2018 IL App (5th) 160498-U

NO. 5-16-0498

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CONTEGRA CONSTRUCTION COMPANY, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 13-L-82
	)	
ROBERT V. SUTPHEN,	)	Honorable
	)	Barbara L. Crowder,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Goldenhersh and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying the defendant's motion to dismiss, which was based on the preclusive effect of the plaintiff's voluntary dismissal of claims it brought in an adversary proceeding in the defendant's corporation's bankruptcy proceeding, in denying the defendant's motion for a judgment notwithstanding the verdict, and in denying the defendant's alternative motion for a new trial.

¶ 2 The defendant, Robert V. Sutphen, appeals the March 10, 2016, judgment of the circuit court of Madison County, entered after a jury verdict awarding the plaintiff, Contegra Construction Company, LLC, $50,000 on count II of the plaintiff's complaint, which alleged a cause of action for common law fraud. On appeal, the defendant argues that the circuit court erred when it: (1) denied the defendant's motion to dismiss the

complaint based on *res judicata*, (2) denied his motion for a judgment notwithstanding the verdict (*n.o.v.*), and (3) denied his alternative motion for a new trial. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 1. *The Complaint*

¶ 5 On January 17, 2013, the plaintiff filed a complaint in the circuit court of Madison County against the defendant. The following allegations are made by the plaintiff in this complaint. The plainiff is the general contractor on a public works project for the Metro East Forensics Lab, a three-story, steel-framed structure constructed in Belleville to house a crime laboratory for the Illinois State Police. The project was administered for the State of Illinois by the Capital Development Board (CDB). Upon the CDB's award of the construction contract to the plaintiff, the plaintiff entered into a purchase order agreement (contract) with Advanced Iron Works (AIW), pursuant to which AIW was required to fabricate and deliver to the project structural steel for a specified sum. The defendant, as vice-president of AIW, executed the contract on behalf of AIW, was the sole representative of AIW during the negotiation of the contract, and is a majority shareholder in AIW.

¶ 6 Continuing with the allegations the plaintiff makes in the complaint, under the contract, the plaintiff was to pay AIW $1,283,490, which was increased by four approved change orders to $1,369,735. In accordance with the contract, the plaintiff agreed to prepay AIW for raw steel to be acquired from the steel mill and delivered to AIW, for AIW to then fabricate and deliver to the project. In accordance with CDB policy, any

contractor seeking payment for construction materials to be stored off of state property must provide certification of such materials' actual procurement using the CDB's standard form "Stored Materials Log (SML)." The SML contains a provision, referred to as the "Transfer of Title Provision," which provides that, "[u]pon the receipt of payment by the Contractor for the stored materials as indicated [on the SML], the title is hereby transferred to the State of Illinois, [CDB]." In order to receive payment from the plaintiff for raw steel procured for the project, AIW was required to complete an SML, present the materials for inspection and certification by the architect of record, request the architect of record to execute the SML, and acknowledge transfer of title of the materials referenced in the SML to the State of Illinois.

¶ 7 According to the complaint, the defendant, as representative of AIW, executed a proper SML for the project for the pay period through January 20, 2012, with respect to $52,300 of the raw steel from the mill. Thereafter, the complaint alleged the defendant created a near duplicate version of the CDB's standard SML form that omitted the transfer of title provision and submitted such altered SML for the pay period January 21, 2012, through February 23, 2012. The plaintiff, without detecting the removal of the transfer of title provision in the altered SML, submitted the altered SML to the CBD in a request for reimbursement for the procurement of such raw materials.

¶ 8 The complaint contains further allegations of wrongdoing by the defendant in connection with applications for payment that the defendant made throughout the course of AIW's work on the project. The complaint alleges the defendant misrepresented the amount of steel that it had fabricated when calculating requests for progress payments

according to the contract. It is not necessary for us to detail these allegations because the jury ultimately found in favor of the defendant with respect to these allegations, and so they are not at issue in this appeal. What is necessary to note, for purposes of context, is the complaint alleges that these misrepresentations resulted in the plaintiff's discontinuation of progress payments to the defendant. This caused the defendant to refuse to deliver critical steel pieces to the job and the relationship between the parties to break down, ultimately halting the project in mid-November 2012.

¶ 9 The complaint alleges that at the time of its filing, approximately 95 tons of raw steel were located at AIW's facility and AIW claimed title to this steel "because the [t]ransfer of [t]itle [p]rovision does not appear in the [SML]." Further, according to the complaint, the submission of the altered SML to the plaintiff meant "title [in] the remaining unfabricated steel presently in AIW's possession may not have transferred to the CDB, may remain in possession of AIW for an indefinite period of time, and may not be integrated into the project." Because the CDB had already paid the plaintiff for this steel, the complaint contends that the plaintiff would have to replace the steel at a cost of approximately $100,000.

¶ 10 Count II of the complaint, the only one which we are concerned with in this appeal, alleges a cause of action against the defendant for common law fraud with respect to the allegedly altered SML. As to the elements of this cause of action, the complaint alleges the defendant submitted the SML in an altered state knowing that the absence of the transfer of title provision meant that AIW would retain a claim of title to the raw steel. Further, the complaint alleges the submission of the altered SML was intentional in

order to induce payment by the plaintiff, and the plaintiff justifiably relied on the defendant's misrepresentations in making payment to AIW on the basis of the altered SML. All documents referenced in the complaint are attached thereto as exhibits.

¶ 11 2. *Motion to Dismiss Based on Res Judicata*

¶ 12 On October 17, 2013, the defendant filed a motion to dismiss the plaintiff's complaint, pursuant to section 2-619(a)(4) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(4) (West 2012)), based on the doctrine of *res judicata*. In his motion to dismiss, the defendant averred as follows. On November 20, 2012, AIW filed a petition for reorganization under Chapter 11 of the Bankruptcy Act (11 U.S.C. § 1101 *et seq.* (1978)). On December 18, 2012, the plaintiff filed an adversary case within AIW's bankruptcy proceeding and amended its complaint on January 24, 2013, adding counts III and IV, alleging fraud on the part of AIW. According to the motion to dismiss, counts I and II in the instant case are "carbon copies" of counts III and IV in the adversary proceeding that the plaintiff filed in AIW's bankruptcy case, except the claims in the adversary proceeding are made against AIW, while the claims in the instant case are made against the defendant, who is AIW's majority shareholder and vice-president. The motion to dismiss states that on April 19, 2013, the bankruptcy court in the adversary proceeding granted the plaintiff's request to dismiss these two counts with prejudice, and that this dismissal operated as a decision on the merits, barring the claims from being brought in the instant case.

¶ 13 The complaint in the bankruptcy court was attached to the motion to dismiss, and reflects that the plaintiff made the same allegations against AIW in the bankruptcy

proceeding as it does against the defendant in the instant case. In addition, the April 19, 2013, order of the bankruptcy court was attached to the motion to dismiss as Exhibit E, and states as follows:

> "A status conference having been held before the Court on April 12, 2013[,] and April 19, 2013, and at the request of [the plaintiff], the Court orders as follows:
>
> A. The following [c]ounts of [the plaintiff]'s First Amended Complaint filed in this Court as Adversary No. 12-01916 are hereby dismissed with prejudice:
>
> (1) Count III (Fraudulent Misrepresentation- Fraudulent Applications for Payment); Count IV (Fraudulent Misrepresentation- Altered Stored Material[s] Log)."

¶ 14 Exhibits to the motion to dismiss evidence the accuracy of the plaintiff's allegations regarding the timing of the filing in the bankruptcy case, and additionally reveal that the bankruptcy case itself was ultimately dismissed on November 22, 2013. On March 5, 2014, the circuit court denied the defendant's motion to dismiss the instant action. The defendant continued to assert *res judicata* as an affirmative defense in his subsequent answer.

¶ 15 3. *Motions in Limine: Replevin Action and Missing Transfer of Title Language*

¶ 16 On February 22, 2016, the defendant filed a motion *in limine* to bar evidence of a replevin action the plaintiff had filed against AIW in Cook County on November 2, 2012. In this motion *in limine*, the defendant made the following allegations. The replevin court did not decide any breach of contract issues. The initial order entered by the replevin

court required the plaintiff to pay AIW $221,654.40 to retrieve fabricated steel, but the plaintiff never paid AIW this or any other sum on or after November 2, 2012. The November 2, 2012, orders of the replevin court specified a process by which the parties were to continue to do business and barred the plaintiff from engaging a competing steel fabricator to perform any fabrication. Subsequent orders of the replevin court allowed the plaintiff to take certain steel as AIW fabricated it, but this was conditioned on the payment of a 1.2 million dollar bond. The replevin action "eventually dissipated" after AIW filed for bankruptcy on November 20, 2012, and could no longer fabricate steel without being paid. The motion argued that the replevin action was not relevant to the instant fraud action and that any argument, testimony, or evidence of the replevin action should be barred.

¶ 17 At a hearing on February 22, 2016, after the plaintiff's counsel argued that the replevin action was relevant to the plaintiff's mitigation of its damages in count I, counsel for the parties made the following representations to the circuit court as to the relevancy of the replevin action to count II:

> "PLAINTIFF: [The defendant] used the lack of [the transfer of title] provision as a defense in the replevin action, your Honor. He said[,] ['l]ook, it doesn't contain a transfer of title provision, so this steel is mine, [the plaintiff] is not entitled to it.'
>
> DEFENSE: He never said that.
>
> PLAINTIFF: It is all part—I'm sorry, his lawyer said it, Judge.
>
> DEFENSE: His lawyer never said it.

PLAINTIFF: It's all part of the overall scheme that [the defendant] perpetrated, and as you correctly noted, goes directly to mitigation.

DEFENSE: Your honor, I searched high and low for the use of the [SML] title language in the replevin action transcript[,] which I have. It was never even mentioned. It was not asserted by—

PLAINTIFF: I'm sorry, Judge. It was in the bankruptcy proceeding.

DEFENSE: Well, no. I'm talking about the replevin action, and it was not used in the replevin action. The replevin action is irrelevant. What they're claiming is they have steel that wasn't delivered. What happened in the replevin action is irrelevant because everything that [c]ounsel just said is either incorrect or subject to dispute. [The defendant] cooperated, but he never got paid. So, of course, when [the defendant] doesn't get paid and the replevin court says get paid, that's going to create problems."

¶ 18 As the hearing progressed, the plaintiff's counsel made the following representations regarding what occurred during the replevin proceeding:

"The first order that was entered which I believe was on November 16, 2012[,] provided a right for [the plaintiff] to execute the replevin. [The plaintiff] initially went out to the yard and began an effort of collecting pieces of steel subject to the replevin order. Within literally minutes of initiating and mobilizing[, AIW] filed bankruptcy, and the initial effort to execute a replevin was immediately halted. *** I think two trailer loads was all the steel that was taken, was loaded, before the bankruptcy filing. Those trucks went away. The parties then went through the

bankruptcy proceeding. And after several hearings at that time [the bankruptcy court] remanded the replevin portion of the dispute between [the plaintiff] and AIW back to *** Cook County to clarify any order of replevin that was issued on November 16th.

The date of the second order, which I'm blanking out on, [the judge in the replevin action] eventually remanded the replevin order to clarify which had a more detailed piece list, at which time several days later the Cook County Sheriff's Department facilitated a second replevin effort which took place. I don't have the exact tonnage, but there were multiple truck loads of steel taken at that time until [c]ounsel for [AIW], who was at the site of the replevin effort, requested that a Cook County sheriff deputy suspend the replevin order to allow additional time to seek a third clarifying order from [the Cook County judge].

There was later a third order entered several days later. Don't have the exact date of that in front of me. The third order was very clear. It even includes the hand notations of [the defendant] indicating pieces of steel that he acknowledges were remaining at the site and were fully fabricated in accordance with that order. Several days later, which I believe was, it [was] after Christmas so I want to say it was the 29th of December of that year, the Cook County Sheriff's Department facilitated a third visit to the AIW site, in which all the remaining steel that was identified subject to the order was taken. There were several pieces previously identified in the replevin proceeding that were left at the site, and the order says a reference to it as the raw steel. And the raw steel was never taken and

it remained at the AIW site, and to this date we're not quite sure what became of that steel.

The raw steel is what's really at issue with the transfer of title provision in the [SML], because that frustrated the ability of both the bankruptcy court and the replevin court to acknowledge that a transfer of title had occurred in that remaining raw steel to the State of Illinois as it exists under the original would-have-been language in the [SML] form."

¶ 19 As further discussion ensued regarding the relevance of the replevin action to the plaintiff's claimed damages in count I, and defense counsel argued that evidence of the replevin action would confuse the jury, another exchange between defense counsel and the circuit court occurred as follows:

"DEFENSE: I dispute what [c]ounsel said. [The plaintiff's counsel] repeated what I know isn't true, that the [SML] title language came up in the replevin.

COURT: No; he said it came up at the bankruptcy court, which is why I thought—which is why it was remanded back to the state court.

DEFENSE: That's what [co-counsel] said. But then [counsel] stood up and said again towards the end that it came up in both the bankruptcy and the replevin action. It didn't come up in the replevin action.

COURT: Well, if the bankruptcy court—well, I guess it would depend on how you looked at it. It depended on what the bankruptcy judge said when they remanded it. So anyway, what we're down to, depending on the issues that we

have at trial, I may or may not—I may try to limit you to a very less confusing presentation to the jury as to—really you just have to be able to tell the jury the number you're asking for and how come. So, you know, you'd say we got this amount on site, we got this amount—and we can argue about how you phrase it—but the damages we're seeking are X and that's why we go from there. So, I guess in terms of the replevin I am not—I am not granting the motion at this moment, because the way the pleadings are now there's still an entire mitigation action and I do think it goes to mitigation. But, I'm telling you that I am likely to really limit your ability to give it to the jury. So, to that extent I'm reserving final ruling on it, but I'm telling you now that you're going—we're not going to give the jury that entire background of other litigation. *** Because you can't expect—you guys all disagree as to exactly what happened. You can't expect them to be able to pick through it. And it's really for your damage issue, and that's all you need to know it for."

¶ 20 On February 29, 2016, the defendant filed a motion *in limine* to bar evidence or argument that the defendant used the missing transfer of title language to gain title to steel. According to this motion, the plaintiff previously filed a replevin action in the circuit court of Cook County to gain access to steel, both fabricated and "raw," which the defendant refused to ship due to the suspension of progress payments. The motion reminded the circuit court that the plaintiff's counsel conceded at the February 22, 2016, hearing that the missing language was never used by the defendant or AIW as a defense in the replevin action. In addition, the motion averred that the defendant never used the

missing language as a defense in the bankruptcy action. Finally, the defendant argued that no material had been produced in discovery that shows that the defendant or AIW ever made a claim to the plaintiff concerning the disputed steel based on the missing transfer of title language.

¶ 21 At a hearing on all pending motions that took place on February 29, 2016, the circuit court revisited the defendant's previously filed motion *in limine* to bar evidence of the replevin action. At this time, plaintiff again argued that the replevin action was relevant to its reply to the defendant's affirmative defense of failure to mitigate damages, in that the replevin action shows that the plaintiff took steps to recover the steel. Counsel for the plaintiff stated, "[i]f failure to mitigate remains an issue, then our argument was we are able to describe in detail the steps [the plaintiff] had to go through to get the steel.

¶ 22 The defendant again argued the replevin action was irrelevant, as there was no final order entered therein and "it fell apart because [AIW] went into bankruptcy." The defendant further argued the replevin action was a "collateral issue," stating:

> "What I think the jury needs to know is what counsel suggested, that AIW was terminated, and that after that [the plaintiff] tried to recover steel. They recovered some, they didn't recover others. And they have a log, you know, which we may dispute in regards, but they have a log of what they got and what they didn't get. And so that's all the jury needs to know. How is going beyond that going to prove whether—make it more or less likely that [there] was fraud either [in] the payment applications or the [SML]."

¶ 23 The circuit court ruled from the bench:

"I'm not going to bar anybody from mentioning that there was a replevin. I would most likely limit the details, simply because the whole point of the replevin is [the plaintiff] pursued [the defendant] in an additional avenue, another way, and got some additional steel that you are giving [the defendant] credit for here. So however that plays out—so I'm not going to bar anybody from *** talking about the fact that there was an additional action. *** So to the extent that the motion was to bar any discussion of replevin, I am denying that. And if you get too far, I would expect there to be objections and I will sustain those, because we're not confusing the jurors with multiple levels of litigation. But certainly it's pertinent to [the plaintiff's] efforts in this case."

¶ 24 During the same hearing, the circuit court heard argument on the defendant's motion to bar evidence that the defendant or AIW ever used the absence of the transfer of title provision in the altered SMLs to claim title to steel. Counsel for the defendant argued, as per his motion, elaborating as follows:

"[T]he last time time we were here I said I had reviewed all the replevin transcripts and it didn't come up. And [the plaintiff's counsel] said, okay, well, so it didn't come up in the replevin because it did come up in bankruptcy. I have reviewed all the bankruptcy transcripts, which I have here on my computer, and all the bankruptcy orders, and there's not one mention of it.

The fact is that [the defendant] never, ever told [the plaintiff] in any form, when they were doing business, hey, you can't claim this steel because of the

[SML], it's missing. He never sent an e-mail, never sent a letter, there's no document, there's not even oral testimony that happened.

There's no mention of the [SML] in the replevin action, and there's no mention in any replevin order of the [SMLs], it was a total non-issue. In bankruptcy, there's no mention in any transcript hearing—and they had days, they had like, I think, seven to ten days of hearings—no mention of the [SMLs] at all.

Now you would think, if their theory was correct, that [the defendant] would be the one saying, hey, you can't claim title to this steel or whatever, you can't have it, because this language is missing. He and his lawyers never made any suggestion. In fact the words never came up, the words [SML] never came up in the bankruptcy hearings, nor in the orders. The only place it ever came up was in Count IV of their adversary filing in bankruptcy, which, by the way, that adversary action was remanded to the state court in Cook County. But the point is it never came up. [The defendant] never made an argument based on it, anywhere.

And, so, in the alternative, absent some evidentiary proof, some document, order motion, something, saying that [the defendant] or AIW said [']no, we're not going to give you the steel because of the claims of the [SML],['] they shouldn't be allowed to argue.

And also, slightly late in the matter, what I would like to point out to the [c]ourt is that in the bankruptcy proceeding, title was discussed, but it was discussed by counsel for [the plaintiff], *** and she stood up in open court and she

said, we have filed a UCC lien—she was claiming ownership, because of the UCC lien.

So there was litigation mentioned, and somebody did attempt to claim ownership based on the UCC lien. There is no evidence that anyone ever even raised the issue of [SMLs]. So I think it would be unfair to allow any mention of the [SMLs] when it comes to claim of title. They want to go with their other theory which claims that somehow the altered language was made to induce payment, that's what they pled. I think that's, you know, I don't agree with them, but I think that's fairly at issue in the case. But I don't think a claim of title is at issue."

In response, counsel for the plaintiff asserted the following:

"Your honor, as he mentioned, title did come up in the bankruptcy proceeding. And frankly, Judge, there was a distinction in the replevin order on what steel [the plaintiff] could and could not get. [The plaintiff] was only able to get fully fabricated steel. The distinction was based on the transfer of title provision. [The plaintiff] could get everything that was fully fabricated, but could not touch steel that was earmarked for this job but had not been fully fabricated. We're entitled to talk about it. [Plaintiff's general operations manager] will testify that was his understanding of what occurred and why he had to leave tens of thousands dollars worth of steel at the AIW facility in Cook County. Steel that then had to be replaced down here. So it's been brought up, it's most certainly going to come up, and the jury is entitled to hear it, Your Honor."

¶ 25 In response to the plaintiff's argument, the defendant stated the following:

"Your Honor, what did come up, [the defendant] claimed non-payment. That was what the issue was in all of these cases, bankruptcy and replevin. They said, the lawyers said, look, we have a contract, we have proof of change orders, you're not paying, I'm not going to ship until I get paid. That was what he claimed. He never claimed, not him when he testified, and not his lawyers, that we're not shipping because there's some language missing on two of the three [SMLs]. It just didn't come up.

So it would almost be bad faith, I believe, to make that kind of argument, absent some kind of evidence in the record. See, it's one thing to make a pleading, but if there's no evidence for it, by the time you get to trial, why should a lawyer be allowed to argue that's what happened. It didn't happen."

The following colloquy then occurred between the court and defense counsel:

"COURT: But the whole point of a replevin is who [is] entitled to possession. If you've got something that I'm entitled to possession because I own it, so I thought that was part of the issue, was that because that paragraph was gone, they couldn't prove that they owned the [raw] steel because they didn't have anything that was—

DEFENSE: No, that was not the issue. This contract was written where they prepaid for the [raw] steel. They paid for [raw] steel when it was ordered. Okay, unlike the other work, which was paid for as progress went on. So from day one of this job, everyone knows [the plaintiff] paid for this steel. The problem

was, when they stop paying, you know, the progress payments, his contract says, we have a right to suspend work. We have a right—and we're going to suspend, because you're behind. He did that, okay. That did happen. And so when they go to replevin for it, nobody's looking at what the [SML] says. What the [c]ourt is looking at is, he's got a claim that he wants to be paid. You claim that you're owed steel you've already paid for, so, let's try to work it out. And at one point, by the way, [the plaintiff] was going to pay AIW $220,000. So the point is, it's a very narrow point actually—

COURT: Yea[h], I understood it, and I deny your motion to bar that claim. All right, next."

¶ 26 4. *Motion and Order on Rule 137 Sanctions*

¶ 27 Also on February 29, 2016, the plaintiff filed a motion for sanctions pursuant to Illinois Supreme Court Rules 137 (eff. July 1, 2013) and 219 (eff. July 1, 2002). According to the motion and attached exhibits, the plaintiff served requests for production on the defendant on June 28, 2013. On March 26, 2014, the defendant responded to request numbers 2 and 3 as follows:

"2. All non-privileged documents (including email, correspondence, internal memoranda, notes, etc.) related to the preparation of [SML]s for the [p]roject.

Response: Subject to and without waiving his General Objections, [d]efendant will produce any documents in his possession, custody[,] or control responsive to Request No. 2.

3. All blank [SML]s, drafts of [SML]s[,] and completed [SML]s related to the project.

Response: Defendant objects to Request No. 3 on the ground that, by seeking all 'blank [SML]s,' it does not seek information that is relevant to the parties' dispute or that it is otherwise reasonably calculated to lead to the discovery of admissible evidence in this litigation. Subject to and without waiving his specific and General Objections, [d]efendant will produce documents in his possession, custody[,] or control responsive to Request No. [3]."

¶ 28 The motion for sanctions also referenced a February 24, 2016, order from the circuit court that the plaintiff was permitted to conduct a forensic search of the defendant's computer hard drive for information related to the SMLs at issue. The motion stated that as a result of the court-ordered forensic search, the plaintiff discovered a number of documents related to the SMLs at issue in this litigation, that, despite being in the possession, custody, or control of the defendant, had never been produced. These documents included a blank SML in its full and complete form that was located on the defendant's computer no later than January 13, 2012, at least one week prior to submission of the first SML at issue in this litigation. The motion noted that this indicates that AIW's former employee, Laura Beyers, had perjured herself during her deposition when she claimed that she had received a hard copy of the form from the defendant then later downloaded a materially altered form from the plaintiff's website.

¶ 29 The motion for sanctions further averred that according to the forensic analysis, the only website that the defendant's computer accessed for purposes of downloading the

SML form was that of the CDB, which contains an unaltered version of the SML. The motion stated that additionally, a number of draft versions of the SML that did not possess the transfer of title provision were found on the defendant's computer, and that none of these drafts had been produced in discovery. The motion noted that the forensic report shows the defendant's computer was accessed on February 23, 2016, the day after the hearing wherein the circuit court ordered the defendant to determine if the computer was available and the day before the computer was examined. Also on that date, the forensic report shows that the SML files were accessed, yet the defendant and his attorney did not disclose their existence prior to the forensic analysis.

¶ 30 The motion for sanctions argued that the defendant had willfully withheld production of the SML documents that have been in existence and within his control since 2012 in order to hinder the plaintiff's prosecution of this case. According to the motion, instead of production, the defendant, his witnesses, and his counsel had testified or argued that the plaintiff provided the defendant with an altered SML, that the defendant never possessed an electronic copy of the full and complete SML or that the plaintiff somehow altered the log after it was in the plaintiff's possession. The motion requested that the circuit court sanction the defendant for his abuse of discovery in failing to produce clearly relevant documents in his possession as well as his arguments that the plaintiff somehow provided the defendant with an altered version of these documents.

¶ 31 On March 1, 2016, before the jury trial commenced, the circuit court entered an order granting the motion for sanctions, having found that the defendant failed to comply with the rules of discovery by failing to produce drafts of the SMLs under his custody

and control until they were discovered by way of a court-ordered inspection of an AIW computer years after the close of discovery. As a sanction, the circuit court ordered as follows:

> "1. [The defendant] is debarred from filing any other pleading relating to the issue of the existence of the [SML]s and from disputing that it was [the] defendant who altered the [SML]s and deleted the Transfer of Title language;
>
> 2. [The defendant] is debarred from maintaining any claim or affirmative defense relating to the [SML]s;
>
> 3. [The defendant] is barred from calling any witness to testify concerning the alteration of the [SML]s or making any arguments concerning the alteration of the [SML]s;
>
> 4. [The defendant]'s pleadings are stricken relating to the issue of the creation and presentation of altered [SML]s and judgment will be entered as appropriate on any elements of [the] plaintiff's complaint dealing with the altered [SML]s.
>
> 5. [The defendant] is assessed reasonable attorney's fees for the preparation and filing of the motion for sanctions and for the evidentiary hearing necessitated thereby."

¶ 32 At the start of trial on the morning of March 1, 2016, counsel addressed the court as to the implications of the order granting the motion for sanctions. The plaintiff presented the position that the circuit court was essentially entering judgment on count II of its complaint, necessitating an instruction to the jury that it was to determine damages

only. The defendant interpreted the order to mean that proximate cause and damages remained at issue on count II. The circuit court agreed with the defendant on this point, addressing the plaintiff's counsel as follows:

> "COURT: I think I would disagree with you that the only thing [the jury] decides is a number. There's still the question of your establishing to [the jury] that there's damages based upon this. I think I'd agree with [the defense counsel] on that.
>
> PLAINTIFF: Okay. Just so I'm abundantly clear *** I can tell the jury that the [c]ourt has already found that the [SML]s were altered by [the defendant]?
>
> COURT: Yes.
>
> PLAINTIFF: And then we are still going to prove how that damaged [the plaintiff].
>
> COURT: That would be a fair assessment of my order."

¶ 33 5. *Jury Trial*

¶ 34 Thereafter, the trial commenced. Because the jury found for the defendant on count I of the complaint, which was premised on the defendant's fraudulent applications for payment, we will limit, as much as possible, our recitation of the evidence presented to that dealing with count II, which was premised on the defendant's fraudulent submission of the altered SMLs to the plaintiff. Bradley Barnard, a member of the plaintiff and its operations manager, testified as to the circumstances surrounding the commencement of the project and the hiring of AIW as the steel fabricator for the project. He testified that based on the plaintiff's position that it had overpaid for steel between

commencement of the project and October 2012, the plaintiff suspended payment for steel and the defendant then suspended delivery.

¶ 35 Mr. Barnard testified that, thereafter, the plaintiff filed a replevin suit in Cook County. Mr. Barnard then testified that based on the replevin action, the plaintiff was allowed to go to the premises of AIW to retrieve fabricated steel, but the court would not permit them to retrieve the 95 tons of raw steel it had paid for. When asked whether he had any understanding of why the plaintiff could not retrieve the raw steel, the following colloquy took place:

> "MR. BARNARD: I believe it was not fabricated and the transfer of title provision didn't allow—
>
> DEFENSE: Objection.
>
> MR. BARNARD: —allow it on their—
>
> DEFENSE: Calls for speculation. No foundation. Undisclosed expert testimony.
>
> COURT: I will sustain that. I don't think this witness is properly qualified to answer that.
>
> DEFENSE: I would ask that the jury be instructed to disregard his answer.
>
> COURT: Please disregard that last answer."

¶ 36 Mr. Barnard then read the transfer of title provision from the blank form SML and laid the foundation for admission of the SMLs at issue in this case, from which the transfer of title provision had been deleted. The SMLs list AIW as "contractor" and the transfer of title provision reads as follows:

> "Upon receipt of payment by the Contractor for the stored materials as indicated above on [SML] No. __, the title is hereby transferred to the State of Illinois, [CDB]. This does not relieve the Contractor of the duty to safeguard and ensure the stored materials as set forth in Article 00765 of the [CDB]'s Standard Documents for Construction."

¶ 37 Mr. Barnard testified that, at the time the defendant submitted these SMLs, the plaintiff did not notice the deletion of the transfer of title provision, but that, eventually the missing language was pointed out by the Office of the Illinois Attorney General. Further, he testified that had the plaintiff discovered that the provision had been deleted by the defendant at the time they were submitted, the plaintiff would have terminated the contract as of mid-February 2012. He testified that, ultimately, the plaintiff paid the defendant $881,500 "because those [SML]s were submitted without the plaintiff being informed that [the defendant] deleted a provision of that form."

¶ 38 On cross-examination, Mr. Barnard testified that he did not know whether the defendant individually, or anybody at AIW, ever claimed title to the raw steel based on the missing transfer of title provision in the SMLs, in writing or otherwise. The plaintiff submitted the SMLs with their applications for payment to the CDB and the CDB paid them the money for the steel represented in the SMLs. The Attorney General mentioned the missing language to the plaintiff after the plaintiff had terminated the contract and initiated the replevin action but the CDB took no action against the plaintiff based on the missing language.

¶ 39 Angela Ridgway testified she is the project manager for the plaintiff. She testified as to her understanding of the transfer of title provision on the SML, stating:

> "That transfer of title basically is when the subcontractor puts the material on here, they're transferring that title of that material upon payment to the owner. Which is not [the plaintiff]. Which is the State of Illinois in this case. So basically [the State of Illinois] is paying for their goods and [the defendant]'s transferring the title of those goods to them, rightfully so. They paid for it so."

Over the defendant's objection, Ms. Ridgway gave the following opinion as to "what happens if [the transfer of title] provision is deleted from the [SML]":

> "I mean, if the provision is deleted from the form then you're no longer saying that the State or that they own the material they paid for, so it's possible that if someone removed it from the form that they're saying they still own it after they've been paid for it."

¶ 40 Ms. Ridgway further testified that there was no benefit to the plaintiff for the transfer of title to be deleted from the SML and if the CDB thought the plaintiff had deleted this provision, it would have terminated its contract with the plaintiff. Ms. Ridgway echoed Mr. Barnard's testimony that the plaintiff would have terminated AIW's subcontract if it had realized that the defendant had altered the SMLs.

¶ 41 Finally, Ms. Ridgway was asked what effect the deletion of the transfer of title provision on the SMLs ultimately had on the plaintiff, to which she answered:

> "They ultimately—we couldn't go get the steel in Chicago that was paid for. We had to go to court and get the steel through that means which took a lot of time, a

lot of money, adding more time to, you know, to everything and costing us a lot of money and just personal time."

¶ 42 Upon further inquiry, Ms. Ridgway added that "after that" they only got the fully fabricated steel the plaintiff had paid for. They could not get the raw steel. According to Ms. Ridgway, the raw steel they were unable to get from Chicago had a value of "probably around $50,000." During cross-examination of Ms. Ridgway, she testified that she agreed with Mr. Barnard that despite the absence of the transfer of title language, in which AIW got paid for the stored material, the plaintiff was paid for the stored material by the CDB.

¶ 43 The defendant testified that he never made a claim based upon the lack of transfer of title language in the SMLs at issue and he never told the plaintiff he was not shipping steel because of the lack of transfer of title language. He further testified that he never claimed in any way at any time that he had some right based on the lack of transfer of title language. He testified that he was paid for the material set forth in the SMLs before he ever completed them. Additionally, he testified it was his understanding that the plaintiff was also paid for the material set forth in the SMLs.

¶ 44 6. *Directed Verdict, Closing Arguments, Jury Instructions*

¶ 45 After the plaintiff rested its case, the defendant moved for a directed verdict on count II of the amended complaint on the basis that the plaintiff failed to prove that the defendant's presumed alteration of the SMLs at issue caused damage to the plaintiff. In response, the plaintiff argued it had proved causation based on the following:

"Mr. Barnard, Ms. Ridgway both testified that they [would have] terminated [the defendant immediately and [would] not then [have] been on the hook for the future payments they made following what would have been [the defendant's] termination in February of 2012. They testified that they were not able to get the [raw] steel from Chicago because of that fact."

The circuit court reserved ruling on the defendant's motion for a directed verdict on count II and announced that it would submit that count to the jury pursuant to section 2-1202 of the Code. 735 ILCS 5/2-1202 (West 2016).

¶ 46 During a preliminary jury instruction conference, as the parties discussed with the court the instructions dealing with the elements of the plaintiff's fraud claims, defense counsel asked the circuit court to clarify its sanctions order to find the defendant was barred from asserting that he did not alter the SMLs at issue, but to submit the issue of materiality to the jury as an offshoot of the causation issue. During this argument, the circuit court asserted its understanding that Mr. Barnard and Ms. Ridgway "both testified that there was unfabricated steel that they were not able to retrieve because they didn't—they couldn't assert title." The following exchange between defense counsel and the court then occurred:

"DEFENSE: Wait, wait, wait. There's no evidence of that.

COURT: They both testified to it. That's evidence.

DEFENSE: They both come in here and they say all kinds of stuff they pull out of their hat.

COURT: Okay, but there was testimony. Whether the jury chooses to believe that or not.

DEFENSE: But, we know that the replevin court made the decision, okay. We know the replevin fell apart and there was no final order. And I have told the [c]ourt before, and I have the transcripts, the [SML] issue never came up. And in fact, that's what I got them to say on the stand, that [the defendant] never made a claim of title anywhere. There's not an order and there's no writing. That's also the testimony. So, their testimony is implausible. They undercut their own testimony. Because clearly if [the defendant] defeated their right to take $50,000 worth of steel that was raw, it happened in the context of his demand to be paid and then the replevin action and from their own testimony not because he made a claim to that steel based on the absence of transfer of title language. I asked them directly is there any writing or order where [the defendant] claimed or was given rights based upon the absence of transfer of title language, and they both answered no.

So, they can still sit up there and say, yeah, well, you know, I felt like he did, but that's not evidence. That's just an opinion that is not supported by the record. And we as lawyers know more than the jury does because we have the replevin transcripts, and I have them here. I've marked them. And we also have the bankruptcy transcripts. And in both proceedings there was zero mention. In fact, in one of the motions, as I wrote, the only place that the issue was ever

mentioned at all was in Count III and IV of their adversarial complaint in bankruptcy.

COURT: Okay, we'll move on. I'll think about it overnight."

¶ 47 When the jury instruction conference resumed at the close of the evidence, the circuit court ruled that as per its prior sanctions order, the jury would be instructed that the fact that the defendant altered the SMLs, and that this constituted a false statement of material fact, was already established. The trial then proceeded to closing arguments. During these arguments, the plaintiff highlighted the fact that both Mr. Barnard and Ms. Ridgway testified that, had they realized the second SML had been altered to remove the transfer of title language, the plaintiff would have terminated its subcontract with AIW in February of 2012. The plaintiff also argued that the defendant was allowed to "hold the [raw] steel hostage" based on the SMLs, stating that Mr. Barnard testified as to "the amount of steel [the plaintiff] is not allowed to take back from Chicago because [the transfer of title] provision was not there." The defendant objected to this statement as mischaracterizing the evidence, but the circuit court overruled that objection, stating, "the jury heard the evidence."

¶ 48 Following closing arguments, the circuit court presented the jury with the jury instructions. Because we find the circuit court's instructions as to count II to be particularly instructive to our disposition, we quote them here:

"On Count II, the [c]ourt has ruled that the plaintiff has already proven each of the following propositions by clear and convincing evidence:

First, the defendant made false statements of material fact by altering the [SMLs] to remove the transfer of title provision;

Second, the defendant knew or believed the statements were false or the defendant made the statements in reckless disregard of whether they were true or false.

Accordingly, you need not consider whether the above elements have been proven.

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

Third, the defendant made the statements with the intent to induce the plaintiff to pay money under a contract;

Fourth, the plaintiff reasonably believed the statements and paid money under the contract;

Fifth, the plaintiff's damages resulted from [its] reliance.

If you find from your consideration that propositions Third, Fourth, and Fifth are more probably true than not true, then your verdict should be for the plaintiff."

¶ 49 As to damages, the jury was instructed in relation to both counts I and II in the same damages instruction, as follows:

"If you decide for the plaintiff on the question of liability you must then fix the amount of money which will reasonably and fairly compensate [it] for any of

the following elements of damages proved by the evidence to have resulted from the conduct of the defendant:

> Amounts overpaid on the subcontract to the defendant;
>
> Amounts paid to complete additional engineering, fabrication and purchase of materials;
>
> Amounts lost due to general delay caused by [the] defendant;
>
> Value of [the] steel paid for by [the] plaintiff but retained by [the] defendant. Whether any of these elements of damages has been proved by the evidence is for you to determine."

¶ 50 7. *Verdict and Posttrial Proceedings*

¶ 51 The jury returned a verdict in favor of the defendant on count I but in favor of the plaintiff on count II. The jury found that the total amount of compensatory damages suffered by the plaintiff is $50,000, which it stated was the value of the raw steel paid for by the plaintiff but retained by the defendant. On March 14, 2016, the circuit court entered a judgment on the verdict. On April 6, 2016, the defendant filed a motion for a judgment *n.o.v.* on count II or, in the alternative, for a new trial on count II. In his motion the defendant advanced all of the major arguments that he is asserting in this appeal, described in detail below.

¶ 52 After hearing oral argument on the defendant's posttrial motion on May 20, 2016, the circuit court took the matter under advisement. On October 27, 2016, the circuit court entered an order explaining that its notes indicated it had entered an order on May 23, 2016, but that the order had been misplaced and could not be found. The circuit court

stated that it then requested a transcript of the hearing on May 20, 2016, in order to refresh its recollection, before entering the October 27, 2016, order. The circuit court denied the defendant's posttrial motion, stating that it had assessed the evidence throughout the trial and found the plaintiff presented evidence sufficient to support the award assessed by the jury. On November 17, 2016, the defendant filed a notice of appeal. Additional facts will be set forth as needed throughout the remainder of this order.

¶ 53 ANALYSIS

¶ 54 1. *Res Judicata*

¶ 55 The first issue the defendant raises on appeal is whether the circuit court erred in denying his motion to dismiss, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)), the plaintiff's complaint based on the doctrine of *res judicata*. As previously set forth, the defendant claims that the plaintiff's voluntary dismissal of counts III and IV of an adversary complaint it had filed within AIW's bankruptcy proceeding precludes the plaintiff from bringing the instant action. We review a circuit court's ruling on a section 2-619 motion to dismiss under a *de novo* standard of review. *Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 91 (2001). A motion to dismiss under section 2-619 assumes the veracity of all well-pleaded facts, in conjunction with other evidentiary materials of record, and should be granted only if, based on these materials, there is no issue of material fact that would preclude a judgment in the movant's favor as a matter of law. *Id.*

¶ 56 Because the integrity of a bankruptcy court judgment is at issue, federal law is relevant in assessing the preclusive effects of the judgment. *Id.* at 92 (citing *Barnett v. Stern*, 909 F.2d 973, 979 (7th Cir. 1990)). As a practical matter, however, the test employed in this state and a majority of the federal courts is substantially similar. *Id.* (citing *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 312-13 (1998)). For *res judicata* to apply, the following elements must exist: " '(1) an identity of the parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits.' " *Id.* (quoting *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir. 1988), and citing *River Park, Inc.*, 184 Ill. 2d at 302). In addition, the court entering the prior judgment must have been one of competent jurisdiction. *Id.* We find this requirement to be dispositive of the issue of the preclusive effect of the bankruptcy court's order dismissing the plaintiff's adversary claims, and thus move to a discussion of the bankruptcy court's jurisdiction in such matters.

¶ 57 The United States Supreme Court most recently explained the jurisdiction of the bankruptcy court to hear matters which are the subject of a suit in common law in *Wellness International Network, Ltd. v. Sharif*, 575 U.S. __, __, 135 S. Ct. 1932, 1938 (2015), as follows:

> "Article III, §1, of the Constitution provides that '[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.' Congress has in turn established 94 District Courts and 13 Courts of Appeals, composed of judges who enjoy the protections of Article III: life tenure and pay that cannot be

> diminished. Because these protections help to ensure the integrity and independence of the Judiciary, 'we have long recognized that, in general, Congress may not withdraw from' the Article III courts 'any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty.' *Stern v. Marshall*, 564 U.S. __, __[, 131 S. Ct. 2594, 2609] (2011) (internal quotation marks omitted).
>
> Congress has also authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work. ***
>
> Congress' efforts to align the responsibilities of non-Article III judges with the boundaries set by the Constitution have not always been successful. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion), and more recently in *Stern*, this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication."

¶ 58 In other words, the Court has found that, in general, bankruptcy judges are not constitutionally permitted to finally determine Article III claims, including cases arising from common law, such as the plaintiff's common law fraud claims in this case. *Id.* However, in *Wellness International Network*, the Court held that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge. *Id.* Accordingly, in order for the bankruptcy court to obtain competent

jurisdiction to finally determine the common law fraud claims the plaintiff raised in the adversary action it filed in AIW's bankruptcy proceeding, both parties' knowing and voluntary consent was required. We find that the plaintiff withdrew any such consent when it chose to voluntarily dismiss those claims. As such, the plaintiff's motion to dismiss those claims effectively removed the claims from the jurisdiction of the bankruptcy court. Accordingly, we find that, for purposes of *res judicata*, the bankruptcy court's order voluntarily dismissing the plaintiff's common law fraud claims with prejudice did not qualify as a judgment rendered by a court of competent jurisdiction. For this reason, the circuit court did not err in denying the defendant's motion to dismiss on the basis of *res judicata*.

¶ 59 2. *Motion for a Judgment n.o.v.*

¶ 60 The second issue the defendant raises on appeal is whether the circuit court erred in denying his motion for a judgment *n.o.v.* A motion for a judgment *n.o.v.* is properly entered in those limited cases where all the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence can stand. *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1068 (2007) (citing *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992)). In ruling on a motion for a judgment *n.o.v.*, a court does not weigh the evidence, nor is it concerned with the credibility of witnesses; rather, it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion. *Id.* (citing *Maple*, 151 Ill. 2d at 453). Also, a motion for a judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence. *Id.* (citing *Maple*, 151

Ill. 2d at 453). We apply a *de novo* standard of review to the circuit court's denial of a motion for a judgment *n.o.v. Id.*

¶ 61 Here, the jury awarded the plaintiff $50,000 on count II of the complaint, which stated a cause of action for common law fraud based on the defendant's submission of altered SMLs which deleted the required transfer of title language. Further, the verdict specifically stated that this amount of damages represented the raw steel that the plaintiff was unable to recover in a replevin action it had filed in Cook County. The elements of common law fraud are: (1) a false statement of material fact; (2) the defendant's knowledge that the statement was false; (3) the defendant's intent that the statement induce the plaintiff to act; (4) the plaintiff's reliance upon the truth of the statement; and (5) the plaintiff's damages resulting from reliance on the statement. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 497 (1996). Having set forth our standard of review and the required elements of the plaintiff's common law fraud claim, we turn to the defendant's arguments as to why he believes the circuit court's denial of his motion for a judgment *n.o.v.* was in error.

¶ 62 The main argument the defendant makes regarding the circuit court's denial of his motion for a judgment *n.o.v.* is that the plaintiff presented no evidence, other than the false testimony of Ms. Ridgway, that the SMLs prevented the plaintiff from asserting title to any of the steel that was the subject of the replevin action. According to the defendant, there was no evidence that the plaintiff's damages resulted from the plaintiff's reliance on the SMLs. The defendant points to the contradictory statements made by the plaintiff's attorney during hearings on the motions *in limine*, as well as statements by the circuit

court that suggest it may have misapprehended this point, in support of his argument. We have set forth these statements in great detail above and agree with the defendant that, as to this specific theory of causation, contradictory statements were made by the plaintiff's attorney, and that the circuit court may have misapprehended the evidence.[1] However, from our review of the record, we find that the standard for a judgment *n.o.v.* was not met in this case, because based on the instructions the jury was given, there was evidence to support its verdict.

¶ 63 The jury was instructed that, in order to enter a verdict in favor of the plaintiff on count II, it must find that the defendant submitted the fraudulent SMLs with the intent to induce the plaintiff to pay money under the contract, that the plaintiff reasonably believed the statements and paid money under the contract, and that the plaintiff's damages resulted from its reliance on the statements. From these instructions, the jury determined that the plaintiff was entitled to judgment on count II. We find that the jury could have so found irrespective of whether the defendant used the SMLs to claim title to the steel. Both Mr. Barnard and Ms. Ridgway testified that the SMLs, including the transfer of title language, were required in order for AIW to be paid for the raw steel that it purchased for fabrication for the project. From this evidence, the jury could infer that the defendant submitted the SMLs for the purpose of getting paid. It was undisputed that the plaintiff paid money under the contract after receiving the SMLs.

[1]We set forth the pretrial proceedings on the motions *in limine* regarding the replevin action in great detail in the facts section of this order to make it clear to the parties that this court has carefully considered the record and has not misapprehended the facts as they relate to the role the evidence of the replevin action played in the trial.

¶ 64 Having found the foregoing elements present pursuant to the instructions which it was given, the jury was left to determine whether the plaintiff was damaged as a result of its reliance on the truth or accuracy of the SMLs. Both Mr. Barnard and Ms. Ridgway testified that the plaintiff would have terminated its contract with the defendant had it known that the defendant had submitted the SMLs in an altered form. From this evidence, the jury could infer that the plaintiff was damaged because, had it terminated the contract earlier, it may have not ended up in the position it was in with the defendant at the time the contractual relationship between the parties broke down. From this conclusion, the jury could reasonably find that the plaintiff's damages were limited to the value of the steel it paid for and did not receive. Because the jury instructions did not require the jury to find that the plaintiff actually relied on the SMLs to claim title to the steel in order to enter judgment in favor of the plaintiff on count II, a judgment *n.o.v.* is improper irrespective of the evidence before the jury regarding the replevin action.

¶ 65 3. *Motion for a New Trial*

¶ 66 Having found the circuit court did not err in denying the defendant's motion for a judgment *n.o.v.*, we move to his argument that the circuit court erred in denying his alternative motion for a new trial. On a motion for a new trial, a court will weigh the evidence, set aside the verdict, and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Jackson*, 372 Ill. App. 3d at 1068-69. A verdict is against the manifest weight of the evidence where the opposite result is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based on the evidence. *Id.* at 1069. A circuit court's ruling on a motion for a new trial will not be reversed except

in those instances where it is affirmatively shown that it clearly abused its discretion. *Id.* In determining whether the circuit court abused its discretion, the reviewing court should consider whether the losing party was denied a fair trial. *Id.* With these standards in mind, we turn to the defendant's three arguments as to why the circuit court's denial of his motion for a new trial was in error.

¶ 67 The defendant's first argument in support of a new trial is that the verdict was against the manifest weight of the evidence based on the same arguments he advances in support of his motion for a judgment *n.o.v.* We reject these arguments for the same reasons as set forth above. Based on the jury instructions and the evidence, the jury could reasonably find that the plaintiff relied on the defendant's submission of SMLs in making payments to the defendant under the subcontract. In addition, the jury could have reasonably found that, had the plaintiff known that the language was missing, the plaintiff would have terminated the contract prior to the breakdown of the relationship of the parties, preventing the plaintiff from paying the defendant for the raw steel that it had not retrieved by the time of trial. Based on this, a verdict of $50,000, representing the value of that raw steel that remained in the hands of the defendant, was not against the manifest weight of the evidence.

¶ 68 The defendant's second argument in support of his motion for a new trial is that the circuit court invited improper comment by the plaintiff during closing argument that substantially prejudiced the defendant. Here, the defendant is referring to the circuit court's inaccurate statement during the hearing on the defendant's motion for a directed verdict, to the effect that "[Ms. Ridgway] and [Mr. Barnard] both testified that there was

unfabricated steel that they were unable to retrieve because they didn't—they couldn't assert title." According to the defendant, the circuit court's mischaracterization of the evidence invited the plaintiff's counsel's comment during oral argument that Mr. Barnard testified that the plaintiff was not allowed to take steel back from Chicago because "the provision was not there." As the defendant points out, when defense counsel objected to this comment on the basis that it was a misrepresentation of the evidence, the circuit court overruled the objection, stating that the jury heard the evidence and could determine the facts.

¶ 69 The following standards apply to our review of the circuit court's denial of the defendant's motion for a new trial on the basis of improper comments made by the plaintiff's counsel during closing arguments:

> "Attorneys are permitted wide latitude in closing argument. [Citation.] Comments on the evidence during closing argument are proper if proven by direct evidence or if reasonably inferable from the facts. [Citation.] A judgment will not be reversed unless the challenged remarks were of such character as to prevent a party from receiving a fair trial. [Citation.] In determining whether a party has been denied a fair trial due to improper closing argument, a reviewing court gives considerable deference to the trial court, which is in a superior position to assess the effect of counsel's statements. [Citation.] Improper closing argument will not warrant reversal without a showing of substantial prejudice. [Citation.]" *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 396 (2000).

¶ 70 As previously stated and set forth in great detail in the facts section of this disposition, this court considered the entire record in this matter and thoroughly reviewed the contradictory statements made by the plaintiff's counsel in the hearings on the motions *in limine* with regard to the issue of whether the defendant ever "used" the missing transfer of title language in the SMLs to "claim" title to the steel that remained on AIW premises after the breakdown in the relationship between the parties. This court also carefully considered the impact of the circuit court's rulings on the motion to bar evidence of the replevin action as well as to bar the plaintiff from arguing that the defendant used the SML in some way during any of the litigation between the parties. If this court had concluded that the only viable theory of causation as to count II of the plaintiff's complaint was the defendant's use of the SMLs to keep steel from the plaintiff, the misstatements of which the defendant complains may have prejudiced the defendant. However, as explained above, the jury was instructed that the plaintiff was entitled to a judgment on count II if the jury found the defendant's submission of the altered SMLs induced the plaintiff to pay money under the contract and the plaintiff was damaged as a result. We find the jury could have simply concluded the plaintiff was damaged in this regard because the parties' relationship lasted longer than it otherwise would have had the plaintiff not relied on the defendant's submission of the SMLs that included the required transfer of title language. For this reason, we find that the plaintiff's incorrect statement of the evidence during closing argument, having no bearing on this theory of causation, did not substantially prejudice the defendant. Accordingly, the circuit court did not err in denying the defendant's motion for a new trial on this basis.

¶ 71 The defendant's final argument relating to his motion for a new trial is that the circuit court erred in applying the discovery sanction it issued on March 1, 2016, and that this error deprived the defendant of a fair trial. The defendant does not contest the sanction insofar as it barred him from contesting that he altered the SMLs. However, the defendant argues that the circuit court's instruction to the jury that the alteration of the SMLs was a false statement of material fact amounted to prejudicial error for two reasons. First, the defendant argues that instructing the jury that the alteration was material was tantamount to an instruction that it resulted in damage to the plaintiff. Second, the defendant argues that instructing the jury that the alteration was material was disproportionate to the gravity of the discovery violation. We address each argument in turn.

¶ 72 To address the defendant's first argument, we turn back to the elements necessary to prove a claim of common law fraud. In order to sustain a claim for common law fraud, a plaintiff must prove that the misrepresentation of fact made by the defendant was material, and that the defendant's reasonable reliance on the misrepresentation caused damage. See *Connick*, 174 Ill. 2d at 497. Thus, the materiality requirement relates to the misrepresentation of fact, and the causation relates to the plaintiff's reliance on the misrepresentation. Because the requirements of materiality and causation relate to different elements of the offense of common law fraud, we do not find a contradiction in instructing the jury that materiality had been proven, but that the plaintiff is only entitled to a judgment on count II if the jury found the plaintiff's reliance on the misrepresentation resulted in damage. Accordingly, we turn to the defendant's argument

that the circuit court's instructing the jury as to the materiality of the altered SMLs was an inappropriate sanction for the defendant's discovery violation.

¶ 73 As with the motion for a new trial, the circuit court is granted broad discretion in fashioning an appropriate remedy for a violation of discovery rules and procedures. *Kubicheck v. Traina*, 2013 IL App (3d) 110157, ¶ 30. There are several factors the Illinois Supreme Court has set forth in determining what sanction to apply to a discovery violation. See *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 124 (1998).[2] The defendant does not cite to *Shimanovsky* or its progeny in his brief or supply this court with an analysis of the factors set forth therein. Rather, the defendant argues that the circuit court's sanctions order was disproportionate to the gravity of his discovery violation because it was prior defense counsel who was responsible for the defendant's failure to produce the computer files, the plaintiff's discovery requests did not specifically ask for computer files, there is no evidence that the plaintiff attempted to resolve the issue pursuant to Illinois Supreme Court Rule 201(k) (eff. May 29, 2014), and there were no prior orders compelling the defendant to produce computer files. For the following reasons, we reject these arguments and decline to disturb the circuit court's sanction and instructions to the jury therewith.

¶ 74 As the circuit court pointed out, computer files are specifically included in the definition of documents in Illinois Supreme Court Rule 201(b) (eff. May 29, 2014), and

[2]The factors are: (1) surprise to the adverse party; (2) prejudicial effect of the proffered testimony or evidence; (3) nature of the testimony or evidence; (4) diligence of the adverse party in seeking discovery; (5) timeliness of the adverse party's objection to the testimony or evidence; and (6) good faith of the party offering the testimony or evidence. *Shimanovsky*, 181 Ill. 2d at 124.

as the Committee Comments to Illinois Supreme Court Rule 214 (eff. July 1, 2014) make clear, due to this amendment, "there can be no question that a producing party must search its computer storage when responding to a request to produce documents." Ill. S. Ct. R. 214, Committee Comments (rev. July 1, 1995). The defendant's discovery responses from 2013 indicated that it had produced all documents responsive to the plaintiff's requests for production of all forms of the SML in the defendant's possession. Therefore, the plaintiff had no reason to believe it needed to attempt to resolve a difference under Rule 201(k) or to file a motion to compel. As the plaintiff points out, it was not until weeks before the trial that the plaintiff became aware of the possibility that responsive computer files existed, when a former AIW employee testified she downloaded a blank SML from the plaintiff's website that did not include the transfer of title language. It is this testimony that prompted the request for the forensic examination of the defendant's computer and the discovery of the unproduced documents. Finally, we agree with the plaintiff that a sanction may be imposed regardless of whether omissions in discovery are intentional or inadvertent (see, *e.g.*, *Gonzalez v. Nissan North American, Inc.*, 369 Ill. App. 3d 460, 464 (2006)), thus negating any argument that the defendant should not be held accountable for his prior counsel's purported failures in instructing him to search the computer for files responsive to the plaintiff's requests for production. For all of these reasons, we decline to disturb the circuit court's denial of the defendant's motion for a new trial on the basis that the sanctions order and corresponding jury instructions were improper.

¶ 75 CONCLUSION

¶ 76 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 77 Affirmed.