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SECOND DIVISION
June 7, 2011

No. 1-10-1418

EUGENE WHITE,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09-L-2694
)	
LISA K. FISHERING,)	The Honorable
)	Irwin J. Solganick,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment and order.

ORDER

Held: The jury's award of \$44,113.27 for compensatory damages and \$135,000 in punitive damages was not against the manifest weight of the evidence, and the circuit court properly denied defendant's motion for a judgment notwithstanding the verdict where the witnesses' testimony conflicted and the credibility of the witnesses was decisive to the outcome of the case.

Defendant Lisa K. Fishering appeals the circuit court's judgment entered on the jury verdict in favor of plaintiff Eugene White. Pursuant to an oral agreement, Ms. Fishering agreed to provide interior decorating services for a house Mr. White and his wife had purchased. Mr. White brought a claim against Ms. Fishering alleging breach of contract, unjust enrichment, and fraud. On appeal, Ms. Fishering contends (1) the jury's award for compensatory damages on the fraud count was against the manifest weight of the evidence; (2) the jury's award for punitive

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damages was against the manifest weight of the evidence; and (3) the trial court erred in denying Ms. Fishing's motion for a judgment notwithstanding the verdict. For the reasons hereinafter set forth, we affirm.

JURISDICTION

The trial court entered a final judgment in the instant case on April 23, 2010, and plaintiff filed her notice of appeal on May 20, 2010. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

BACKGROUND

Mr. White filed a three-count complaint against Ms. Fishing for (I) breach of contract, (II) unjust enrichment, and (III) fraud. On the first day of trial, both parties agreed to a judgment entered in favor of Mr. White on counts I and II in the amount of \$44,113.27. The cause proceeded to trial on count III, fraud.

At trial, Ms. Fishing testified as an adverse witness for Mr. White. Ms. Fishing stated that her design business was called Whizbang. Mr. White and his wife hired her in September, 2006, to provide interior design services for a house they were renovating in Chicago. Her services included "[p]resenting designs and looking for furniture and fixtures." She performed the billing and invoicing duties for her business. On October 2, 2006, she sent her first invoice to Mr. White in the amount of \$2,000 for 16 hours of work at \$125 per hour. She acknowledged that Mr. White paid the invoice. Counsel for Mr. White introduced evidence of Whizbang's account at J.P. Morgan Chase. Ms. Fishing stated that the account had a negative balance on

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September 27, 2006, and on each day from October 10 to October 19, 2006.

On October 4, 2006, Ms. Fishing went to Walter E. Smithe to order furniture for the Whites. She signed a sales order for the total amount of \$13,816.41 and gave a check to Walter E. Smithe for \$6,908. The check was returned for insufficient funds. She said that she did not know her check bounced until August, 2007. No one from Walter E. Smithe called her to discuss the issue. She did not know whether she sent the Whites the sales order; however, she did leave an invoice with Mrs. White for \$17,001.22, along with a sales order from Walter E. Smithe. The sales order she gave them stated that the amount paid to Walter E. Smithe for furniture was \$15,301.10. The order also showed a trade discount of \$1,712. Ms. Fishing testified that she did not pay Walter E. Smithe \$15,301.10 that day but she also did not represent to the Whites that she had paid the full amount to Walter E. Smithe. She acknowledged that the Whites never received any furniture from Walter E. Smithe, nor did she return any of the \$15,301 Mr. White gave her as payment for the furniture.

Ms. Fishing continued to send invoices to the Whites for purchases of other furniture and materials, and the Whites continued to pay those invoices. She acknowledged that the Whites did not receive most of the furniture they paid for, nor did she return any monies they had paid to her. She testified that the Whites paid for and received plumbing fixtures in the amount of \$5,156.58.

When asked about various emails sent from Whizbang to Walter E. Smithe's Rosemary Larkner, Ms. Fishing stated that her assistant took care of the emails while she was out of town. She instructed her assistant "to take care of whatever had to be taken care of" and she never

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reviewed the emails herself although her name appeared in the correspondence. In an email to Mr. White regarding Walter E. Smithe's cancellation of the order for non-payment, Ms. Fishing wrote him that she responded to Walter E. Smithe's inquiries about payment and delivery. She further stated that she never received any certified letters from Walter E. Smithe about the matter. She acknowledged that she received emails from Mr. White in August, 2007, asking about the furniture but she never responded. She stated, however, that she did call Mrs. White.

On cross-examination, Ms. Fishing testified that at the time she worked with the Whites, she was also working with four other clients. Whizbang's bank statements show deposits in addition to the monies paid by the Whites. She stated that the \$15,301 invoice from Walter E. Smithe did not reflect the entire cost of the purchase for custom-ordered furniture. She further testified that the invoice sent to the Whites in the amount of \$17,001.22 was prepared by an employee of Walter E. Smithe and reflected a 10% designer's discount. Ms. Fishing's relationship with the Whites began to deteriorate in mid-August of 2007, after she informed them that Walter E. Smithe had cancelled their furniture purchase. She sent an email to the Whites which stated that she had an appointment with Walter E. Smithe and would "try to get the funds reimbursed in part, hopefully in full." She did not get any reimbursement. She did not give the Whites a refund "[b]ecause there was no communication, no ability to go through the accounting of what they did receive or what I could have finished or what I could have returned." She stated that she had some of the furniture for the Whites in storage, which she later returned.

Rosemary Larkner testified that she works as an accounting department supervisor for

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Walter E. Smithe. She stated that Walter E. Smithe does not give discounts to outside designers, whom they refer to as clients. Ms. Larkner testified that they require a client's signature on sales orders because the orders are contracts. In Walter E. Smithe's system, the sales order for Whizbang, signed by Ms. Fishering, reflected a total amount of \$13,816.41. The order also indicated that payment of \$6,908 was made by check and a balance of \$6,908.41 would be due upon delivery. Viewing the invoice Ms. Fishering sent to Mr. White for the amount of \$17,001.22, minus a trade discount, Ms. Larkner stated that no such sales order was entered into Walter E. Smithe's system. Ms. Larkner concluded that the order sent to the Whites was altered because they don't provide trade discounts, "the amount paid was not accurate, the font is different, the terms had been changed, and it was also printed."

Ms. Larkner also testified about emails she exchanged with Ms. Fishering on December 29, 2006, informing her that the check she wrote as down payment on the Whites' order was returned for insufficient funds. Ms. Fishering responded that she would give her credit card number for replacement of the deposit, and then stated that she would ask the Whites "to supply [her] with the balance due for forwarding to your firm." On January 17, 2007, an email from Whizbang, Inc. stated that the Whites mailed a check for the balance that day. Ms. Larkner testified that Walter E. Smithe never received a check for the balance from Ms. Fishering or the Whites. On February 24, 2007, Walter E. Smithe sent an email to Ms. Fishering informing her that in order to continue holding the Whites' furniture, they must have the balance of the payment due and schedule delivery for March or early April. Ms. Fishering never sent a balance check, nor did she respond to daily emails from Walter E. Smithe inquiring of the payment and

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delivery. After sending certified letters stating that Ms. Fishering must either “take delivery or forfeit your deposit” Walter E. Smithe eventually cancelled the order and sold the furniture.

Mr. White testified that he and his wife purchased a house at 10609 S. Fairfield in Chicago. They decided to renovate the house and hired Joe Bell to perform the renovation. When the Whites expressed a need for an interior designer, Bell recommended they contact Ms. Fishering. They met with Ms. Fishering in September of 2006 and entered into an oral contract in which Ms. Fishering would be paid hourly for her services, and Mr. White would pay for any furniture Ms. Fishering purchased for the project. If the furniture needed to be stored for a period of time, Mr. White would pay for storage.

In October, 2006, Mr. White received his first invoice from Ms. Fishering showing a \$2,000 charge for her services. He also received another invoice, along with what appeared to be a sales order for furniture from Walter E. Smithe, in the amount of \$15,301.10. On October 18, 2006, Mr. White wrote a check to Whizbang, Inc., for \$17,301. Mr. White testified that when he signed the check, he relied on Ms. Fishering’s representation that the invoices actually reflected the cost of the furniture purchased for the project. Mr. White stated that he obtained the actual sales order from Walter E. Smithe after he moved into his house on Fairfield. He testified that if he had known of the discrepancy, he would have fired Ms. Fishering. When they moved into their house, the only furniture that had been delivered were two chairs, a lamp and some plumbing fixtures. Furthermore, they had given away their old furniture believing that their house would be furnished with the furniture they had purchased. Mr. White testified that he wrote checks to Ms. Fishering totaling about \$55,536 but received only \$11,422.24 worth of

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goods and services. Mr. White sought damages in the amount of \$44,113.27.

Mr. White became concerned in August, 2007, when he had not been able to contact Ms. Fishing and the furniture had not been delivered. Although Ms. Fishing informed Mr. White that she would provide a full accounting of everything he had paid for, she never gave him that information. Mr. White continued to email Ms. Fishing asking her to call him, but she never responded. Mr. White did not know that Walter E. Smithe had sold their furniture until he contacted them about the purchase some time in August, 2007. Mr White then placed another order with Walter E. Smithe, which he paid for, and received the furniture in about 12 weeks.

The jury returned a verdict in favor of Mr. White, and awarded compensatory damages in the amount of \$44,113.27. The jury also awarded \$135,000 in punitive damages. Ms. Fishing filed a posttrial motion for a judgment notwithstanding the verdict, or alternatively, for a new trial. She also sought a remittitur. The trial court denied her motion and Ms. Fishing filed this timely appeal.

ANALYSIS

Ms. Fishing first contends that the jury award of \$44,113.27 was improper. The trier of fact determines the amount of an award and a reviewing court gives great deference to that determination. *Clarke v. Medley Moving & Storage, Inc.*, 381 Ill. App. 3d 82, 96 (2008). A court will not set aside an award unless it is so excessive that it indicates the jury was moved by prejudice or passion, it exceeds the limits of fair and reasonable compensation, “or is so large that it shocks the judicial conscience.” *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 47 (2009).

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Mr. White testified that, relying on Ms. Fishering's representation of herself as a professional interior designer, he wrote checks totaling \$55,536 to her but received only \$11,422.24 in furniture and fixtures. In further reliance on Ms. Fishering's representation, the Whites sold all of their old furniture prior to moving in anticipation of the delivery of their new furniture. Ms. Fishering does not dispute that Mr. White wrote those checks, or that he received less than \$55,536 in goods. She also testified that she never returned monies to Mr. White although he did not receive everything he paid for. The jury's award of \$44,113.27 is not so excessive or shocking as to require this court to set it aside.

Ms. Fishering disagrees and argues that the amount of damages awarded is against the manifest weight of the evidence where the main evidence of fraud resulted in damages of only \$1,484.69. Ms. Fishering contends that the evidence of fraud at trial consisted of the Walter E. Smithe transaction in which Ms. Fishering charged Mr. White \$15,301.10 instead of the actual invoice amount of \$13,816.41. Therefore, the actual damages of the fraud was only \$1,484.69. We disagree. Mr. White proved more than \$1,484.69 in damages. Ms. Fishering represented herself as a designer who would help the Whites decorate and furnish their house. It is undisputed that the Whites paid \$55,536 to Ms. Fishering, including \$15,301 she charged for the Walter E. Smithe order, but received only \$11,422.24 worth of goods and services in return. Other than her testimony and the invoices she sent to the Whites, Ms. Fishering offered no proof that she actually purchased other furniture for the project. The Whites also never received the furniture ordered from Walter E. Smithe. The jury reasonably awarded Mr. White damages in the amount of \$44,113.27, which included money paid for the Walter E. Smithe furniture he

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never received.

Ms. Fishering further argues that Mr. White is not entitled to damages of more than \$1,484.69 because the evidence supported a breach of contract claim rather than a claim for fraud. Mr. White simply did not receive the goods Ms. Fishering had promised to provide in exchange for his payments. Ms. Fishering contends that the cancellation of the White's order resulted from Ms. Fishering's insufficient communication with Walter E. Smithe, not from her intent to defraud the Whites. Ms. Fishering also argues that Mr. White did not sufficiently prove she fraudulently induced him to make payments subsequent to the Walter E. Smithe order. Furthermore, Ms. Fishering contends that evidence of communications between Walter E. Smithe and Ms. Fishering, her testimony acknowledging that the Whites paid for furniture they never received, testimony that she had discarded receipts, and emails she exchanged with Mr. White regarding the delivery of the furniture all support a claim for breach of contract rather than fraud.

The jury heard testimony from Ms. Fishering, as well as conflicting testimony from Ms. Larkner, regarding Walter E. Smithe's timely notification that Ms. Fishering's check was returned for insufficient funds. The jury heard conflicting testimony that Walter E. Smithe notified Ms. Fishering that payment of the balance was due before cancelling the order, and whether Ms. Fishering told Walter E. Smithe that the Whites would be sending a check for the balance despite the fact she had already received full payment from them. The jury also heard conflicting testimony concerning the authenticity of the Walter E. Smithe sales order Ms. Fishering gave to Mr. White, and whether Ms. Fishering responded to Mr. White's emails

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inquiring about the furniture. Whether the evidence supports a claim for fraud, or indicates a simple breach of contract without fraud, depends on whose testimony the factfinder deems credible as well as what inferences may be drawn from the testimony. The trier of fact is in a superior position “to observe witnesses while testifying, to judge their credibility, and to determine the weight” of their testimony. *Bazydlo v. Volant*, 164 Ill. 2d 207, 214-25 (1995). The jury as factfinder also resolves conflicts in the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). A reviewing court will not substitute its judgment “on issues involving the weight of the evidence or the credibility of the witnesses.” *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). Here, the jury reasonably found Ms. Larkner and Mr. White to be more credible witnesses than Ms. Fishing and awarded damages accordingly.

Ms. Fishing also argues that the jury award of \$44,113.27 cannot stand because it gives Mr. White an impermissible double recovery. Ms. Fishing contends that in the pretrial settlement, Mr. White already received damages for breach of contract in the amount of \$44,113.27¹, and the jury award for damages on his fraud claim was for the same sum resulting in a double recovery. Ms. Fishing, however, did not dispute the calculation of damages at trial. In closing argument, her counsel stated that “[m]y client does not dispute she received payments in the amount of \$55,535.51. She does not dispute, obviously, Mr. White’s contention that he received \$11,422.24 in goods or services.” Ms. Fishing did not object to Jury Instruction No.

¹In the settlement order, Ms. Fishing agreed to pay Mr. White \$44,000 in two payments. Although she made her first payment of \$10,000, she failed to make the second payment of \$34,000. Due to her default, Ms. Fishing consented to a judgment on the breach of contract count for the full \$44,000 without application of the \$10,000 payment.

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8, in which it stated that “White seeks an award of damages of \$44,113.27.” Failure to object to the computation of damages at trial renders the issue waived on appeal. *Amalgamated Bank of Chicago v. Kalmus and Associates, Inc.*, 318 Ill. App. 3d 648, 658 (2000). In any event, Mr. White agrees and states in his brief that he “has never asserted, and it was fully understood by Fishing at the time she agreed to the entry of judgment on the other claims, that White could only recover his compensatory damages one time.” There is no double recovery here. The compensatory damages of \$44,113.27 were properly awarded on each count of Mr. White’s complaint. He cannot recover his compensatory damages more than once. Upon the payment of the compensatory damages Ms. Fishing will be entitled to a satisfaction of judgment on all counts to the extent of \$44,113.27.

Ms. Fishing also argues, for the first time in her reply brief, that Mr. White improperly received \$44,113.27 as “benefit-of-the-bargain” damages. Ms. Fishing contends that in order for Mr. White to receive such damages, he must “prove that Fishing made a misrepresentation to lure him into buying the furniture” which he failed to do. Ms. Fishing cites *Gold v. Dubish*, 193 Ill. App. 3d 339, 352 (1989) as support. However, as the court in *Gold* articulated, benefit-of-the-bargain damages apply only when a transaction has actually been consummated based on fraud. *Gold*, 193 Ill. App. 3d at 352. Such damages represent additional value sufficient to give the plaintiff the benefit of the contract. *Gold*, 193 Ill. App. 3d at 352. If Mr. White had received furniture represented as coming from Walter E. Smithe, but in actuality the pieces were cheaply made imitations, he would be entitled to benefit-of-the-bargain damages. *Gold* is inapposite here. As Mr. White never received the furniture from Ms. Fishing, the transaction was not

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completed and no benefit-of-the-bargain damages ensued.

Ms. Fishing challenges the admission into evidence of email correspondence between her and Walter E. Smithe indicating that she may not have been truthful with Mr. White. She contends that since Mr. White did not see the communication “until after the fact” he could not have relied on it. Instead, the emails served no purpose other than to inflame the jury. The trial court has discretion to determine the relevancy and admissibility of evidence, and this court will not overturn that decision absent an abuse of discretion. *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 636 (2007). Evidence is considered relevant if it has any tendency to render the existence of any material fact more or less probable than it would be without the evidence. *Bergman*, 375 Ill. App. 3d at 636. In his fraud claim, one of the elements Mr. White must prove is that Ms. Fishing made a false statement which she knew or believed to be false at the time. See *Abshire v. Stoller*, 235 Ill. App. 3d 849, 854 (1992). Therefore, Ms. Fishing’s emails to Walter E. Smithe indicating she had knowledge of facts different from what she had presented to Mr. White is relevant to the fraud claim. The trial court did not abuse its discretion in admitting this evidence.

Fishing’s next contention is the jury’s punitive damages award was improper because it should have been based on compensatory damages of \$1,484.69 rather than \$44,113.27. Plaintiff, however, does not dispute the fact that the jury awarded punitive damages to Mr. White or that it used a formula computing such damages as three times the amount of compensatory damages. Since we have already determined that the proper amount of compensatory damages is \$44,113.27, the jury’s award of \$135,000 in punitive damages is not against the manifest weight

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of the evidence. See *Blount v. Stroud*, 395 Ill. App. 3d 8, 22 (2009).

Ms. Fishing's final contention is that the trial court erred in denying her motion for a judgment notwithstanding the verdict (JNOV) where the only evidence of fraud resulted in damages of \$1,484.69. A JNOV is proper where all the evidence, viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant such that no contrary verdict can stand. *Gomez v. The Finishing Company, Inc.*, 369 Ill. App. 3d 711, 718 (2006). A JNOV is granted in limited cases where the evidence is "nearly conclusive." *Maple*, 151 Ill. 2d at 453-54. A JNOV is not proper if there is any evidence "demonstrating a substantial factual dispute, or where the assessment of credibility of the witness or the determination regarding conflicting evidence is decisive to the outcome." *Maple*, 151 Ill. 2d at 454. Here, there was conflicting testimony regarding Ms. Fishing's communications with Walter E. Smithe, and her credibility as a witness was decisive to the outcome. Therefore, a JNOV was not appropriate and the trial court did not err in denying Ms. Fishing's motion.

In her brief, Ms. Fishing also argues that Mr. White's references at trial and posttrial to "a scheme to defraud" were improper, and that the trial court erroneously admitted her bank records into evidence. However, Ms. Fishing does not provide citations to authority for either argument. Illinois Supreme Court Rule 341(h)7 (eff. July 1, 2008), requires a clear statement of contention with citations to supporting authority and the pages of record relied upon. Ill-defined and insufficiently presented issues do not satisfy the rule and are considered waived. *Express Valet v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007).

For the foregoing reasons, the judgment of the circuit court is affirmed.

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Affirmed.