the Evolution Racing credits, which lowered the amounts due. Polansky realized that there might be a problem when Harmer asked for the additional $100,000 for Evolution Racing. He lost faith in Harmer in December 2009 to January 2010. He asked Harmer to send his 12 horses to other trainers. There were another four co-owned horses that Harmer kept, and Polansky hoped that they would be sold at a legitimate auction, which did not happen. Polansky did receive $20,000 for one of those horses, Omaha Survivor. Polansky never indicated to Harmer that he would not pay reasonable charges for the training bills.

¶ 51 Polansky identified exhibit 14 as a document that he prepared based on subpoenaed tax returns and Polansky's bills, and it showed his estimates of Harmer's horse training overcharges. For a charge like blacksmithing, Polansky had a column for the amount he was charged, which was $64,360 in 2004. Harmer's deduction from schedule C of his taxes for blacksmith in 2004 was $37,198. When Polansky visited the stables in Illinois and Florida, he saw that he owned

about 70% of the horses there.[5] Polansky therefore attributed 70% of the deduction for blacksmithing to his charges, which led to an implied overcharge of $38,321 for blacksmithing for that year. Polansky used this same method in going through all of the additional expenses on the training bills, such as vet fees, tack, workers' compensation, vitamins, and the Christmas bonuses, for the years 2004 to 2009. Polansky did not include 2003 because he did not receive that tax return, and he did not include 2010 because his horses left within the first two weeks of that year. Polansky believed that, in total, he was overcharged over $750,000 for the training bills. He agreed that the overcharges he listed were based only on the tax return information, which is why he characterized them as "implied overcharges."[6]

¶ 52 Even though Polansky won $4 or $5 million in race winnings, from 2003 to 2009 he had a net loss of over $1 million on harness racing. He continued in the business because he loved every facet of the racehorse ownership, such as the breeding, the naming, the racing, and visiting the horses.

¶ 53 Caplan sent Polansky monthly statements regarding Evolution Racing. Polansky was unaware how many bikes were sold each month but did not ask Caplan. Polansky did see a lot of the sulkies at the race track. He was credited $683,000 over the course of the relationship towards training bills. From 2004 to 2009, there were over 100 horses "that either entered or left [Harmer's] barn," but Polansky did not know how many horses he had with Harmer during any specific year. In 2005 to 2008, Harmer was training a total of 35 to 40 of his horses, based on

[5] Polansky testified: "I owned approximately 70 percent of the stable, and could have been 68. It could have been 72. It might have been 74. It could have been 66. It was about 70 percent" of the fully owned and co-owned horses.

[6] Exhibit 14 was later admitted into evidence over Harmer's objection.

what Polansky could recall. Polansky owned anywhere from 66 to 74% of the stable. There were several years where Polansky was personally charged more than the total deductions on the tax forms. He never saw horses without shoes on and did not talk to Harmer about his horse-shoeing practices.

¶ 54 4. Jonathan Frasure

¶ 55 The jury was shown the videotaped deposition testimony of Frasure, who was deposed in October 2012. Frasure testified that he had been involved in the horse racing industry since he was 13 years old, when he began grooming horses. He later started training his own horses and worked for a few high profile trainers around the country.

¶ 56 Frasure met Harmer in 1986, and he worked for him as a groom. He worked for him in 2004 for 1½ to 2 years, and from 2006 to 2009. Frasure had worked for Harmer four or five times over a 25-year-period as his second trainer, which meant that he was his "right-hand man." He would instruct the grooms, who were in charge of the horses' daily care, train the horses with Harmer or by himself, help him "break babies, two-year olds," and race all over the country. There were times when there were two or three trainers "underneath" Frasure as well.

¶ 57 As a horse owner and trainer, Frasure was familiar with customary training charges in the industry. Trainers generally charged a daily rate of $20 to $45.

¶ 58 Horses usually had their shoes changed every 30 days. Frasure had seen Harmer take shoes off a horse only about two times in 10 years; he would disagree that Harmer was involved in changing horseshoes on a regular basis. To put shoes on a horse would cost between $75 to $125 during the relevant time frame. It was industry custom for the owner to get a copy of the blacksmith and veterinary receipts; the actual charges were passed through to the owner, as the fees were collected from the trainer. Charges for grooms were also passed through to the owner,

and Harmer paid his grooms in this manner. Harmer did not pay Christmas bonuses to his grooms, though he did give them a one-week paid vacation.

¶ 59 Evolution Racing sold the premier sulkies in the industry. Frasure did work for the company, getting the bikes from Michigan, where they were made, and delivering them around the United States. He would haul 20 to 30 sulkies at a time in Harmer's trailer. It was part of Frasure's job, and he did not get paid separately for it. Some of the checks Frasure collected for the sulkies were made out to Evolution Racing, but some were made out to Harmer individually; Frasure had witnessed Harmer telling a buyer to make the check payable to him. Harmer also gave Frasure an Evolution Racing credit card and told him to use it for his hotel, food, and gas expenses. Frasure used it for expenses associated with training horses, which was not related to the company's business.

¶ 60 There was a horse called My Metallica that became lame. Harmer told Frasure that the other two owners, which included Polansky, did not want a brood mare. However, when her offspring became successful, the other two owners demanded a share of the revenue; they did not know that they had lost their interest in My Metallica.

¶ 61 In March 2011, Harmer was going to have a public sale of some horses, including some owned in conjunction with Polansky. Harmer posted some notices, took pictures of them, and then took them down. He said that he left one up that was so high that no one could see it. When the time for the sale came, about five people showed up, who must have found out by word-of-mouth. Harmer said that the sale had been canceled because the owner had withdrawn the best horses. Later, Harmer asked Frasure to come to the office, and he said that they were going to have a horse sale. He said that he would read each name, and Frasure would have the opportunity to bid on it. If Frasure did not bid on it, Harmer would buy it. Frasure understood

that he would not be bidding against his boss. They went through a list of 10 to 15 horses, some of which Polansky owned. Harmer bought them for $100 or $1,000 even though some of the horses were worth up to $75,000. At the end, Harmer had other individuals from the barn sign papers saying that they were present at the sale.

¶ 62 For many years, Frasure thought that Harmer was a consummate professional and successful in the industry. However, at the end, it seemed like Harmer had gotten so far into debt that he changed his whole personality; that was one of the reasons Frasure stopped working for him.

¶ 63 5. James Lynch

¶ 64 Lynch, a CPA who worked in the fields of forensic accounting and business valuations, testified as follows. He was hired by Polansky's attorneys. He prepared a report on Evolution Racing based on Caplan's documents, invoices from Aerospoke and Evolution Racing, and a variety of other documents, such as credit card statements. Many of Caplan's records were handwritten and "lacking"; for example, there was no general ledger or cash disbursement journal. Lynch's firm went through the documents and put together a general ledger. They were asked to look at: whether the revenue was properly recorded; whether the cost of sales was recorded; different expenses such as shipping, travel, and telephone; and the capital account for a specific transaction. They were also engaged to value the company on December 31, 2008, and December 31, 2010. Finally, they were asked to review Polansky's schedules, specifically blacksmith charges as related to the care of his horses. They had looked at thousands of documents, and Polansky had paid over $100,000 for their services.

¶ 65 Evolution Racing designed, marketed, and distributed the sulkies, while Aerospoke manufactured them. Lynch received invoices for 2007 to 2011 from both companies. For that

period, they found a discrepancy of $528,000 in revenue compared to what was recorded on tax returns. The difference in the cost of sales was minor, at $23,000. To Lynch, this meant that most of the cost of sales was recorded while all of the revenue was not. In total, there was about $550,000[7] worth of unaccounted revenue and unsupported cost of sales.

¶ 66 The shipping charges for the sulkies increased over time from $250 to $450. Harmer was overpaid about $164,000 for shipping based on his deposition testimony of what portion of shipping charges he was to receive, that being the shipping charges on invoices minus the amount paid to third parties. Lynch relied on the invoices for the shipping charges and did not question Harmer as to what expenses went into shipping. Lynch took into account the recall of 357 sulkies based on documents, not 835 sulkies. He did not know how many bikes were repaired and sent out again.

¶ 67 Lynch further went through credit card statements from 2007 to 2009; he did not go through more because the process was very time consuming. Lynch opined that $26,000 worth of travel expenses were not proper for the company. He looked at telephone expenses for 2009 to 2011 and found three cell phones, two land lines, and an internet service bill. Lynch thought that reasonable charges would have been $175 per month for the phone and internet, which resulted in about $26,000 in overpayment for telephone bills.

¶ 68 The next category was excess withdrawals. Each partner was supposed to contribute $100,000 in 2009, which Polansky did. Harmer paid only $36,647, which included $4,000 in debt from Evolution Racing that he forgave. The books showed that Harmer paid another $20,000 in December of that year, so his total was around $56,000. Polansky received a

[7] We note that $528,000 plus $23,000 equals $551,000, which is a figure we use later in our analysis.

distribution of $40,000 against his $100,000, which made the two parties about equal. However, Harmer then took out another $91,000. Lynch agreed that in 2004, Polansky got a $275,000 distribution and Harmer got 0; that in 2005 neither received a distribution; and that in 2006 Polansky received $17,000 and Harmer received $8,000. Lynch agreed that Polansky received $683,500 in distributions from Evolution Racing while Harmer's total distributions were $136,000. Also, Harmer did not receive any income for his services, other than the shipping charges.

¶ 69 Lynch opined that Evolution Racing was worth about $1.5 million in 2008 based on its income, and in 2010 the company's value decreased substantially to a little less than $300,000.

¶ 70 Lynch had reviewed Polansky's blacksmith calculations and determined that they were mathematically accurate.

¶ 71 6. Jury Verdict

¶ 72 For Harmer's single claim that Polansky owed him money for horse training services, the jury found in Harmer's favor and awarded him $79,000. The jury also found in Harmer's favor on several of Polansky's claims against him. Specifically, for Polansky's claim of unjust enrichment relating to Polansky's purchase of Evolution Racing, it found that Polansky did not prove that Harmer was unjustly enriched by keeping the difference between what Polansky paid for both an interest in the company and Calfin's equine interests and what Calfin received. The jury also found in Harmer's favor on Polansky's intentional misrepresentation claim, finding that Harmer did not make false statements of material fact that certain horses Polansky owned or co-owned could no longer race and had no residual value. It similarly found for Harmer on Polanksy's claim of fraud relating to horse purchases Harmer facilitated for Polansky; it found

that Harmer did not make false statements of material fact regarding the sale prices of these horses.

¶ 73 Regarding Polansky's claim for breach of fiduciary duty relating to Evolution Racing, the jury found that Harmer was the managing member of the company and owed Polansky and Evolution Racing a fiduciary duty; that Harmer failed to act as a reasonably careful managing member would have acted under the same or similar circumstances, or failed to act with undivided loyalty to Polansky and/or the company; and that Polansky was harmed as a result of the breach of fiduciary duties. It awarded Polansky $400,000 in damages on this claim.

¶ 74 The jury also found in favor of Polansky on his claim for breach of the 2009 contribution agreement. It found that there was a $68,000 difference between the contributions Polansky and Harmer made and that Polansky received $32,000 less in distributions than Harmer after the agreement. Therefore, it awarded Polansky $100,000 in damages on this claim.

¶ 75 Finally, the jury found for Polansky on his claim for fraud relating to horse training bills. It found that Harmer made false statements of material fact that the charges reflected in the bills were for reasonably necessary services; that Harmer knew that the statements were false; that Polansky reasonably believed the statements and paid the bills in justifiable reliance on the statements' truth until he discovered the fraud; and that Polansky sustained damages as a result, totaling $265,000.

¶ 76 Thus, the jury's verdict in Harmer's favor totaled $79,000, and its verdicts in Polansky's favor totaled $765,000.

¶ 77 C. Posttrial Proceedings

¶ 78 On April 23, 2014, Harmer's trial attorney filed a motion for a new trial and/or arrest of judgment, a motion for an additur to increase the verdict in his favor, and a motion for judgment

in his favor. Harmer later withdrew these motions because he retained different counsel for posttrial proceedings.

¶ 79 Also on April 23, 2014, Polansky filed a motion for judgment notwithstanding the verdict (*n.o.v.*) and for alternative relief. He argued that he was entitled to judgment *n.o.v.* or a new trial as to Harmer's claim against him, because Harmed failed to submit any evidence of outstanding training bills. Polansky sought the same relief as to his own claims for unjust enrichment, intentional misrepresentation, and fraud. He requested, in the alternative, that the jury's verdict against Harmer be treated as a setoff against the jury's verdict in his favor, rather than a separate award.

¶ 80 Harmer filed a posttrial motion on April 25, 2014, and an amended posttrial motion on May 15, 2014. He argued that he was entitled to judgment *n.o.v.* because the evidence did not establish that he breached his fiduciary duties and because the evidence did not establish overcharging on invoices from 2004 to 2009. Harmer alternatively argued that he was entitled to a new trial because: the trial court improperly admitted Polansky's analysis as evidence; the jury's award of damages for breach of the 2009 contribution agreement was not supported by the evidence; breach of fiduciary duty damages were improper; and Polansky argued facts not in evidence during closing arguments. Harmer argued as another alternative that he was entitled to a remittitur of the damages awarded to Polansky, because the $100,000 award for breach of the 2009 contribution agreement was excessive. Harmer additionally contended that he was entitled to an additur for his breach of contract claim because, although the jury awarded him $79,000, the uncontroverted evidence showed that he was owed $129,926.04.

¶ 81 The trial court denied both parties' posttrial motions on July 22, 2014. Regarding the admission of exhibit 14, the trial court stated that Harmer raised a different objection at trial than

he was making in his posttrial motion. On the subject of a setoff, the trial court said that the judgments would remain separate because they resulted from two separate cases that had been consolidated only for convenience.

¶ 82 The parties timely appealed.

¶ 83 II. ANALYSIS

¶ 84 On appeal, Harmer argues that: (1) the trial court erred in admitting exhibit 14 into evidence, justifying a new trial on the claim of fraudulent horse training charges; (2) the finding of fraudulent horse training charges was against the manifest weight of the evidence; (3) the jury's verdict on the breach of fiduciary duty claim was based on speculation and conjecture; and (4) the jury's verdict on the claim of breach of the contribution agreement was against the manifest weight of the evidence.

¶ 85 In his cross-appeal, Polansky argues that: (1) the trial court erred in denying his motion to dismiss Harmer's 2013 complaint. He further argues that he is entitled to judgment *n.o.v.* or a new trial on: (2) Harmer's claims against him for unpaid horse training services; (3) his claim of intentional misrepresentation; and (4) his claim of fraud. Last, Polansky alternatively argues that (5) the trial court erred in failing to treat the verdict in Harmer's favor as a setoff against the verdicts in his favor.

¶ 86 A. Harmer's Appeal

¶ 87 1. Fraudulent Horse Training Charges

¶ 88 a. Exhibit 14

¶ 89 Harmer first argues that the he is entitled to a new trial on Polansky's claim of fraudulent horse training charges, because that verdict and damage award were based on inadmissible evidence, that being exhibit 14.

¶ 90 We will not reverse a trial court's ruling on the admissibility of evidence absent an abuse of discretion. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 29. "The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court." *Id.* Even where a trial court abuses its discretion in admitting evidence, we will order a new trial only if the trial court's ruling appears to have caused substantial prejudice affecting the trial's outcome. *Id.*

¶ 91 Harmer argues that exhibit 14 is an inadmissible summary of Polansky's testimony and opinion. Harmer cites caselaw for that proposition that calculations that go beyond the data summarized by including assumptions, inferences, and projections, are opinion testimony that can be used as a testimonial aid but should not be admitted into evidence. Harmer maintains that exhibit 14 is more than just a summary of data in his tax returns and bills to Polansky, as it includes the unsupported assumption about what percentage of his business expenses were attributable to Polansky's horses and the assumption that a corresponding percentage of schedule C business deductions were attributable to those horses. Harmer contends that the exhibit also synthesizes other people's opinions, in that Polansky relied on information from Caplan to estimate overcharges for worker's compensation. Harmer also argues that while Polansky testified about the general methodology for creating exhibit 14, he gave his conclusion about how much he was overcharged only for blacksmithing in 2004, and he never defined the 18 separate expense categories he created or his conclusions on each of the categories.

¶ 92 Harmer further argues that even if we were to overlook exhibit 14's improper content, the exhibit still should not have been admitted because it lacked the necessary foundation. Harmer argues that Polansky merely testified that he looked through several boxes of documents that he

had obtained from Harmer containing Harmer's bills and tax returns. Harmer argues that Polansky never established whether the documents were actually what they purported to be, whether they were drafts or final products, and whether Harmer had signed the tax returns. Harmer argues that without such information, it was impossible to determine whether the documents Polansky relied on were themselves admissible. Harmer argues that Polansky also failed to establish that schedule C of Harmer's tax returns even included expenses associated with training Polansky's horses, as it would logically reflect only those charges Harmer incurred in his own business operations, and not charges that were passed on to third parties like Polansky. Harmer maintains that Polansky additionally did not show that his information and calculations were accurate, and in fact they could not have been because Polansky admitted that he did not know how many horses he had with Harmer in any particular year.

¶ 93 In response, Polansky notes that at trial, Harmer did not object to Polansky's testimony regarding his analysis and conclusions for the blacksmith overcharges specifically. He argues that all of his conclusions were subject to cross-examination by Harmer using any of the documents from the 11 boxes that Harmer produced in this case. Polansky argues that Harmer later objected to the exhibit's admission only on the bases that it was self-serving and inconsistent with Polansky's testimony. According to Polansky, Harmer made no objections based on foundation, hearsay, or reliance on flawed assumptions, and Harmer thereby forfeited these objections for appeal. Polansky argues that even if the objections were not forfeited, the trial court properly admitted exhibit 14, because his analysis was a proper synthesis of a decades' worth of information in Harmer's possession, and his approximation that he owned 70% of the horses in Harmer's stable was based on his personal knowledge and observations.

¶ 94 Harmer replies that although his objection was "inartfully made in the heat of trial," it put the court on notice that exhibit 14 went beyond what Polansky had testified about, and that Polansky did not establish the basis for each of the exhibit's components. Harmer argues that he thereby articulated the same bases for his objections that he relies on in this appeal.

¶ 95 Harmer did not object when Polansky was testifying about exhibit 14. When exhibit 14 was later offered into evidence, Harmer's attorney objected, stating: "It's self serving and he testified and there was more in that than he testified to. I don't know that he testified to each and every particular subject piece of that [*sic*] he was prepared under his supervision and control. He testified generally that it was prepared under [*sic*], but not specifically." Polansky's counsel replied, "He actually said he calculated every one of these documents." The trial court allowed the exhibit into evidence over Harmer's objection.

¶ 96 A party must make specific objections to evidence, based on particular grounds, and the party forfeits all other grounds not specified or relied on. *Stapleton ex rel. Clark v. Moore*, 403 Ill. App. 3d 147, 156 (2010). Harmer's first objection at trial was that the exhibit was self-serving. "[S]elf serving declarations by a party or on behalf of a party are inadmissible as evidence in favor of the party." *Fandrich v. Allstate Insurance Co.*, 25 Ill. App. 3d 301, 309 (1974). Here, while Polansky created exhibit 14, he testified that the underlying information about training services fees and actual costs, as derived from tax forms, came from the documents supplied by Harmer. Polansky also testified as to his rationale for attributing 70% of the costs to himself. Therefore, trial court acted within its discretion in allowing the exhibit into evidence over this objection.

¶ 97 Harmer's remaining objections apparently were that Polansky did not testify as to all of exhibit 14's contents, nor did he testify that he prepared the entire document. In response to the

latter issue, Polansky's counsel stated that Polansky testified that he personally calculated all of the information; this representation is supported by the trial testimony. As for the former issue, Polansky described his calculations for the blacksmith charges and testified that he used the same method in going through all of the additional expenses on the training bills, such as vet fees, tack, workers' compensation, vitamins, and Christmas bonuses for 2004 to 2009. We agree with Polansky that the trial court did not abuse its discretion in allowing exhibit 14 into evidence over these objections.

¶ 98 Harmer has forfeited the other bases he now asserts for the exhibit's improper admission, as he did not specify those grounds at trial. See *Stapleton ex rel. Clark*, 403 Ill. App. 3d at 156.

¶ 99 b. Jury's Verdict for Polansky

¶ 100 Harmer next argues that he is entitled to a new trial because Polansky offered no evidence from which the jury could have reasonably concluded that Harmer was charging for goods and services that he did not actually provide. Harmer argues that even if exhibit 14 were properly admitted, at most it shows that Harmer charged Polansky more for items or services that Harmer himself paid, but merely making a profit does not mean that he defrauded Polansky. Harmer maintains that the only testimony regarding the reasonableness of training services came from Frasure. Harmer argues that Frasure's testimony cannot support the jury's fraud finding, either, because even though he testified that other horse trainers would have charged certain expenses differently, this does not mean that Harmer did not incur these expenses or was defrauding Polansky. Harmer argues that, even otherwise, Polansky's payment of the bills for seven years shows that Harmer's billing method was proper under the parties' arrangement. As for Frasure's testimony that he rarely saw Harmer performing blacksmith or veterinary work, Harmer argues that Frasure worked for Harmer only a few months during the relevant period and

spent much of that time on the road delivering sulkies for Evolution Racing. Harmer argues that the only specific testimony about the amount of overcharges was Polansky's statement that the supposed overcharges for blacksmith work in 2004 were $38,321, but there was no evidence that a blacksmith did not perform these services. Harmer contends that at no point during the trial did any witness identify a single invoice where Harmer charged for services that were unnecessary or not performed at all.

¶ 101 Harmer relatedly argues that the jury's damage award cannot be reconciled with the evidence. Harmer points out that there must be some reasonable basis for the jury's damage award. See *Razor v. Hyundai Motor*, 222 Ill. 2d 75, 107 (2006) (no basis for jury to award $5,000 where the only evidence relating to damages was the plaintiff's testimony that "she would not today pay the price she had originally paid for the vehicle" if she had known about all of the problems it would have). Citing *Avery v. State Farm Mutual Insurance*, 216 Ill. 2d 100, 152-53 (2005), Harmer argues that jury awards that vary drastically from the evidence presented may be rejected as pure speculation and conjecture.

¶ 102 Harmer argues that "[w]hile Polansky testified to a possible methodology for computing damages, it was based on overcharges and not on whether such charges were reasonably necessary." Harmer also argues that Polansky testified that Harmer overcharged him $750,000 for training between 2004 and 2009, but the amounts of overcharges listed in exhibit 14 add up to just $691,737. Harmer notes that the jury instructions directed the jury to consider charges for blacksmith, tack, vet, holiday bonuses, and vitamins, but even when those categories are isolated on exhibit 14, damages would be $501,567. Harmer points out that the jury awarded damages of just $265,000, and Harmer argues that since the jury was not provided with copies of the invoices underlying Polansky's analysis, it had no way to compute damages without engaging in

unwarranted speculation. Finally, Harmer argues that the verdict form for the fraud claim did not have any instructions for calculating damages, unlike the other verdict forms, thereby inviting the jury to guess at what the damages might be.

¶ 103 A trial court should grant a motion for a new trial if the verdict is contrary to the manifest weight of the evidence. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38. That occurs where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary, and not based on any of the evidence. *Id.* We will reverse a trial court's ruling on a motion for a new trial only if the trial court abused its discretion. *Id.* In determining whether the trial court abused its discretion, we consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 46.

¶ 104 Harmer's argument is not persuasive. On the subject of evidence of Harmer's overcharging, it is undisputed that the parties agreed that Harmer would receive a daily fee of $50 per horse and 5% of the horse's purse winnings. They further agreed that Harmer would also be paid expenses, but they failed to discuss what those expenses would be and how they would be computed. Harmer admitted that he would charge clients a set rate for vitamins, regardless of the actual cost. He also testified that he frequently removed horse shoes between races and charged the work to Polansky, though he admitted that 90% of trainers might disagree with this horse-shoeing method. The evidence also showed that Harmer did not provide Polansky with receipts to back up charges, such as vet and blacksmith bills. Frasure, who had worked for Harmer on and off during a 25-year period, testified that he was the second trainer but had only seen Harmer take shoes off a horse about two times in 10 years. He further testified that it was industry custom for owners to get receipts showing blacksmith and veterinary

charges, and that Harmer did not pay Christmas bonuses to his grooms. Polansky testified regarding his method of calculating implied overcharges, which was to compare the amount he was charged for each category of services to Harmer's tax forms listing business deductions, and attribute 70% of the business expenses to Polansky's horses based on his estimate of what portion of the horses he owned. We recognize that this evidence could lead to different inferences and conclusions, but it still constitutes sufficient evidence from which the jury could conclude that Harmer fraudulently overcharged Polansky for horse training services; this verdict was not against the manifest weight of the evidence.

¶ 105 On the subject of the amount of damages, Harmer claims that the jury's award was improperly based on speculation and conjecture. The party seeking damages has the burden to establish not only that he or she sustained damages, but also to provide a reasonable basis to compute those damages. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 31. Damages may not be based on speculation, hypothesis, conjecture, or whim. *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 57. Still, damages are not required to be proven with mathematical certainty, but rather a plaintiff needs only to present evidence that allows damages to be computed with a fair degree of probability. *Pyramid Development, LLC v. Dukane Precast, Inc.*, 2014 IL App (2d) 131131, ¶ 37. The question of damages is one of fact that is left to the jury. *Control Solutions, LLC v. Elecsys*, 2014 IL App (2d) 120251, ¶ 55. Reviewing courts are reluctant to interfere with a jury's discretion in determining damages and will not disturb a jury's award unless it is against the manifest weight of the evidence. *Id.* An award is considered against the manifest weight of the evidence if the jury ignored a proven element of damages, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss. *Id.*

¶ 106 We disagree with Harmer's representation that under *Avery*, 216 Ill. 2d at 152-53, jury awards that vary drastically from the evidence presented may be rejected as pure speculation and conjecture. In *Avery*, the expert's range between his high and low-end damage estimates was $500 million, and he conceded that his estimates could be incorrect by as much as $1 billion. *Id.* at 152. Our supreme court stated that the expert's evidence was too speculative and uncertain to support an award of damages. *Id.* at 152-53. Here, in contrast, the jury had information regarding the base daily rate for services, and exhibit 14 provided a detailed representation of Polansky's claim for damages. While the jury awarded less damages than the $750,000 Polansky sought, and less than Harmer argues is supported by exhibit 14, "[t]he mere fact that the verdict is less than the claimed damages does not necessarily mean that the award is inadequate [citation], particularly since the jury is free to determine the credibility of witnesses and to assess the weight accorded to their testimony [citation]." *Nilsson v. NBD Bank of Illinois*, 313 Ill. App. 3d 751, 761 (1999). Even where competing experts testify as to damages, a jury is not required to accept one opinion, and its award does not have to be capable of precise determination. *F.L. Walz, Inc. v. Hobart Corp.*, 224 Ill. App. 3d 727, 733-34 (1992). Therefore, we will not invalidate a verdict merely because a jury has reduced an expert's damage calculation. *Id.* at 734; see also *Tyco Electronics Corp. v. Illinois Tool Works, Inc.*, 384 Ill. App. 3d 830, 835 (2008) (a jury's verdict is not against the manifest weight of the evidence just because it is less than the experts' damage calculations). "In short, damages are the jury's prerogative, not the appellate courts'. " *Nilsson*, 313 Ill. App. 3d at 762.

¶ 107 Here, Harmer cross-examined Polansky regarding the information in exhibit 14, including his position that he owned 70% of the horses when he could not state how many horses he had in any particular year, and that the overcharges were only "implied" because they were

based on information from tax returns. Thus, it was logical for the jury to reduce the award sought, and its award of $265,000 for fraudulent training charges was not against the manifest weight of the evidence.

¶ 108 As for Harmer's argument that the verdict form for the fraud claim should have had instructions for calculating damages, he offers no citation to the record showing any objections to the jury instructions, nor have we located any such objections. Therefore, by failing to object in the trial court, Harmer has forfeited this issue for review. See *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 19 (to preserve the right to challenge a jury instruction that was given at trial, a party must make a timely and specific objection to the instruction and tender an alternative, remedial instruction to the trial court).

¶ 109 2. Breach of Fiduciary Duty Claim

¶ 110 Harmer next argues that he is entitled to a new trial on the breach of fiduciary duty claim because the jury's verdict was based on speculation and conjecture. Harmer argues that the jury instruction on the claim did not ask jurors to identify exactly what Harmer did to violate his duty, so it is impossible to determine whether the jury had any basis for awarding Polansky "the suspiciously round $400,000" on this claim. Harmer argues that the verdict form also asked the jury to decide whether he breached his duty to "Polansky and/or Evolution Racing," but it did not ask the jury to specify to whom the duty was breached. Harmer maintains that if the duty was only to Evolution Racing, the damage award should be halved, since Polansky was a 50% owner. Harmer argues that without this information, the award is without an evidentiary basis and should be reversed.

¶ 111 Harmer further argues that the "missing" $550,000 in revenue and unsupported costs of sale cannot be the basis of the jury's award, because Lynch: never tied this money to any

wrongdoing by Harmer; acknowledged that he did not see these funds on Harmer's tax returns; did not explore any alternative explanations, such as the missing funds were a result of customers who failed to pay; and did not count any sales in his analysis unless he had an invoice from both Evolution Racing and Aerospoke. Harmer maintains that the mere fact that the money is unaccounted for is not grounds for finding that Harmer breached some duty to Evolution Racing or Polansky. Harmer argues that even if he had improperly taken that money, his total distributions then would have exceeded Polansky's by only $3,500.

¶ 112 Harmer argues that the decline of the company's value also cannot be the basis of the jury's award. Harmer argues that no one testified that he caused the decline, but rather the undisputed evidence was that the revenue declined because the market was already saturated. Harmer contends that, even otherwise, there was no process whereby the jury could have turned the $1.2 million decline into a $400,000 verdict. Similarly, Harmer argues that the supposed excess shipping, telephone, and travel charges cannot be the basis for the jury's award, as Lynch himself claimed these totaled just $216,000.

¶ 113 Polansky notes that the jury verdict form asked the jury to assess the amount of damages to him personally, and he also notes that Harmer did not object to the jury instruction or propose an alternative instruction. Polansky further points out that the jury received an instruction form defining an LLC member's fiduciary duty, which included accounting to the company and acting as a trustee of its assets, acting fairly, and refraining from competing with the company.

¶ 114 Polansky argues that in breach of these duties, Harmer used Evolution Racing as a "personal ATM," as shown by evidence that: Harmer requested that some customers make checks out to him personally; Harmer instructed Frasure to use an Evolution Racing credit card for charges unrelated to its business; and Harmer improperly paid personal expenses from

company funds, "competed with Evolution Racing in the shipment of sulkies," and overpaid himself for various Evolution Racing expenses.

¶ 115 As for the amount of damages, Polansky argues that taken cumulatively, the numerous categories of damages Harmer identified more than support a damage award of $400,000, even considering that Polansky had a 50% interest in the company. Polansky argues that Harmer failed to account for $552,000 of company revenue, and since Lynch confirmed that none of this money went to Polansky, the only other place for it to go was Harmer's pockets, which corresponds to Frasure's testimony that customers wrote checks directly to Harmer. Polansky argues that "Harmer's attempts to negate the evidence of missing revenue by arguing that he and Polansky received disproportionate distributions completely lacks merit given the overwhelming evidence *** that Polansky's 'distributions' came in the form [of] credits against bogus training bills."

¶ 116 Polansky also cites Lynch's testimony that Harmer overpaid himself $164,000 for shipping, $26,000 for reimbursed travel expenses, and $26,000 for telephone bills. Polansky argues that when these amounts are added to the $552,000 in missing revenue and divided by two based on the parties' equal interests in the company, the jury had to find only that Polansky suffered additional harm of less than $20,000 from Harmer causing the company to significantly decrease in value over just a three-year period.

¶ 117 We agree with Polansky in that Harmer may not rely on the jury instructions as a basis for reversal, for there is no indication that he objected to them at trial and tendered an alternative instruction. See *Studt*, 2011 IL 108182, ¶ 19. We also agree with Polansky that the jury's determination that Harmer breached his fiduciary duties was not against the manifest weight of the evidence given that there was over $500,000 of revenue not accounted for; Frasure testified

that Harmer asked customers to make checks out to him personally and instructed Frasure to use a company credit card for non-company expenses; Harmer used the credit card for personal purchases; and Lynch testified that Harmer overpaid himself a total of $216,000 through excess shipping expenses, travel expenses, and telephone bills.

¶ 118 That being said, we also agree with Harmer that a jury's award based on the decline in the company's value would be against the manifest weight of the evidence, as there was no evidence that Harmer's actions caused the company to steeply decline in value. Rather, the evidence showed that Harmer took action to support the company's longer-term viability, such as recalling and fixing sulkies with design flaws and creating a new sulky model when the market had become saturated with Evolution Racing bikes. Therefore, the decrease in the company's value cannot support the jury's damage award.

¶ 119 Lynch testified that Harmer overpaid himself a total of $216,000 for shipping, travel expenses, and telephone bills. He also testified that there was a total of $551,000 in revenue and unsupported cost of sales unaccounted for in the company. Therefore, the jury could have properly based a verdict on these amounts. However, when these two figures are added together, they total $767,000. Since Harmer and Polansky were each 50% owners of Evolution Racing, the damages to Polansky would be only half this amount, which is $383,500. Therefore, we agree with Harmer that the jury's $400,000 damage award was against the manifest weight of the evidence and cannot stand. Moreover, we may not simply reduce the award to $383,500 because even that figure does not take into account the undisputed testimony that Polansky received $547,500 more in distributions from the company than Harmer. Although Polansky urges us to ignore these excess distributions on the basis that he received them in the form of credit against "bogus" training bills, Polansky conveniently disregards the fact that the jury already

compensated him for the fraudulent training bills by awarding him $265,000. Therefore, the difference in distributions favoring Polansky should have been accounted for in some manner when calculating damages. *Cf. State Farm Mutual Insurance Co. v. Hervey*, 353 Ill. App. 3d 162, 164 (2004) (it was against the manifest weight of the evidence for the jury to completely disregard portion of car rental bill paid by insurance company). As we subsequently discuss, we have no basis on which to disturb the jury's separate award of $32,000 for Polansky for the difference in distributions he and Harmer received *after* the 2009 contribution agreement, so that amount should be considered on remand when accounting for the impact of distributions on damages for breach of fiduciary duty.

¶ 120 In sum, the jury's $400,000 verdict for Polansky on his claim of breach of fiduciary duty was against the manifest weight of the evidence because, based on the evidence, it bears no reasonable relationship to the loss he suffered from the breach. See *Control Solutions, LLC*, 2014 IL App (2d) 120251, ¶ 55 (damage can be said to be against the manifest weight of the evidence if, *inter alia*, it bears no reasonable relationship to the loss suffered). Correspondingly, the trial court abused its discretion in denying Harmer's motion for a new trial on this issue, and we reverse this ruling. See *Lawlor*, 2012 IL 112530, ¶ 38 (trial court's ruling on motion for a new trial reviewed under an abuse-of-discretion standard).

¶ 121 Once a reviewing court find that a jury's damage award was against the manifest weight of the evidence, it must determine whether to grant a new trial limited to the issue of damages. Such a trial may be granted where: (1) the evidence amply supports the jury's verdict on the issue of liability; (2) the question of damages and liability are so separate and distinct that a trial limited to the issue of damages would not be unfair to the defendant; and (3) the record does not suggest that the jury reached a compromise verdict or that the error resulting in the jury's

damage award also affect the jury's liability finding. See *Cimino v. Sublette*, 2015 IL App (1st) 133373, ¶ 22. Here, as discussed, there was ample evidence to support the verdict that Harmer breached his fiduciary duty. It is also clear that the question of liability and damages is distinct in this situation. Finally, there is no indication of a compromise verdict or that the error in the damage award was somehow related to the jury's finding of liability. As such, we vacate the jury's $400,000 damage award and remand the cause for a new trial on the issue of damages for the finding of breach of fiduciary duty.

¶ 122 3. Breach of 2009 Contribution Agreement

¶ 123 Last, Harmer argues that the jury's verdict on the claim of breach of the contribution agreement was against the manifest weight of the evidence. Harmer notes that the jury awarded Polansky $100,000 for this breach, consisting of $68,000 for the difference in the parties' capital call contributions to Evolution Racing, and $32,000 for the deficiency in the distributions that Polansky received after 2009 as compared to Harmer.

¶ 124 Harmer maintains that Polansky was not harmed by Harmer's alleged failure to contribute to the company because, at most, only the company would have been harmed. Harmer maintains that no witness testified that Polansky was adversely affected, such as being required to make up for the shortfall.

¶ 125 Harmer's argument is without merit. The evidence clearly showed that the 2009 contribution agreement required each party to contribute $100,000; that Polansky contributed $100,000; and that Harmer did not contribute this amount. According to Lynch, Harmer's total contribution was $56,000. Thus, Polansky could said to be harmed in that the company did not really need the full $200,000 to keep functioning, and Polansky should have been able to

contribute less for the capital call. Accordingly, the jury's verdict that Harmer breached the contribution agreement was not against the manifest weight of the evidence.

¶ 126 Harmer argues that even if Polansky was harmed by Harmer's failure to contribute, the jury calculated damages incorrectly. Harmer points out that, under Lynch's testimony, the difference in their contribution amounts was $44,000, as compared to the $68,000 the jury awarded.[8] Harmer argues that if we do not reverse the jury's verdict entirely on this issue, we should reduce this portion of its award from $68,000 to $44,000.

¶ 127 The jury also awarded $32,000 to Polansky as the "deficiency in the distributions received by Polansky as compared to the distributions taken by Harmer following the 2009 Contribution Agreement." Harmer argues that the contribution agreement provided that the parties would receive equal distributions until each had been repaid their $100,000 contributions. Harmer notes that Lynch testified that after the contribution agreement, Harmer took out $91,000 in distributions while Polansky received $40,000. Harmer maintains that this testimony ignores at least $30,000 in distributions that Polansky received as credits against his training bills after the contribution agreement was signed. Harmer therefore argues that his distributions exceeded Polansky's by only $21,000, so the jury's award should be reduced to half of this amount, being $10,500.

¶ 128 Polansky simply argues that the jury's damage award of $68,000 was supported by the evidence, without specifying the evidence that could lead to such a calculation. He also does not specifically address the $32,000 awarded by the jury.

[8] The $68,000 award was specified on the jury verdict form to be the "difference between the contribution made by Polansky and the contribution made by Harmer pursuant to the 2009 Contribution Agreement."

¶ 129 We agree with Harmer that the jury's award of $68,000 for the difference between the amounts the parties contributed under the 2009 agreement was against the manifest weight of the evidence in that it does not bear a reasonable relationship to the loss suffered, as under the testimony of Polansky's own expert, Lynch, the difference in the contribution amounts was $44,000. While we have cited caselaw holding that a jury may properly decrease an expert's damage calculation, we have not found any caselaw holding the reverse, that a jury may award more in damages than the calculation of the prevailing party's expert. We also find no basis in other witnesses' testimony for the increase. Accordingly, the trial court abused its discretion in denying Harmer posttrial relief on this issue, and we reverse that ruling. We agree with Harmer that the proper remedy is to reduce this portion of the jury's award from $68,000 to $44,000.

¶ 130 The subject of the deficiency in distributions after the 2009 contribution is more difficult to tackle. While Harmer argues that Polansky received over $30,000 in distributions as credits toward training bills in addition to the $40,000 Lynch testified he received in distributions, this is not clear in the evidence, as Lynch did not specify how Polansky received the distributions. In fact, Polansky testified that he received a total of $683,000 in distributions from Evolution Racing in the form of credits for training bills, so the $40,000 testified to by Lynch could easily be interpreted to be distributions through credits. Therefore, we find no basis in which to reduce this portion of the jury's award to $10,500. Rather, Lynch's testimony that Harmer took out $91,000 in distributions after the contribution agreement while Polansky took out $40,000 would support a verdict up to $51,000 on this issue. As the jury awarded less than this amount, $32,000, we cannot say that the award was against the manifest weight of the evidence. See *F.L. Walz, Inc.*, 224 Ill. App. 3d at 734 (we will not invalidate a verdict just because the jury reduced

an expert's damage calculation). However, as previously stated, this award should be considered on remand in the determination of damages for Harmer's breach of fiduciary duty.

¶ 131 B. Polansky's Cross-Appeal

¶ 132 1. Motion to Dismiss Harmer's Complaint

¶ 133 Turning to Polansky's cross-appeal, Polansky first argues that the trial court erred in denying his motion to dismiss Harmer's 2013 complaint based on prior dismissals for discovery sanctions. Polansky argues as follows. Harmer's first, 2011 action for unpaid training bills was dismissed as a discovery sanction. The trial court then rejected Harmer's attempt to reinstate the case after the first dismissal because he still had not complied with outstanding written discovery. After Harmer attempted to re-file his case in Cook County, that court dismissed it, also recognizing that Harmer had still failed to comply with discovery. However, on Harmer's third attempt to revive his case without complying with discovery, the trial court abused its discretion and allowed the claim to proceed.

¶ 134 Polansky cites section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2012)), which allows for involuntary dismissal if there is another action pending between the same parties for the same cause. The goal of section 2-619(a)(3) is to avoid duplicative litigation. *Illini Environmental, Inc. v. Environmental Protection Agency*, 2014 IL App (5th) 130244, ¶ 40. A dismissal under this section is not an adjudication on the merits but rather serves to suspend the proceedings and allow the plaintiff the opportunity to renew the claim at another time and/or in a different forum. *Id.* In determining whether to grant a section 2-619(a)(3) motion, the court should consider comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum. *Kellerman v. MCI Telecommunications Corp.*,

112 Ill. 2d 428, 447 (1986). Whether to grant a section 2-619(a)(3) motion is within the trial court's discretion. *Id.*

¶ 135 Polansky argues that Harmer's 2011 and 2013 cases met the same cause and same parties requirement of section 2-619(a)(3), and he argues that the 2013 case also satisfied the *Kellerman* factors. Particularly, he argues that the trial judge who ruled on the motion to dismiss the 2013 case, who was different than the judge presiding over the 2011 case, failed to consider Harmer's vexatious harassment in repeated attempts to reinstate his case without complying with discovery.

¶ 136 Harmer points out that he reasserted his claims as counterclaims in Polansky's action, and the trial court rejected Polansky's attempts to dismiss them. Harmer also argues that his 2013 case was reassigned to the judge presiding over the original 2011 case within three months of his filing the 2013 case. The case was officially consolidated on March 20, 2014. Harmer argues that, therefore, any concerns about differing trial judges were alleviated. Harmer maintains that the original judge also rejected Polansky's attempts to dismiss the 2013 case, though he did order some discovery sanctions. Harmer argues that the alleged discovery non-compliance was presumably cured to the satisfaction of the original trial judge, who allowed his claim to proceed.

¶ 137 Polansky responds that the original judge who had dismissed Harmer's case retired, so the case was reassigned to his successor. Polansky argues that, even otherwise, the subsequent transfer and consolidation does not affect the error in the denial of his section 2-619(a)(3) motion.

¶ 138 We agree with Harmer that the trial court acted within its discretion in denying Polansky's section 2-619(a)(3) motion. The original dismissal of Harmer's complaint was without prejudice, meaning that it was contemplated at the outset that he would be able to re-file

his action. See *Romo v. Allin Express Service, Inc.*, 219 Ill. App. 3d 418 (1991) (where trial court dismissed the plaintiff's motion for relief from judgment without prejudice, it invited re-filing the motion). Even a dismissal under section 2-619(a)(3) contemplates re-filing. See *Illini Environmental, Inc.*, 2014 IL App (5th) 130244, ¶ 40. Although the 2011 and 2013 actions were not before the same trial judge, they were certainly in the same court, making many of the *Kellerman* factors inapplicable. Moreover, Harmer's cases were ultimately consolidated, and his counterclaims in Polansky's case requesting the same relief remained standing, so in the end his claims would have come before the jury regardless. Thus, this issue is ultimately moot. See *Ballard RN Center, Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2014 IL App (1st) 131543, ¶ 55 (an issue is moot where no actual controversy exists between the parties or where, due to the circumstances, the court is unable to grant effectual relief).

¶ 139 2. Verdict for Unpaid Horse Training Services

¶ 140 Polansky next argues that he is entitled to judgment *n.o.v.* or a new trial on Harmer's claim against him for unpaid training services because Harmer failed to introduce any evidence to support his claim. As stated, a trial court should grant a motion for a new trial only if the verdict is contrary to the manifest weight of the evidence, and we will reverse a trial court's ruling on a motion for a new trial only if the trial court abused its discretion. *Lawlor*, 2012 IL 112530, ¶ 38. A trial court should grant judgment *n.o.v* only where all the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on the evidence could ever stand. *Id.* ¶ 37. When a defendant moves for judgment *n.o.v.*, there must be a total failure or lack of evidence to prove any necessary element of the plaintiff's case. See *id.* We review *de novo* the trial court's ruling on a motion for judgment *n.o.v.* *Id.*

¶ 141 Polansky argues that Harmer failed to submit any evidence at trial in support of his claims for outstanding training bills aside from his own testimony. Polansky notes that the jury submitted a question requesting such support.[9] He argues that all competent evidence adduced at trial demonstrates that Harmer's training charges were largely fraudulent, as shown by the jury's verdict for fraud, yet the jury failed to consider this fact in rendering judgment in Harmer's favor.

¶ 142 Harmer argues that he testified at trial that when Polansky stopped using his services, Polansky owed him $129,926 for training 25 to 30 horses for the months of November, December, and part of January. Harmer argues that this amount was based on his personal knowledge, unlike Polansky's calculations of allegedly fraudulent training charges. Harmer maintains that, even otherwise, the jury took fraudulent charges into account by awarding him just $79,000, thereby reducing the award to account for goods and services that it determined were not reasonably necessary.

¶ 143 We conclude that Polansky is not entitled to judgment *n.o.v.* or a new trial on Harmer's claim of unpaid training services. It is undisputed that the parties had an agreement for Harmer to train Polansky's horses, and that the daily rate was $50. Harmer testified that Polansky picked up his horses in December 2009 and January 2010 without paying their bills. He testified that Polansky's charges were generally $60,000 to $70,000 per month and that Polansky owed $129,926.04 for November and December 2009 and part of January 2010. A plaintiff does not

[9] The jury sent a question asking, "Is there any justification for the request of $129,000 in favor of Harmer? Or [*sic*] any paperwork for us to view?" The trial court replied, "Whether there is any justification for the request of $129,000 by Mr. Harmer is for you to decide." It also directed them to exhibit 18, which was the December 2009 bill Polansky received.

have to produce documentary evidence to prove damages (see *1472 N. Milwaukee, Ltd.*, 2013 IL App (1st) 121191, ¶ 32), so the jury could properly rely on Harmer's testimony in determining that Polansky owed money for unpaid training services. Even otherwise, as the trial court pointed out in its response to the jury's question, the bill for December 2009 was in evidence. The jury also had exhibit 14, which included Polansky's summary of his charges for 2004 to 2009. While the jury ultimately determined that Harmer had fraudulently inflated charges for the bills Polansky had paid, there was no instruction for it to use that amount as a setoff for unpaid training services. Moreover, the jury could properly reduce the amount Harmer requested in determining the reasonable charges Polansky still owed, and it was logical for it to do so here if it believed that a portion of the training charges were fraudulent. See *Nilsson*, 313 Ill. App. 3d at 761 (a jury may award party less than the damages claimed).

¶ 144 3. Claims for Unjust Enrichment

¶ 145 Polansky's third argument in his cross-appeal is that he is entitled to judgment *n.o.v.* or a new trial for his claim that Harmer was unjustly enriched by improperly representing to Polansky that the value of Calfin's interests in Evolution Racing and in certain horses was $700,000 instead of the $500,000 that Harmer agreed to pay Calfin. Polansky argues that the evidence adduced at trial showed that Harmer pocketed the $200,000 difference, to Polansky's detriment.

¶ 146 To prove unjust enrichment, a plaintiff must show that the defendant has unjustly retained a benefit to the plaintiff's detriment, violating the fundamental principles of justice, equity, and good conscience. *Chicago Title Insurance Co. v. Teachers' Retirement System*, 2014 IL App (1st) 131452, ¶ 17. Unjust enrichment is not an independent cause of action but rather a remedy for unlawful or improper conduct as defined by law, including fraud, duress, or undue influence. *Id.* It may also be based on contracts implied in law, but this theory does not apply when the

contract is express, whether oral or written. *Id.* Unjust enrichment is an equitable remedy, so it is available only when there is no adequate remedy at law. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (2005).

¶ 147 We conclude that Polansky's argument is without merit. Harmer purchased Calfin's interest in Evolution Racing and co-owned horses and sold them to Polansky, albeit in reverse order. These were two separate transactions, so the jury could reasonably conclude that Harmer could negotiate each transaction independently, to his own benefit. Indeed, had Polansky wanted to ensure that he was paying the same price for the interests as Calfin was receiving, he could have arranged to buy the interests directly from Calfin. In short, Polansky is not entitled to judgment *n.o.v.* or a new trial on his unjust enrichment claim.

¶ 148 4. Intentional Misrepresentation Claim

¶ 149 Polansky further argues in his cross-appeal that he is entitled to judgment *n.o.v.* or a new trial on his claim of intentional misrepresentation. According to the jury instruction, Polansky claimed that Harmer knowingly made the false statement that certain horses Polansky owned or co-owned could no longer race and had no residual value. Polansky claimed that he reasonably believed Harmer's statement and relinquished his ownership interests in these horses without consideration, suffering damages as a result. Harmer denied that he made false statements in this regard and that Polansky was damaged.

¶ 150 The elements of intention misrepresentation are: (1) that the defendant made a statement, (2) of a material nature rather than an opinion, (3) that was untrue, (4) and was known by the defendant to be untrue, (5) that was made for the purpose of inducing reliance, (6) that the plaintiff relied on to his or her detriment (7) and the reliance led to the plaintiff's injury. *Richmond v. Blair*, 142 Ill. App. 3d 251, 254-55 (1985). A party is not justified on relying on

representations when he had ample opportunity to ascertain their truth before acting. *Tan v. Boyke*, 156 Ill. App. 3d 49, 57-58 (1987). The question is whether, considering the facts known the plaintiff and those which could have been discovered through ordinary prudence, the plaintiff had a right to rely on the defendant's false representations. *Id.* at 58.

¶ 151 Polansky argues that the uncontroverted evidence showed that Harmer intentionally misrepresented some horses' quality and value in order to collect undisclosed commissions and to induce Polansky to cede ownership so that Harmer could convert them for his own benefit. Polansky argues that the evidence also showed that he was entitled to rely on Harmer's representations because he put his trust in Harmer as an expert in horse training and breeding, and he would have had to engage in a complex and independent analysis of horse quality to reveal the falsity of Harmer's misrepresentations.

¶ 152 Harmer argues that the intentional misrepresentation claim did not encompass the undisclosed commissions, which was the subject of a separate fraud claim. Harmer further argues that Polansky does not point to any actual misstatements that Harmer made. Harmer notes that in his statement of facts, Polansky does describe the event in which Harmer signed Polansky's name to an ownership form that resulted in Harmer obtaining Polansky's interest in a horse named Just A Little Respect, for no consideration. That horse had an offspring called No Respect who had a successful racing career. Harmer points to his testimony that after Just A Little Respect was injured, he told Polansky that the horse's racing career was over but that she could be a brood mare. Harmer testified that Polansky said that he did not want any more brood mares and was tired of the breeding business, and that Polansky agreed to let Harmer have the horse. Harmer also testified that he signed Polansky's name to the ownership transfer form with Polansky's permission, as he had done about 85 other times. Harmer argues that his testimony

showed that he did not make any false statements but rather gave Polansky the facts, and that Polansky made an informed and voluntary decision to give up his interest in the horse.

¶ 153 Harmer further argues that even if he made a false statement about the residual value of Just A Little Respect or any other horse, it would not be actionable under an intentional misrepresentation theory because a statement must be of a material nature rather than an opinion. Harmer argues that Illinois courts have long-recognized that the quality and value of a horse is subjective, so any statement he made about a horse's quality and value would be considered opinion. See *Chicago & N.W. Ry. Co. v. Calumet Stock Farm*, 96 Ill. App. 337, 340 (1901) ("There is probably no matter concerning which the opinions of experts vary more widely and in which it is so difficult to ascertain the exact facts as with reference to the value of trotting and other high priced horses.").[10]

¶ 154 We conclude that the trial court did not err in denying Polansky's request for judgment *n.o.v.* or a new trial on his claim for intentional representation. As Harmer highlights, according to his testimony, he told Polansky that Just A Little Respect was injured but could be used as a brood mare. Harmer testified that Polansky was not interested in having more brood mares and said that Polansky could have her. Harmer testified that he signed Polansky's name to the ownership transfer form with Polansky's permission, as he often did. Harmer offered similar testimony regarding another horse, My Metallica. A jury is free to determine witnesses' credibility and weigh their testimony, and it may accept some evidence and reject other evidence. *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 180 (2008). Therefore, the jury could have accepted Harmer's testimony that Polansky gave him his interest in Just A Little Respect

[10] We note that appellate court decisions before 1935 are not binding authority. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 95 (1996).

and My Metallica, which would defeat Polansky's intentional representation claim. While Polansky seems to question how the jury could accept that he gave up his interest with no consideration, the jury could have simply believed Harmer's testimony that Polansky said that he was tired of the breeding business. Indeed, Polansky admitted to continuing in the racehorse business despite net losses totaling over $1 million, from which the jury could infer that his decisions relating to horses were not based solely on his personal financial gain. We also agree with Harmer that allegations of undisclosed commissions were not part of Polansky's intentional misrepresentations claim but rather the subject of his fraud claim, which we turn to next.

¶ 155 4. Claim of Fraud

¶ 156 Polansky argues that he is entitled to judgment *n.o.v.* or a new trial on his claim that Harmer fraudulently facilitated the purchase of horses by Polansky for more than their sales prices. Polansky contends that the undisputed evidence at trial showed that Harmer acted as a dual agent in transactions for horse purchases, telling Polansky that the sale prices for such horses was more than the prices received by the seller so as to receive an undisclosed commission. Polansky argues that he had a right to rely on Harmer's recommendations and advice, and Harmer's intent to deceive was clear from his conduct.

¶ 157 Harmer notes that the verdict form on the fraud claim asked jurors: "Did Harmer make false statements of material fact regarding the sale price of horses purchased by Polansky with Harmer's facilitation?" The jury responded, "No." Harmer argues that there is nothing in the record that would support any other answer. According to Harmer, the only evidence Polansky presented on this claim was that Harmer communicated the sale price of a horse named Pujols to Polansky, and that sale price included a brokerage fee of $15,000 or $20,000. Harmer testified at trial that he paid the money to the seller's trainer, though in his deposition he testified that he

received the money. Harmer argues that regardless of who received the commission, there was no evidence that Polansky could have paid $15,000 to $20,000 less for Pujols or that Harmer misrepresented the sale price. He maintains that, to the contrary, he saved Polansky almost $40,000 off the initial sale price of $300,000. Harmer argues that even if he had made false statements about Pujols's price, Polansky did not present sufficient evidence for the jury to reach a verdict in his favor on the fraud claim, because Polansky never established for how many transactions Harmer received a fee or the fee amounts.

¶ 158 To prevail on a claim of common-law fraud, the plaintiff must show: (1) a false statement of material fact; (2) the defendant knew or believed that the statement was false; (3) an intention to induce the plaintiff to act; (4) the plaintiff reasonably relied on the statements' truth; and (5) the plaintiff was damaged as a result of his reliance. *Phillips*, 2014 IL App (1st) 122817, ¶ 71. Here, the jury did not get past the first element, as it determined that Harmer did not make false statements of material fact regarding the sale prices of horses.

¶ 159 We conclude that the evidence on this issue does not so overwhelmingly favor Polansky such that no contrary verdict based on the evidence could ever stand, nor is the verdict against the manifest weight of the evidence. Quite simply, the jury could have determined that any commissions were part of the sale prices of the horses, so Harmer did not make any false statements of material fact about the horses' prices. Accordingly, Polansky is not entitled to judgment *n.o.v.* or a new trial on this issue.

¶ 160 5. Setoff

¶ 161 Last, Polansky alternatively argues that the trial court erred in allowing Harmer to execute on the judgment in his favor and against Polansky for $79,000. Polansky argues that the trial court should have instead used this amount as a setoff for the verdict in his favor, as

Polansky had requested in his posttrial motion. Polansky maintains that the trial court's rationale for denying this request, which was that the case involved two separate actions consolidated only for convenience, does not have a sound basis in Illinois law under sections 12-276 and 12-177 of the Code of Civil Procedure (735 ILCS 5/12-176, 12-177 (West 2012)).

¶ 162 Harmer argues that under section 12-177, setoff is available to a judgment debtor at the judgment debtor's sole discretion, and it may be applied at the time the judgment creditor seeks to enforce its judgment. Harmer argues that there is nothing in the statute that requires a trial court to set off mutual judgments when the judgments are entered absent a judgment debtor's request.

¶ 163 Section 12-176 provides: "Judgments between the same parties may be set off, one against another, if required by either party, as prescribed in the following Section." 735 ILCS 5/12-176 (West 2012). Section 12-177 states, under the heading "Multiple judgments":

> "When one of the judgments is delivered to an officer to be enforced, the debtor therein may deliver his or her judgment to the same officer, and the officer shall apply it, as far as it will extend, to the satisfaction of the first judgment, and the balance due on the larger judgment may be collected and paid in the same manner as if there had been no set-off." 735 ILCS 5/12-177 (West 2012).

Set-off is not allowed in certain situations under section 12-178 (735 ILCS 5/12-178 (West 2012)), none of which are applicable here.

¶ 164 In construing a statute, our primary goal is to ascertain and give effect to the legislature's intent, which is best indicated by the plain and ordinary meaning of the statute's language. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 12. We agree with Polansky that the trial court's reasoning behind denying the setoff request was incorrect, as the statute does not

prohibit judgments from consolidated cases from being set off against each other. That being said, we also agree with Harmer that under section 12-177, the trial court is not required to set off awards at the time of entering the judgment, as the statute refers to the judgment debtor requesting setoff. Still, the court may order that judgments be set off through its inherent and statutory authority over the enforcement of its judgments. *Adam Martin Construction Co. v. Brandon Partnership*, 135 Ill. App. 3d 324, 326-27 (1985). As the trial court apparently did not realize that it had this discretion, the subject of setoff may be revisited on remand. See *Estate of Oglesby v. Berg*, 408 Ill. App. 3d 655, 659 (2011) ("A trial court's refusal to exercise its discretion due to its belief it has none is error."); see also *People v. Jones*, 2015 IL App (2d) 120717, ¶ 4 (where a trial court erroneously believes that it does not have discretion in a matter, its failure to exercise discretion can constitute an abuse of discretion).

¶ 165 III. CONCLUSION

¶ 166 For the reasons stated, on Harmer's direct appeal, we affirm the jury's verdict in Polansky's favor on his claim of fraudulent horse training charges and its $265,000 award. We also affirm the jury's verdict that Harmer breached his fiduciary duty. However, we reverse the trial court's denial of Harmer's motion for a new trial on the issue of damages for breach of fiduciary duty, and we vacate the jury's $400,000 award on this claim as contrary to the manifest weight of the evidence. We remand the cause for a new trial limited to the issue of damages, which should also account in some manner for the impact of distributions from Evolution Racing to the parties. We affirm the jury's verdict that Harmer breached the 2009 contribution agreement and the portion of its award giving $32,000 to Polansky for the difference in distributions to the parties after the contribution agreement was signed. The portion of the jury's

award giving Polansky $68,000 for the difference the parties contributed under the agreement was against the manifest weight of the evidence, and we modify this award to $44,000.

¶ 167 On Polansky's cross-appeal, we affirm the trial court's denial of his motion to dismiss Harmer's 2013 complaint. We affirm the jury's verdict in Harmer's favor on his claim for unpaid horse training services, and its $79,000 award. We also affirm the jury's verdicts in favor of Harmer on Polansky's claims of intentional representation and fraud. Polansky's request for a setoff of damages is an issue that may be revisited upon remand.

¶ 168 Affirmed in part, reversed in part, vacated in part, and modified in part; cause remanded.