2019 IL App (1st) 171599-U

No. 1-17-1599

Third Division
March 27, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

STRATEGIES FOR DYNAMIC GROWTH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14-L-2395
	)	
GERHARDT "GARY" WITTSTOCK,	)	Honorable
	)	James M. Varga,
Defendant-Appellee.	)	Judge, presiding.
	)	
	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Plaintiff was not entitled to a new trial on damages where there was a reasonable hypothesis for and sufficient evidence to support the award of $0 for direct damages. The trial court did not abuse its discretion in denying costs for an evidence deposition and court reporter appearance fees.

¶ 2 Plaintiff-Appellant, Strategies for Dynamic Growth, appeals the jury verdict finding in its favor against defendant-appellee, Gerhardt "Gary" Wittstock on a breach of contract claim. Plaintiff further challenges the trial court's denial of its motion for a new trial on damages, arguing that the jury award for direct damages was legally inconsistent and against the

manifest weight of the evidence. Additionally, plaintiff challenges the trial court's denial of post-trial motions for costs in relation to evidence deposition expenses and court reporter attendance fees. For the following reasons, we affirm the trial court's orders.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed a complaint alleging that Wittstock had violated an oral agreement entered into on June 15, 2005, providing that the plaintiff would receive 20% equity in Wittstock's companies, Pond Supplies of America, Inc. and Pond Sweep Manufacturing Company (the Companies), in exchange for professional services related to the valuation of, securing investors for, or selling the companies. The complaint further alleged that plaintiff was owed $440,000, as the cash equivalent of the promised 20% equity in the companies, as a result of the breach. The case proceeded to a four-day jury trial during which the following evidence was adduced.

¶ 5 Plaintiff is a consulting company composed of two members, David Shuman and Matthew Brooks. In May 2004, Wittstock reviewed plaintiff's proposed consulting contract outlining the type of work Shuman and Brooks promised would improve and grow Wittstock's companies and requesting $632,000 in fees. The proposal contemplated a three-year payment schedule, with fees of $8,000 per month for the first year from June 1, 2004 through May 31, 2005, with annual increases to monthly payments of $12,000 and $16,000 totalling $432,000. To cover the remaining $200,000 requested, the proposal contemplated granting plaintiff equity, equivalent to 20%, in the companies. This proposal was never signed, nonetheless, plaintiff began working at the companies.

¶ 6 Wittstock, through the companies, began paying plaintiff $2,000 per week for its consulting services. Shuman and Brooks began reviewing and making changes to the

companies' administration, distribution, manufacturing, marketing, and sales practices. Plaintiff later reported that it needed to take on an increased workload and increased its fees to $3,500 per week in October 2004. Plaintiff indicated in a letter to Wittstock that this amount reflected a discount, from the actual fee of $5,000-$6,000 per week, given with the understanding that an equity position in the company would be worked out. Wittstock complied with weekly payments under the increased fees, but did not act to transfer any equity in the companies.

¶ 7 Despite Wittstock's and plaintiff's efforts, the companies were still in financial distress. On June 16, 2005, Wittstock and plaintiff reached a separate agreement[1] related to additional work needed to determine a valuation of, secure investors for, or sell the companies. Wittstock agreed to give plaintiff 20% of his 67% personal share[2] in the companies' stocks amounting to 13.4% equity interest in the companies in exchange for this additional scope of work. No written agreement was signed and the transfer of equity was never initiated.

¶ 8 Wittstock continued to pay plaintiff's weekly fees for consulting work until the end of 2005. During this time, plaintiff worked with Wittstock to search for potential investors and buyers. This included completing a valuation of the companies and presenting a sale proposal at meetings with representatives from Beckett Corporation and its parent company, General Foam Plastics. There were three meetings in total which took place in Rosemont, Illinois; Dallas, Texas; and Norfolk, Virginia. However, a sale was never completed. According to Wittstock, after meeting in Norfolk in January 2006, the representative from General Foam Plastics indicated that a proper due diligence investigation would take months before a sale

[1]There are no claims on appeal challenging the jury's determination regarding the formation of this contract and facts relevant to making that determination are omitted.

[2]It is unclear from the record who the other shareholders were and what percent they held in the company. Wittstock testified that he started with three other business partners, but at the time in question he only worked with John Menhart.

could be finalized. Shortly after this meeting, Wittstock unilaterally terminated his relationship with plaintiff. Shuman and Brooks testified that they could not reach Wittstock. They did not speak with Wittstock again until after hearing news of Wittstock selling the company.

¶ 9 Wittstock testified that his decision to sell the company was motivated by the actions of First Choice Bank. Wittstock and his business partner John Menhart had obtained a $750,000 small business loan and a $1,200,000 commercial loan in March 2004 and August 2005, respectively. The loans were written out to Pond Supplies of America, Inc. with Pond Sweep Manufacturing Company, Wittstock, and Menhart listed as the guarantors. The small business loan was also secured by a mortgage on Wittstock's house whereas the commercial loan had a security interest in the accounts receivable of Pond Supplies. On February 3, 2006, First Choice Bank issued letters of default and demanded the outstanding balance on the small business and commercial loans which were $605,190.24 and $360,475.41, respectively.[3] Wittstock determined that his choices were limited to declaring bankruptcy, finding another buyer or investor that would be willing and able to move faster than Beckett, or turning to his son Gregory for help as the bank had begun taking over the assets of the company.

¶ 10 Wittstock and Gregory had previously been in business together running Aquascape Designs, Inc., however, Wittstock left Aquascape and started the competing companies in 1996. Gregory agreed to conduct a due diligence investigation and consider acquiring the companies. After approximately a month and a half, and with communications between Wittstock, Aquascape, and First Choice Bank's lawyers, the parties reached a settlement

[3]These figures include the remaining principal balance and accrued interest. The outstanding debt was also subject to per diem interest of $164.70 and $148.86, respectively.

agreement regarding the loans. The settlement agreement entered into on March 17, 2006, reflected that First Choice Bank would release its security interest in the companies' inventory, equipment, and accounts receivable as well as all claims and liability under the small business and commercial loans in exchange for Aquascape's payment of $750,780. The settlement agreement was signed by representatives from First Choice Bank, Aquascape, and Wittstock.

¶ 11 In addition to negotiating a settlement with First Choice Bank, Aquascape and the companies entered into an asset purchase agreement. Wittstock was questioned about three versions of the agreement provided during discovery. The first agreement, dated February 1, 2006, provided that the purchase price would be no more than $2.2 million to cover the companies' liabilities and disclaimed any responsibility for liabilities in excess of $2.2 million. This agreement was not admitted into evidence after objections that the document offered was incomplete where it referenced exhibits not attached. The later versions of the agreement dated March 3 and March 17, 2006, reflected an unspecified purchase price dictated by Aquascape's "assumption at closing of the specific liabilities on Exhibit A." These liabilities were limited to the amounts due to First Choice Bank on the loans, lease payments to Marlin Leasing Corporation not to exceed $12,000, lease payments to GFC Leasing, and amounts due to the Illinois Department of Revenue and the Internal Revenue Service. Wittstock noted that the asset purchase agreement only addressed the largest creditors against the companies, however Aquascape did, at their discretion, negotiate and settle a number of other liabilities including attorney fees. However, Wittstock had no proof of what was paid and related that creditors who were not necessary to keep the business going forward were never paid.

¶ 12 Aquascape's president, Colleen Heitzler, was also called to testify about the asset purchase agreement. At the time of the purchase, she was either the chief financial officer or the chief operating officer and she assisted with the due diligence investigation. Although she testified to recognizing the agreements entered into evidence, she had no personal recollection about many of the details. She estimated the wire transfer to First Choice Bank made after the asset purchase agreement was finalized to be "in the 750,000-dollar range and change." She had no recollection about the Marlin leasing payments beyond what the asset purchase agreement stated. She believed Aquascape made payments to the Illinois Department of Revenue pursuant to the purchase agreement, but did not know details about the payments. Heitzler was also questioned about personal benefits[4] Wittstock had received from Aquascape after the asset purchase agreement was completed.

¶ 13 Shuman and Brooks testified that they were blindsided by the sale of the companies to Aquascape. They recounted hearing the news when contacted by a third-party and having to call Wittstock from "blind" phone numbers in order to speak with him. Wittstock testified that he received congratulatory calls from Shuman and Brooks after the sale and they made no claims of being owed money at that point in time. He stated that his next contact with Shuman and Brooks occurred after they filed the breach of contract complaint.

¶ 14 Brooks testified that no specific event was required to trigger plaintiff's right to the 20% equity shares. He stated that it was meant to be compensation for the work to be performed. He also testified concerning his belief that he and Shuman were owed $159,000 which represented their calculation of 20% of the companies' value at the time of sale to Aquascape. Shuman and Brooks explained that they had conferred with Wittstock to

[4]Wittstock and Heitzler both testified that Wittstock was, and continued to be, employed by Aquascape as a full-time salaried consultant after the asset purchase was completed.

determine the "bottom line" of $4 million that they would accept for a sale of the companies to cover an estimated $2.2 million in liabilities and allowing for net proceeds to be split amongst the shareholders according to equity share. From this "bottom line" sales price, plaintiff expected to net $360,000. However, Shuman and Brooks believed no sale was completed because Wittstock "pulled the plug" on their efforts to find a buyer. Plaintiff also submitted one invoice for incidental expenses. Shuman testified as to the accuracy of the invoice and attached receipts totalling $988.74 as expenses incurred in the course of the trip to Norfolk, Virginia to present the sales pitch before General Foam Plastics.

¶ 15 During closing arguments, plaintiff's counsel argued that there were four options for determining direct damages. First, plaintiff stated that damages should be calculated as the 13.4% that would have been gained had a sale gone through at the amount determined in plaintiff's valuation of the companies ($4 million). Plaintiff argued that it was owed $536,000 in direct damages due to Wittstock's breach of contract which prevented finalization of a sale to Beckett. Second, plaintiff argued that damages were equivalent to 13.4% of the original $2.2 million purchase price in the February 2006 asset purchase agreement which amounted to $294,800. The third option was described as 13.4% of the "going concern" ($4 million) minus the total value of the assets ($2.2 million), amounting to $241,200. Lastly, plaintiff argued that the damages were equivalent to 13.4% of what Aquascape actually paid for the assets ($778,439) amounting to $104,310.83. In response, Wittstock's counsel argued that there were no legal damages because there were no net proceeds from the sale of assets. Thus, there was nothing for the shareholders to receive even if plaintiff's 13.4% equity share was recognized.

¶ 16 The trial court provided the jury with a four-page verdict form which included eight "yes or no" questions and a ninth question for determining damages. Verdict A, indicting that the jury found for plaintiff, and Verdict B, indicating the reverse, were printed on the same page with spaces for the jurors' signatures under each verdict. The first seven questions asked whether plaintiff proved: (1) there was an offer, (2) there was an acceptance, (3) there was consideration, (4) plaintiff performed its contract obligations, (5) Wittstock failed to perform his obligations and breached the contract, (6) plaintiff sustained damages, and (7) the damages were caused by the breach. Question eight asked whether plaintiff presented evidence from which the jury could determine the fair and reasonable value of the loss. After each question, the form indicated that a "no" answer meant that deliberations were complete whereas a "yes" answer required continuing to the next question. Question nine asked the jury to provide an accounting of the damages awarded through the following formula:

> (a) the value of the contract benefits plaintiff proved it should have received;
>
> (b) the expense plaintiff saved because of the breach;
>
> (c) the total direct damages—(a) minus (b);
>
> (d) the incidental damages described as the amount reasonably spent securing the contract benefits; and
>
> (e) the total damages—(c) plus (d).

¶ 17 The jury signed and returned Verdict A, finding in favor of plaintiff. The jury responded "Yes" to all eight questions indicating that it found plaintiff proved the formation of an oral contract, its performance, Wittstock's breach of contract, damages sustained as a result of the breach, and sufficient evidence to determine the fair and reasonable value of the loss. However, in itemizing the damages, the jury found that plaintiff suffered no direct damages

and awarded $988.74 in incidental damages. The trial court entered judgment on the verdict reserving the issues of prejudgment interests and costs.

¶ 18 Plaintiff moved for a revised judgment asking the court to find $593.45 in prejudgment interest, pursuant to section 2 of the Interest Act, 815 ILCS 205/2 (West 2016), and $4,535.99 in costs taxable to defendant and owed to it as the prevailing party, pursuant to section 5-108 of the Code of Civil Procedure, 735 ILCS 5/5-108 (West 2016). Plaintiff subsequently moved for a new trial on the issue of damages under section 2-1202(b) of the Code of Civil Procedure, 735 ILCS 5/2-1202(b) (West 2016).

¶ 19 On May 26, 2017, the trial court entered orders denying, in part, the motion for a revised judgment and denying the motion for new trial. The court found that plaintiff's request for costs of a witness's evidence deposition was unjustified where the witness, a resident of Illinois, was properly subpoenaed but did not honor the subpoena due to out-of-state travel plans. The witness provided no reason on the record for the trip and the court deemed that the existence of plans, alone, was insufficient to prove unavailability to testify and the necessity of conducting an evidence deposition. The court, applying *Kehoe v. Wildman, Harrold, Allen & Dixon*, 387 Ill. App. 3d 454 (2008), further found that plaintiff's request for costs of the court reporter's attendance fees could not be taxed under section 5-108. The court awarded plaintiff $693.84 as taxable costs for filing fees, jury demand, and witness subpoenas as well as $593.35 in prejudgment interest and entered a revised judgment.

¶ 20 The court rejected plaintiff's argument that the jury verdict was inconsistent in failing to award any direct damages despite indicating that it found plaintiff had presented sufficient evidence to determine the fair and reasonable value of the loss suffered by virtue of Wittstock's breach. The court reasoned that "a lot of these [damages] arguments are

extremely, I think, too complicated for jurors." Thus, the court presumed that in their confusion over what constituted the value of 20% equity, the jury simply found that "there's no money to pay and decided "we're not going to award direct damages because there's no money left to—for the direct damages. We'll toss in the incidental damages because it's not that big and he can probably pay it."

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 As a preliminary matter, we note that Wittstock has not filed a response brief. Therefore our review is governed by *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976), in which our supreme court "set forth three distinct, discretionary options a reviewing court may exercise in the absence of an appellee's brief: (1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of an appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates prima facie reversible error that is supported by the record." *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009) (citing *Talandis*, 63 Ill. 2d at 133). The issues in this case are straightforward, the record is simple, and it can be decided without the aid of a respondent's brief. Accordingly, on September 24, 2018, this court ordered that this case would be taken for consideration on the record and plaintiff's brief.

¶ 24 A. New Trial on Damages

¶ 25 Plaintiff first contends that it is entitled to a new trial on damages because the jury verdict was inconsistent where the jury indicated it found plaintiff had presented sufficient evidence to determine the fair and reasonable value of the loss suffered yet awarded $0 in direct

damages. Plaintiff further contends that the trial court abused its discretion by entering judgment on the jury's damages determination which was against the manifest weight of the evidence.

¶ 26 1. Legally Inconsistent Verdict

¶ 27 Whether a jury's verdict is legally inconsistent is a question of law, and a trial court's decision to grant or deny a motion for a new trial based on a claim of a legally inconsistent verdict is reviewed *de novo*. *Rodriguez v. Northeast Illinois Regional Commuter R.R. Corp.*, 2012 IL App (1st) 102953, ¶ 48 (citing *Redmond v. Socha*, 216 Ill. 2d 622, 642 (2005)). A verdict in a civil case may be considered legally inconsistent if it is internally inconsistent or inherently self-contradictory. *Socha*, 216 Ill. 2d at 643. A court must not find a verdict legally inconsistent unless it is absolutely irreconcilable. *Id*. To determine if the verdict is absolutely irreconcilable, we must assess whether, applying all reasonable presumptions in favor of the verdict, it can be supported by some reasonable hypothesis. *Id*. at 643-44.

¶ 28 We note that plaintiff identifies a number of cases[5] that it summarily claims are analogous examples of verdicts warranting reversal "for similar, zero inconsistent damages awards." Plaintiff offers no analysis of these cases. Rule 341(h)(7) requires an appellant's brief to contain an "argument" section, "which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). "Citations to authority that set forth only general propositions of law and do not address the issues presented do not constitute relevant authority for purposes of Rule 341(h)(7)." *Robinson v. Point One Toyota, Evanston*, 2012 IL

[5]*Stamp v. Sylvan*, 391 Ill. App. 3d 117, 126 (2009); *Murray v. Philpot*, 305 Ill. App. 3d 513, 516 (1999); *Urban v. Zeigler*, 261 Ill. App. 3d 1099, 1105 (1994); *Kumorek v. Moyers*, 203 Ill. App. 3d 908, 912-913 (1990), and *Hinnen v. Burnett*, 144 Ill. App. 3d 1038, 1046 (1986).

App (1st) 111889, ¶ 54. "The purpose of [supreme court] rules is to require parties before a reviewing court to present clear and orderly arguments so that the court can properly ascertain and dispose of the issues involved." *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. The court "is not a depository into which the burden of research may be dumped." *Campbell v. Wagner*, 303 Ill. App. 3d 609, 613 (1999). The failure to provide cohesive, organized arguments supported by legal citation may result in waiver of a party's claims. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007). However, we find that the brief's deficiency does not preclude our review.

¶ 29 Plaintiff's contention that the jury's award of $0 for direct damages from the same set of facts from which they awarded incidental damages should be deemed "absolutely irreconcilable" and unsupported by "any reasonable hypothesis" conflates the legal analyses of the issue. This is apparent in the cases cited by plaintiff which are not analogous to the present issue on appeal. Each of these cases involves a jury verdict awarding damages in one category of recovery for personal injury but not another. Although these cases include findings that the damages awarded were "irreconcilably inconsistent," the analysis applied is not applicable to plaintiff's present argument. For example, in *Stamp v. Sylvan*, the jury awarded damages for medical expenses that the plaintiff incurred for treatment following an injury, but did not award damages for pain and suffering despite the plaintiff's testimony of such pain and suffering during the same time period medical treatment was sought. *Stamp*, 391 Ill. App. 3d at 126. The court stated that this award, or lack of an award, "ignore[d] a proven element of damages that the jury was not free to disregard." *Id*. An analysis of whether an element of damages was proven is a question of fact and reviewed under the manifest weight of the evidence standard as discussed in *Stamp*. See *id*. at 123-24. In

contrast, plaintiff asks us to first consider whether, as a question of law, the jury verdict was inconsistent and separately contends that a new trial is warranted on the basis that the damages calculation was against the manifest weight of the evidence. These two arguments are distinct and we will consider the latter in the next section.

¶ 30 The gist of plaintiff's claim is that the verdict is internally inconsistent because the jury awarded $0 for direct damages despite indicating that it found plaintiff had presented sufficient evidence to determine the reasonable value for the loss. We examine the parties' theories, the jury instructions, and the evidence to determine whether a reasonable hypothesis exists to support the jury's determination. See *e.g.*, *Simmons v. Garces*, 198 Ill. 2d 541, 556, 561 (2001) (considering the evidence and the parties' theories in determining whether the jury verdict and answer to a special interrogatory were irreconcilable).

¶ 31 Here, applying all reasonable presumptions in favor of the verdict, we find that it is possible for the jury to have answered question eight affirmatively to indicate that it found the evidence was sufficient to prove incidental damages. The "loss" in question eight is not specific to direct damages and could be interpreted as referring to any loss suffered during the course of the contract. Thus, the verdict was not irreconcilably inconsistent.

¶ 32 Furthermore, it is possible that the jurors found that even though plaintiff had secured 20% equity shares in the companies—such percentage was worth nothing at the time of the sale. Wittstock testified that the bank issued letters of default and had begun taking control of the companies' assets. The settlement agreement and related negotiation letters entered into evidence showed that the bank, in reference to its outstanding loans with Wittstock and companies, received $750,780 directly from Aquascape in exchange for releasing all security interests in the companies' inventory, equipment, and accounts receivable as well as

Wittstock and Menhart's personal guarantees. The asset purchase agreement also indicated that Aquascape would cover the outstanding bank loans, lease payments, payroll taxes, and amounts due to the Illinois Department of Revenue in exchange for all of the companies' assets.

¶ 33 The jury was told that equity is the value that is left over when you take the assets of a company and subtract out what the company owes. Here, the companies sold all the assets in order to satisfy outstanding debts. Wittstock testified that even after the settlement agreement and asset purchase agreement were entered, there were outstanding debts to smaller creditors. Thus, it was reasonable for the jury to find that the companies had no equity left and plaintiff's 20% equity share in the companies under its contract with Wittstock was worth $0. We find that the trial court correctly determined the jury verdict to be legally consistent and did not err in denying the motion for a new trial.

¶ 34 2. Manifest Weight of the Evidence

¶ 35 "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence." *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). "If the trial judge, in the exercise of his discretion, finds that the verdict is against the manifest weight of the evidence, he should grant a new trial; on the other hand, where there is sufficient evidence to support the verdict of the jury, it constitutes an abuse of discretion for the trial court to grant a motion for a new trial." *Id*. at 456.

¶ 36 Furthermore, the determination of damages is a question of fact, not law, and is within the discretion of the jury, not the court. *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 490 (2008) (citing *Snover v, McGraw*, 172 Ill. 2d 438, 447 (1996)). Our supreme court has held

that a jury's award of damages is entitled to substantial deference by the court and a trial court can upset a jury's award of damages only if it finds that: (1) the jury ignored a proven element of damages; (2) the verdict resulted from passion or prejudice; or (3) the award bore no reasonable relationship to the loss sustained. *Snover*, 172 Ill. 2d at 447.

¶ 37 Plaintiff asks this court to consider whether the jury ignored a proven element of damages. Plaintiff argues that of the four direct damages options presented to the jury, the fourth[6] based on the undisputed amount Aquascape paid for the companies' assets should have been awarded. Under this theory of recovery, plaintiff contends that it had a right to the companies' assets, due to its equity in the companies, which Wittstock and Menhart ignored when executing the asset purchase agreement with Aquascape. Plaintiff contends that, had Wittstock honored its equity ownership, it would have objected to the asset sale. Plaintiff concludes that it was entitled to 13.4% of the purchase price from the asset sale as compensation for Wittstock's denial of plaintiff's right to refuse the sale.

¶ 38 First, we find that plaintiff's statement regarding the "undisputed" amount Aquascape paid for the companies' assets is not supported by the record. Plaintiff asserts that Aquascape paid $778,439 for all of the companies' assets. From the record it can be confirmed that $750,780 was owed to First Choice Bank, per the settlement agreement, and that the Illinois Department of Revenue was owed $15,659. As Wittstock admitted in his testimony, there is no record of what Aquascape paid to the leasing companies or the Internal Revenue Service to comply with the terms of the asset purchase agreement. Heitzler's testimony only stated that the amount paid to First Choice Bank was more than $750,000. Thus, the evidence before the jury undermines plaintiff's calculation of the total amount paid on which the

[6]Plaintiff does not argue that the manifest weight of the evidence supported findings under the other three options presented in closing arguments, therefore we do not consider them.

fourth damages calculation is based. Furthermore, plaintiff argued to the court in the motion for new trial that the 13.4% figure tied to plaintiff's damages calculation was consistently presented to the jury, however, Brooks testified about being promised 20% of the company and being owed 20% of the companies' value. The evidence was not clear regarding how to calculate damages under the percentages claimed or why the percentage of the purchase price reflected the benefits plaintiff would have reaped if Wittstock had transferred the promised equity. Thus, we find that the jury did not ignore a proven element of damages and the verdict was not against the manifest weight of the evidence.

¶ 39 Plaintiff briefly asserts that the trial court's comments during the motion hearing represented unreasonable grounds to deny the requested relief. Plaintiff then goes on to state the test for awarding a new trial on damages only without further discussion of the alleged abuse of discretion warranting a new trial. We recognize that the trial court's comments about the complexity of the arguments and the potential confusion of the jurors did not address plaintiff's arguments about the manifest weight of the evidence. However, the reasons given for a judgment or order are not material if the ruling itself is correct. A reviewing court may sustain the decision of a lower court on any grounds which are called for by the record regardless of whether the lower court relied on the grounds and regardless of whether that court's reasoning was correct. *In re Estate of Funk*, 221 Ill. 2d 30, 86 (2006)

¶ 40 B. Costs Taxable to Wittstock

¶ 41 Plaintiff contends that the trial court erred in denying the motion seeking to tax Wittstock the costs of the court reporter's attendance fees and the costs of a witness's evidence deposition. We review the trial court's judgment awarding costs for an abuse of discretion. *Boehm v. Ramey*, 329 Ill. App. 3d 357, 366 (2002). Plaintiff argues that the trial court erred

in its application of section 5-108 of the Code of Civil Procedure and followed case law containing flawed reasoning.

¶ 42 Section 5-108 provides that an award of costs "shall be entered" for the prevailing plaintiff in a civil case. 735 ILCS 5/5-108 (West 2016). The provision is mandatory, but must be narrowly construed because it is in derogation of the common law. *Vicencio*, 204 Ill. 2d at 300 (citing *Department of Revenue v. Appellate Court, of Illinois, First District*, 67 Ill. 2d 392, 396 (1977)). However, costs are not defined by the statute and have been left to the courts to decide. Our supreme court attempted to define "costs" in *Vicencio* by first examining the plain and ordinary meaning and case precedent. *Id*. at 302. After determining that neither provided a working definition of "costs" as discussed in section 5-108, the court turned to Black's Law Dictionary and quoted language which distinguished between court costs, "charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees" and litigation costs "expenses of litigation, prosecution, or other legal transaction, esp[ecially] those allowed in favor of one party against the other." *Vicencio*, 204 Ill. 2d at 302 (citing Black's Law Dictionary 350 (7th ed. 1999)). In the following sentence, the court stated, "[i]t is undisputed that section 5-108 mandates the taxing of costs commonly understood to be "court costs," such as filing fees, subpoena fees, and statutory witness fees, to the losing party." 204 Ill. 2d. at 302.

¶ 43 1. Evidence Depositions

¶ 44 The court in *Vicencio* held that the professional fee charged by a nonparty treating physician for attending an evidence deposition was considered a litigation costs and non-taxable to the losing party under section 5-108. *Id*. at 311. The court's opinion also addressed the cost of the court reporter and videographer who attended the evidence deposition and

held that these fees were recoverable as taxable costs, at the discretion of the court, under Illinois Supreme Court Rule 208[7], Ill. S. Ct. R. 208 (eff. Nov. 1, 2011). *Id*. at 306. In order to recover costs, the claiming party had to prove that the deposition was "necessarily used at trial." *Id*. at 307. The court established that the phrase "necessarily used at trial" required the evidence deposition to contain relevant and material evidence, which could not be procured at trial due to the deponent's death, disappearance, or otherwise unavailability. *Id*. at 308.

¶ 45 Here, plaintiff is not requesting the costs of the witness's professional fees. Plaintiff however, does argue that the evidence deposition of Frederick Roth, Wittstock's former attorney, was necessarily used at trial and the costs of the deposition should be taxable to Wittstock. Wittstock responded to the motion before the trial court arguing that the deposition was unnecessary because the evidence gained from it was not material or relevant. The trial court did not address whether the evidence deposition was relevant and material, ruling instead on the issue of availability.

¶ 46 In *Vicencio*, the record did not reveal whether the evidence deposition was relied upon as a matter of necessity or convenience and the court remanded the cause for further determination in line with the standard outlined. *Id.* Similarly in *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 540 (2003), the court could not determine from the record the necessity of the evidence deposition and remanded. Here, the trial court confirmed during the post-trial motions hearing that the witness was properly subpoenaed, but did not honor the subpoena due to out-of-state travel plans. The trial court deemed that the existence of conflicting plans, alone, was insufficient to prove unavailability to testify and found that the evidence deposition was employed for convenience rather than necessity. Although the witness had the

[7]We note that plaintiff's only reference to Rule 208 appears in its reply in support of the motion for revised judgment before the trial court. Although plaintiff argues for costs under section 5-108 rather than Rule 208 on appeal, we will address the matter under Rule 208 as discussed in *Vicencio*.

opportunity to explain the necessity of his travel, he did not. Plaintiff cites no case law that unspecified travel plans qualify a witness as "otherwise unavailable." In our reading of the test outlined in *Vicencio*, we note that the "otherwise unavailable" is preceded by two serious circumstances, death or unexplained disappearance which create the necessity. We agree with the trial court that an unspecified reason for the unavailability does not fall in line with these other examples of where costs would be justifiably taxed. Given that our standard of review is under abuse of discretion, we find that the trial court did not abuse its discretion in ruling that Roth's evidence deposition was not conducted out of necessity due to the witness's unavailability.

¶ 47 The argument for the lack of necessity is further amplified by the fact that Wittstock's counsel noted during the motion hearing that there was an available discovery deposition that could have been entered via stipulation. However, according to Wittstock's counsel, plaintiff's counsel never even attempted to broach the subject of stipulation. Thus, it appears that plaintiff unnecessarily assumed the costs of the evidence deposition which it now wishes to tax on Wittstock.

¶ 48 2. Court Reporter Attendance Fees

¶ 49 Applying *Kehoe*, the trial court ruled that plaintiff's request for costs of the court reporter's attendance fees were not covered by section 5-108. See 387 Ill. App. 3d at 472. Plaintiff contends that *Kehoe* was incorrectly decided where the court employed a narrow, restrictive reading of *Vicencio*. See *Kehoe*, 387 Ill. App. 3d at 472 (citing *Vicencio*, 204 Ill. 2d at 300)). Plaintiff also advances an argument that, because the Illinois Supreme Court rules mandate a sufficient record of all trial-related proceedings be made in order to appeal a decision and the fact that the Cook County Circuit Court does not provide court reporters or

electronic recordings in all courtrooms, fees for private court reporter attendance such as in this case must be treated as court costs rather than litigation costs.

¶ 50 A split has arisen in the appellate court about whether court reporter fees are recoverable under *Vicencio*. The Appellate Court, Second District held in *Burmac v. Metal Finishing Co. v. West Bend Mutual Insurance Co.*, 356 Ill. App. 3d 471, 486 (2005) that these costs were recoverable under section 5-109.[8] 735 ILCS 5/5-109 (West 2016). Conversely, this District expressly disagreed with *Burmac* in *Kehoe*. *Kehoe*, 387 Ill. App. 3d at 471-72. Plaintiff urges us to reconsider *Kehoe* and apply *Burmac*.

¶ 51 The court in *Burmac* found no abuse of discretion where the trial court determined the fees constituted a necessary expense of litigation and properly taxable. 356 Ill. App. 3d at 486. Whereas the court in *Kehoe* relied on the supreme court's earlier admonition in *Vicencio* that statutes allowing recovery of costs must be narrowly construed, 204 Ill. 2d at 300, and rejected *Burmac* and the "necessary" analysis because it viewed such as a gratuitous expansion of the supreme court's limitation to "costs commonly understood to be in the nature of 'filing fees, subpoena fees, and statutory witness fees.'" *Kehoe*, 387 Ill. App. 3d at 472.

¶ 52 We agree with *Kehoe* that *Burmac*'s consideration of whether the fees were necessary is the incorrect analysis under section 5-108. Under section 5-108 the only question is whether the costs may be considered as court cost. Pursuant to *Vicencio*, section 5-108 is a mandatory award of costs to the prevailing party and filing fees, subpoena fees, and statutory witness fees are explicitly undisputed as costs covered by section 5-108. *Vicencio* did not address the

[8]Section 5-108 and section 5-109 are companion sections in the code dealing with the recovery of costs by the prevailing party and the court's construing of "costs" under one section is applicable to the other. See *Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 408 (2011).

specific question of court reporter fees in the context of preparing trial transcripts under section 5-108. As the question of whether court reporter fees are considered court costs has not been explicitly answered by the legislature or our supreme court, we agree with *Kehoe* that it is proper to narrowly construe the statute. Thus, we reject plaintiff's arguments under *Burmac*. We find that given the lack of clarity over what else may be considered as costs under section 5-108, the trial court did not abuse its discretion in limiting plaintiff's recovery for costs to only those items explicitly discussed in *Vicencio*.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we affirm the judgment of the trial court and the jury verdict.

¶ 55 Affirmed.