2014 IL App (1st) 120881-U

SECOND DIVISION
September 2, 2014

No. 1-12-0881

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVIS FRIEDMAN, Plaintiff, Counter-Defendant, and Appellee, v. DAVID KAHN, Defendant, Counter-Plaintiff, and Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 09 L 1909 Honorable Raymond Mitchell, Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Harris and Pierce concurred in the judgment.

O R D E R

¶ 1 *HELD*: Judgment entered on jury verdict in favor of plaintiff/counter-defendant affirmed. We hold that the trial court did not abuse its discretion when it refused to: (1) instruct the jury as to the substantive basis of court rulings that were entered into evidence at trial; (2) give a nonpattern instruction regarding the defendant/counter-plaintiff's status as an attorney; (3) give a nonpattern instruction that misstated the law of negligence with respect to an attorney's duty to disclose risks; and (4) give a nonpattern instruction regarding the value of contingency fees cases in dividing a marital estate. We further hold that the court did not abuse its discretion in barring cumulative expert testimony.

¶ 2 The law firm of Davis Friedman filed suit against David Kahn (Kahn) for failing to pay legal bills incurred in connection with its representation of Kahn in his divorce trial. Kahn countersued for breach of contract and legal malpractice, claiming that his counsel's breach of care in his divorce suit led to an unfavorable division of the $12 million marital estate. By agreement, the trial was bifurcated and the liability phase proceeded to trial before a jury. At the conclusion of the jury trial, a verdict was entered in Davis Friedman's favor in both the breach of contract and legal malpractice actions. On July 28, 2011, the trial court entered judgment on the two verdicts.

¶ 3 Kahn filed a post-trial motion requesting judgment in his favor notwithstanding the verdict. Davis Friedman filed a post-trial motion for prejudgment interest and costs. On February 27, 2012, the trial court entered an order denying Kahn's motion for judgment notwithstanding the verdict, and awarded Davis Friedman $14,402.49 in prejudgment interest and $5,543.35 in costs against Kahn. Kahn filed a timely notice of appeal. This court has jurisdiction to hear this appeal pursuant to Rule 303. Ill. S. Ct. R. 303 (a)(1) (eff. June 4, 2008). For the reasons that follow, we affirm.

¶ 4 BACKGROUND

¶ 5 A. Divorce Proceedings

¶ 6 Kahn and his wife, Sharon, were married in 1979. They had four children together. Prior to the marriage, Kahn was a practicing attorney and Sharon was a law student. The parties separated in August 1999, and Kahn filed for dissolution of the marriage in May 2002. Kahn retained and terminated the services of various attorneys during the course of his divorce proceedings prior to trial. In February 2005, he hired the law firm of Davis Friedman to

represent him as trial counsel. Errol Zavett (Zavett) was an attorney at Davis Freeman and principally responsible for Kahn's representation at trial.

¶ 7 On the first day of the divorce trial, the parties entered into a stipulation as to the value of the marital estate. The stipulation contained an inventory of marital assets—including real estate interests, investment and retirement accounts, bank accounts, and Kahn's law firm—and set forth a valuation total of approximately $12.55 million.

¶ 8 According to the stipulation, Kahn's law practice was valued at $477,000, based on the amount held in the firm's bank accounts. The IRA assets in Kahn's name were valued at approximately $2.6 million. During the divorce proceedings, Sharon proposed that the entirety of Kahn's IRA assets be awarded to him.

¶ 9 On December 2, 2005, the divorce court entered a judgment for dissolution of marriage which divided the estate equally between Kahn and Sharon. The court awarded the law firm to Kahn, but gave Sharon a balancing award equal to half the amount ($238,500) held in the firm's bank accounts. Kahn and Sharon were each awarded their individual interests in their respective IRA accounts, which were valued at $2.6 million for Kahn and $94,261 for Sharon.

¶ 10 Kahn subsequently filed a motion to reconsider and asserted, *inter alia*, (1) that the trial court failed to consider the tax consequences of the property distribution, and (2) that the valuation of his law firm was incorrect because it failed to account for various liabilities. While that motion was pending, he also filed a supplemental disclosure statement and a motion to reopen proofs.

¶ 11 The divorce court denied Kahn's motion to reconsider, in part, finding that he was bound by his stipulation as to the value of his firm and that he had also waived any issue regarding tax

consequences of the distribution because he had failed to offer evidence of such consequences at trial. Kahn's supplemental disclosure statement and motion to reopen proofs were stricken.

¶ 12 Kahn appealed the divorce court's judgment and award, as well as its post-trial rulings. He also filed a petition to modify certain child support payments required by the judgment. The trial court granted Sharon's motion to strike the petition on the basis of lack of jurisdiction. On review, this court affirmed the judgment of the trial court and the orders denying Kahn's post-trial motions, but reversed and remanded the matter for a hearing on his petition for modification of child support. *In re Marriage of Kahn*, Nos. 1-06-1715, 1-06-3181 (cons.) (2008) (unpublished order under Supreme Court Rule 23). In affirming the denial of Kahn's post-trial motions, we agreed that Kahn was bound by his stipulation as to the valuation of his law firm and that he was not entitled to have the tax consequences of the property distribution considered after judgment where he did not present any evidence of such tax consequences at trial. *Marriage of Kahn*, order at 13-14.

¶ 13 B. Counterclaim for Legal Malpractice and Breach of Contract

¶ 14 On February 7, 2007, Davis Friedman sued Kahn for $54,514.47 in unpaid legal bills related to the divorce case. In his answer to the complaint, Kahn acknowledged receiving the bills, but denied that the firm had performed its obligations under the engagement agreement. Kahn also filed a counterclaim for legal malpractice and breach of contract.

¶ 15 In his legal malpractice counterclaim, Kahn first alleges that Zavett mishandled the stipulation as to the valuation of his law firm. He claims that Zavett should have made clear, in the stipulation and to the divorce court, that the $477,000 amount in Kahn's firm bank accounts was subject to the firm's financial obligations to third parties. Kahn contends that the $477,000 total from the firm's cash accounts did not represent the actual "value" of his firm; instead, it

reflected funds that were "due and owing to third parties and would be shortly paid to them." He claims that the value of his firm was actually "zero." He asserts that the divorce court's award would not have happened but for his counsel's professional negligence in advising him to sign the stipulation. He also contends that Zavett should have advised him of the risk that the judge would interpret the stipulation to the $477,000 amount as the value of his law firm.

¶ 16 Second, Kahn alleges that Zavett failed to advise the court of the high tax treatment associated with the $2.6 million IRA assets in his name, prior to the court awarding him 96% of the IRA assets, which will be taxable at higher rates in the future. Kahn claims that his counsel's failure to raise the taxation issue and to object to the proposed division of the IRA assets in a timely manner constituted legal malpractice.

¶ 17 C. Pretrial

¶ 18 Prior to trial, Kahn disclosed Glenn Dalhart, a certified public accountant, as an expert witness pursuant to Rule 213(f)(3) (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007)). According to Kahn's initial Rule 213(f)(3) disclosures, Dalhart was expected to testify as to (1) the potential taxation of IRA assets compared to other non-IRA accounts in the marital estate; (2) the losses incurred by Kahn as a result of the stipulation regarding the worth of his law firm; and (3) the damages that Kahn would incur as a result of the court's award of 96% of the IRA assets.

¶ 19 Davis Friedman filed its Rule 213(f)(3) disclosures, in which it disclosed its liability expert, David Pasulka. According to the disclosures, Pasulka was expected to testify that the stipulated value of Kahn's firm based on the $477,000 cash accounts favored Kahn strategically, because using a business valuation instead would likely have resulted in a higher value for the firm. In response, Kahn filed a second supplemental Rule 213(f)(3) disclosure, in which he stated that Dalhart would testify that the fair market value of Kahn's firm was "zero."

¶ 20 Prior to trial, Davis Friedman filed a motion *in limine* requesting that the trial be bifurcated, with the jury deciding the issue of liability and the court deciding the issue of damages. Both the court and the parties agreed to bifurcation. Kahn's lawyers then argued that Dalhart should be allowed to testify to the jury about the value of Kahn's law firm and the tax consequences associated with the award of Kahn's IRA assets. They argued that this testimony was relevant to the issue of liability. The trial court agreed, stating:

> "[I]f causation goes to the jury, they have to find an injury, right? *** And if the testimony [of Dalhart] is sufficiently limited, I don't see a harm in it. In fact, I think it almost has to be before them in order to decide this issue of causation and also relative to some of the defenses."

Thus, over Davis Friedman's objection, the trial court agreed to allow Dalhart to testify before the jury for the limited purpose of establishing that Kahn had suffered an injury.

¶ 21 Kahn filed a pretrial motion entitled: "Motion for the Court to take Judicial Notice of the Trial Court's Findings in the Divorce Action," wherein he requested that the court advise the jury that the trial court found: (1) "that David Kahn was bound by the stipulation [of the firm's value] and could not counter the stipulation with evidence that the firm had obligations and/or liabilities as of the date of trial" and (2) "that [the court] is required to consider the tax consequences of the division of marital property upon the respective economic circumstances of the parties, but that it could not do so without evidence of the tax consequences *** [and] *** Kahn waived his right to present evidence as to the tax consequences of the IRA assets where he failed to offer evidence of tax consequences until after the divorce judgment was entered."

¶ 22 Kahn also filed a pretrial motion entitled: "Motion for the Court to take Judicial Notice of the Appellate Court Findings in the Underlying Divorce Action," wherein he requested that the court further advise the jury that: (1) "[t]he Appellate Court affirmed that trial court's finding that David Kahn was bound by the stipulation and could not counter the stipulation with testimony regarding the firm's obligations[,]" and (2) "[t]he Appellate Court found the tax consequences of the property division is a relevant consideration in a divorce action *** [and] that David Kahn could not contest the trial court's failure to consider the tax laws or tax consequences where he failed to request that the court do so and failed to bring the appropriate materials to the attention of the court."

¶ 23 The trial court ultimately denied both of Kahn's motions, stating: "[I]t seems to me that the best evidence of what those rulings mean is the rulings themselves as opposed to me putting a judicial gloss on them. It seems to me that they speak for themselves."

¶ 24 D. Jury Trial

¶ 25 1. Kahn's testimony

¶ 26 A jury trial was held on liability from July 19, 2011 through July 27, 2011. Kahn testified on his own behalf. Kahn stated that although he was a lawyer, he had never been in divorce court prior to his own divorce, and he knew almost nothing about divorce law. Prior to retaining Zavett as his divorce attorney in February, 2005, Kahn had other legal counsel representing him in his divorce case, which was filed in 2002. Kahn himself, along with other attorneys from his law firm, had also filed appearances in the divorce case—these appearances were later withdrawn when Zavett began his representation.

¶ 27 Kahn testified that the divorce court did not consider the firm's outstanding obligations in determining its value, because of the stipulation that Zavett recommended Kahn sign prior to

trial. Kahn testified that Zavett presented him with the stipulation on the day of the trial and told him to sign it. At that time, Kahn observed that the stipulation contained a listing of the balances of his law firm's bank accounts, which totaled approximately $477,000. Kahn testified that the value of his law firm was really not the cash the law firm held in its bank accounts; instead, because the firm had current and future financial obligations such as taxes, rent, and employee compensation, the law firm's worth was "functionally zero." Kahn said that he was reluctant to sign the stipulation but Zavett "insisted" that Kahn sign it, telling him that if he refused to sign, the divorce judge would be angry. Zavett assured him that the stipulation would not prevent the court from considering evidence that the firm was actually worth less than $477,000, and Kahn did so testify at trial. Kahn signed the stipulation based on Kahn's advice. However, the divorce court did not consider Kahn's evidence of the law firm's outstanding and future financial obligations. Instead, the court awarded the firm to Kahn and awarded other assets to his wife. Kahn claims this allocation was the equivalent of splitting the firm's cash between the parties.

¶ 28 Kahn further testified about Zavett's alleged negligence in failing to present evidence of the future tax consequences related to the marital IRA assets. Kahn stated that the tax consequences for IRA accounts are higher than for other kinds of accounts. He explained that money in an IRA is tax-deferred, unlike an investment account where only profits are taxable upon withdrawal.

¶ 29 Kahn testified that prior to trial, each party submitted a proposed division of the marital assets. Kahn's wife proposed that approximately Kahn's IRA assets be awarded to Kahn. Kahn stated that he emailed Zavett and asked whether they should object to this proposal and inform the court of the tax consequences of such assets. Zavett told him that it would be unnecessary because, in his experience, judges always divided such assets equally. Kahn said that he

regarded this advice as "[n]ot great," but he did not insist on submitting the tax consequences into evidence during the divorce trial because he wanted to trust Zavett's extensive divorce law experience over his own lack of experience. In the end, the trial court divided the IRA assets according to Mrs. Kahn's proposal, and awarded Kahn 96% of those assets. Kahn testified that the taxes on those accounts could potentially be as much as $980,000.

¶ 30 2. Zavett's testimony

¶ 31 Kahn then called Zavett as an adverse witness. Zavett was certified by the court as an expert in family law. With regard to the stipulation submitted during the divorce trial, Zavett testified that he intended to stipulate to the value of the bank accounts held by Kahn's law firm, not the value of the firm itself, but the trial court interpreted the stipulation as the latter and treated the marital law firm as being worth $477,000. Zavett admitted that he both advised Kahn to sign the stipulation and told Kahn that if he did not sign it, the judge would not be pleased with him. However, he also said that "Mr. Kahn was not a client who blindly accepted advice. Mr. Kahn argued, debated, and discussed many of the decisions. If he agreed to do this, believe me, he was an independent thinker."

¶ 32 Zavett gave two reasons why he advised Kahn to sign the stipulation. First, he stated that the amount of cash in the firm's accounts was an easily verifiable fact, and forcing the other side to subpoena the bank records to prove those amounts would be a waste of the court's time. Additionally, he stated that as a matter of strategy, he did not want to draw too much attention to the valuation of Kahn's firm, because the firm also had "other significant potential assets" – namely, contingent fee cases in progress that could potentially be argued to contribute to the firm's value. He stated that the firm's primary source of income consisted of contingent fees. However, Zavett admitted that, during his closing argument in the divorce trial, he informed the

court that, as a matter of law, contingent fees of a law firm could not be counted in valuing the law firm when dividing marital assets.

¶ 33 With regard to the marital IRA accounts, Zavett admitted that he made no mention, during trial, of the potential tax consequences for IRA accounts. He testified that this was a matter of trial strategy. Under their proposed division of the marital estate, Kahn wanted to give his wife $1 million in IRA assets. Zavett stated that he and Kahn wished this to be perceived as a "grand gesture" and "a very attractive way to sell the settlement" to attempt to achieve a 60/40 split of the marital assets in Kahn's favor. Consequently, Zavett testified that he did not want to point out that these assets would be highly taxed which would serve to highlight that this $1 million in IRA assets was not a grand gesture. Zavett also stated that Kahn participated in the drafting of this proposed strategy to attempt a 60/40 division of the estate and "certainly didn't reject it." Zavett stated that he believed that the divorce judge was aware of the potential tax consequences that applied to IRA assets. He opined that even if he had raised the tax issue at trial, the result would have been the same.

¶ 34 Zavett denied telling Kahn that the divorce court would make a proportional distribution of the IRA assets. He stated that, in fact, it is not true that divorce courts generally make an equal division of tax-deferred assets such as IRA accounts. However, he agreed that he sent an email to Kahn in which he stated the following: "You know that I think that to the extent [the divorce judge] does a percentage division, she'll divide in kind so this [informing her of tax consequences] will be unnecessary." He characterized this comment as "a throw away" and further stated, "I am of the firm belief that Mr. Kahn understood the risks."

¶ 35 Regarding the future tax consequences for IRA accounts, Zavett admitted that in his postjudgment motion for reconsideration, he stated the following: "The potential tax costs to

David [Kahn] are significant (at the 35 percent rate payable on ordinary income, the potential tax could come to about $980,000 on the IRAs awarded him)." However, Zavett stated that Kahn gave him that sentence to insert into the motion. He stated that it was "very common" for Kahn to direct him regarding what to write in briefs.

¶ 36 Finally, Zavett admitted that he did not counsel Kahn that their trial strategy to attempt a 60/40 split of the marital assets might cause the divorce court to value Kahn's law firm at $477,000 or award Kahn 96% of the IRA assets. "Mr. Kahn did not need me to explain it," Zavett stated. "Mr. Kahn was a sophisticated, experienced lawyer who had been in court, who had been in much bigger litigation than this. And he certainly understood the risks."

¶ 37 3. Oney's testimony

¶ 38 Kahn called a family law attorney, Claudia Oney, to testify as an expert on the standard of care for a family law attorney. She was a graduate of DePaul law school and practiced family law in her firm, Oney & Arthur, for 33 years. She had testified as an expert only one other time. Oney testified that both the divorce court and the appellate court found that the stipulation was controlling as to the value of Kahn's law firm and, by signing it, Kahn had relinquished the right to present evidence of his firm's obligations. Oney stated that a reasonably careful divorce attorney would have listed the firm's liabilities along with its assets in the stipulation or, alternatively, would have declined to make any stipulation regarding the law firm. This latter option would require the parties to establish the value of the bank accounts at trial, but Oney stated that doing so would typically take about five minutes.

¶ 39 Additionally, Oney testified that retirement accounts affect the distribution of property in a divorce proceeding because the money in such accounts has not yet been taxed. She noted that when a divorce judge is dividing a marital estate, one of the statutory factors she is required to

consider is the tax consequences on the parties. Oney opined that a reasonable divorce lawyer would give the judge information on every statutory factor, including tax consequences, and it was a deviation from the standard of care for Zavett, Kahn's attorney, to fail to bring such tax consequences to the attention of the court. She explained: "It was a huge amount of money that the judge should have been asked to view in a separate way than the rest of the assets, because no taxes had been paid on $2.7 million, and that's a lot of tax."

¶ 40 4. Court's ruling on Dalhart's testimony

¶ 41 Following Oney's testimony, counsel for Davis Friedman asked the court whether Glenn Dalhart, Kahn's damages expert, would be permitted to testify before the jury during the liability phase. Dalhart's testimony was presented outside the presence of the jury as an offer of proof at trial. He testified, *inter alia*, that: (1) Kahn's law firm had no fair market value as of September 30, 2005, and that (2) the divorce court's IRA allocation resulted in Kahn receiving $342,708 less after taxes than he would have received under a "50-50 division" of the IRA accounts.

¶ 42 The court decided to exclude Dalhart's testimony during the liability phase, and stated its reasoning as follows:

> "I just don't know that it's appropriate to put on a damage expert when the jury is not – when they're not deciding damages. ***
> What I was concerned with at the outset when we initially visited this issue, the concern was that there wouldn't be a mechanism. There wouldn't be anything there for the jury to discern any injury and we're asking them to decide proximate cause. But now having heard the testimony, there is. And so I just, I just don't see that it's appropriate."

¶ 43 Kahn then rested his case

¶ 44 5. Pasulka's testimony

¶ 45 Davis Friedman's expert, Pasulka, testified that Zavett did not breach the standard of care in advising Kahn to enter into the stipulation regarding the valuation of the law firm's bank accounts. Pasulka had over 26 years of experience as a family law attorney and had tried over 300 family law cases. Pasulka noted that Kahn, in fact, testified to the liabilities of his law firm during the divorce trial and that "[t]he stipulation doesn't prohibit further information." During cross-examination, Pasulka explained that there was "an enormous distinction" between the value of a firm and the "cash on hand in the firm bank accounts." Pasulka stated, however, that in its judgment order, the divorce court provided that Kahn's firm was "not valued," but instead listed the firm's bank accounts and the values of the accounts. Therefore, Pasulka concluded, there was "no confusion in the judge's mind as to what that stipulation did."

¶ 46 Pasulka also testified that Kahn had work-in-progress on multiple contingent fee cases. In particular, he said that at the time of the divorce, Kahn and his firm had $2.85 million worth of time and expenses invested in a case he referred to as the "WRT" case, and Kahn was hoping for "a large award of attorney's fees" on that case. On cross-examination, Pasulka admitted that future income is usually not considered by the divorce court in dividing the marital estate. He agreed that the Illinois Supreme Court had held that contingent fees were not to be counted in dividing marital assets.

¶ 47 With regard to the marital IRA accounts, Pasulka testified that the overall strategy developed by Zavett and Kahn was to obtain a 60/40 division of the marital estate in Kahn's favor. As part of this strategy, they offered to give $1 million in IRA assets to Kahn's wife. Pasulka testified that this strategy was within the standard of care, and it would have undermined

that strategy to highlight the tax consequences of IRA assets because it would uncover the fact that they were not really giving $1 million to the wife. Pasulka further testified that, in his 26 years of family law practice, he had never presented evidence to the court of how an IRA account would be taxed upon withdrawal. He stated that any such tax computation would be speculative because the applicable tax bracket would depend on the owner's income at the time of withdrawal.

¶ 48 After Pasulka's testimony, Kahn took the stand in rebuttal. He stated that at the time of the divorce trial, he considered the value of the "WRT" case to be "[b]asically zero," because his firm had been working on that case for at least 12 years, it was not close to being finished, and it was not going well. He stated that, in fact, he has never received anything from that case.

¶ 49 6. Jury instructions and verdict

¶ 50 At the close of evidence, Kahn tendered three nonpattern jury instructions, which stated as follows:

> [1] "It is not a defense to David Kahn's professional negligence claim that David Kahn agreed to follow Davis Friedman's advice and/or that he is an attorney."
>
> [2] "If a lawyer fails to advise his clients regarding the foreseeable risk of a course of action he advises the client to take, the lawyer is negligent regardless of the propriety of the course of action the lawyer recommends."
>
> [3] "In determining the division of a marital estate, where a spouse has a law practice, a spouse's contingent fee cases are not marital assets and may not be taken into account in dividing the marital estate."

¶ 51 All three proposed instructions were rejected by the trial court.

¶ 52 The jury returned verdicts in Davis Friedman's favor on both its breach of contract claim and on Kahn's counterclaim for legal malpractice and breach of contract. Kahn now appeals, claiming that the trial court erred: (1) by denying his motions for jury instructions on the divorce and appellate courts' waiver rulings ; (2) by refusing to give other nonpattern jury instructions; and (3) by excluding Dalhart's expert damages testimony during the liability phase of trial.

¶ 53 ANALYSIS

¶ 54 A. Denial of "Judicial Notice" Motions

¶ 55 Kahn first contends that the trial court erred in denying his "Motion for the Court to take Judicial Notice of the Trial Court's Findings in the Divorce Action" and "Motion for the Court to take Judicial Notice of the Appellate Court Findings in the Underlying Divorce Action." According to Kahn, the jury should have been instructed as to the divorce and appellate courts' rulings that he was bound by his stipulation as to the valuation of his law firm and that he waived any issue regarding the tax consequences of the property distribution by not offering evidence of such tax consequences at trial. He claims that "[l]eaving the legal question of the meaning of the divorce opinions to the lay jury was clear error."

¶ 56 In response, Davis Friedman argues that Kahn has waived this issue by failing to submit the court with "formal" written instructions regarding the divorce and appellate courts' rulings during the jury instruction conference. Alternatively, Davis Friedman argues that the trial court did not abuse its discretion in rejecting Kahn's proposed instructions, because non-IPI instructions are disfavored and the instructions merely highlighted evidence favorable to Kahn.

¶ 57 Initially, we find no merit to Davis Friedman's waiver argument. It is not disputed that Kahn did submit, in his pretrial motions, proposed written instructions regarding the divorce and

appellate courts' rulings. Despite its assertion that Kahn failed to properly preserve his challenge to the rejection of those instructions, Davis Friedman fails to cite any legal precedent for the proposition that a trial court's refusal to give a jury instruction may only be challenged where the ruling is made in the context of a jury instruction conference, as opposed to a pretrial motion. Given the lack of authority for Davis Friedman's position, we will consider the merits of Kahn's claim.

¶ 58 The purpose of jury instructions is to inform the jury of the correct principles of law that apply to the submitted evidence. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 507 (2002). "In Illinois, the parties are entitled to have the jury instructed on the issues presented, the principles of law to be applied, and the necessary facts to be proved to support its verdict." *Id.* at 505. Our supreme court has explained that:

> "Generally speaking, litigants have the right to have the jury instructed on each theory supported by the evidence. Whether the jury would have been persuaded is not the question. All that is required to justify the giving of an instruction is that there be some evidence in the record to justify the theory of the instruction. The evidence may be insubstantial." *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007) (citing *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 406 (1998)).

The decision to give or deny an instruction is within the discretion of the trial court. *Id.*[1] No abuse of discretion will be found where, taken as a whole, the instructions are sufficiently clear so as not to mislead the jury and they fairly and correctly state the law. *Dillon*, 199 Ill. 2d at 505.

[1] Kahn argues that the abuse of discretion standard is inappropriate because the court lacked discretion to not instruct the jury "as to the meaning of the divorce court's waiver opinions." Confusingly, however, he then goes on

¶ 59 Here, Kahn claims that the trial court erred in refusing to instruct the jury as to the divorce and appellate courts' rulings (1) that he was bound by the stipulation regarding the value of his law firm, and (2) that he had waived his right to present evidence as to the tax consequences of the property distribution. The record shows that the orders of the divorce and appellate courts were entered into evidence at trial and that the relevant portions were published to the jury. It further shows that those portions were discussed at length by several witnesses and shown to the jury *via* an overhead projection device on multiple occasions. Nonetheless, Kahn argues that the courts' rulings were "a pure matter of law" and that "a jury must be instructed by the Court on the law relevant to the disposition of the case."

¶ 60 We agree with the trial court's conclusion that the divorce and appellate courts' rulings "speak for themselves" and did not require a separate jury instruction. We also agree with Davis Friedman's contention that the courts' rulings were evidentiary matters at trial and did not explain the law relevant to a legal malpractice case. Moreover, Illinois Supreme Court Rule 239(a) (eff. Jan. 1, 2011) provides that a non-pattern jury instruction must be "simple, brief, impartial, and free from argument." Here, the instructions proposed by Kahn were argumentative in that they merely highlighted the evidence at trial which favored Kahn's position. See *Lay v. Knapp*, 93 Ill. App. 3d 855, 858-59 (1981) (noting that "argumentative instructions are adversarial statements highlighting favorable and unfavorable evidence with partisan overtones"). We reject Kahn's argument that if the trial court did not find his proposed instructions appropriate, it should have modified them or directed the parties to do so. Kahn has cited no authority requiring the court to take such action and there is no indication that a rewritten instruction was even necessary. We

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to cite our supreme court's statement that "when a party tenders a jury instruction that states the legal principles applicable to the case and that instruction is supported by the evidence, it is an *abuse of discretion* to refuse to give the instruction if the refusal prejudices the party's right to a fair trial." (Emphasis added.) *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 562-63 (2008). We apply this standard in accordance with the cited precedent.

thus find no abuse of discretion by the trial court in denying Kahn's proposed instructions regarding the divorce and appellate courts' waiver rulings.

¶ 61 B. Kahn's Additional Nonpattern Jury Instructions

¶ 62 Kahn next contends that the trial court erred in refusing to give other nonpattern jury instructions that he proposed. He claims that the trial court should have instructed the jury (1) that his status as an attorney was not a defense to Davis Friedman's negligence, (2) that Davis Friedman had a duty to inform him of the risks and benefits of its strategies, and (3) that contingent future income is not divisible marital property.

¶ 63 Before addressing the propriety of Kahn's proposed instructions, we note that the supreme court has mandated a presumption in favor of IPI instructions. *Pruett v. Norfolk & Western Ry. Co.*, 261 Ill. App. 3d 29, 36 (1994). Under Supreme Court Rule 239, if there is an applicable IPI instruction, it "shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 239. Non-IPI or nonpattern jury instructions must be "simple, brief, impartial, and free from argument." *Id.* As previously noted, the decision to give or deny an instruction is generally reviewed for an abuse of discretion. *Heastie*, 226 Ill. 2d at 543. The issue of whether the applicable law was conveyed accurately, however, is a question of law that we review *de novo*. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13. With these principles in mind, we turn to the instructions at issue.

¶ 64 1. Kahn's status as an attorney

¶ 65 Kahn first claims that the trial court erred in refusing to instruct the jury that his status as an attorney was not a defense to Davis Friedman's alleged negligence. He claims that this instruction was necessary because Davis Friedman argued to the jury that Kahn's involvement in

settlement negotiations and other aspects of the divorce case was a defense to the purportedly negligent advice.

¶ 66 The record shows that, prior to trial, Davis Friedman filed an affirmative defense arguing that Kahn was contributorily negligent because he had filed an appearance as counsel in his own divorce proceeding and authorized the manner in which Davis Friedman proceeded. Kahn responded by tendering the nonpattern instruction at issue, which stated:

> "It is not a defense to David Kahn's professional negligence claim that David Kahn agreed to follow Davis Friedman's advice and/or that he is an attorney."

During the jury instruction conference, the trial court rejected the foregoing instruction on the ground that it was in tension with another instruction on contributory negligence. Prior to closing arguments, however, Davis Friedman withdrew its contributory negligence affirmative defense, and all references to contributory negligence were removed from the instructions and verdict forms. Kahn argued, in his motion for a new trial, that without the benefit of his proposed instruction, "the jury was permitted to conclude that Kahn's status as an attorney or his decision to follow [Davis Friedman's] advice exculpated [Davis Friedman] when, as a matter of law, neither was true." The trial court rejected his argument, stating, "Davis Friedman withdrew its estoppel and contributory negligence defenses, so the proposed instruction was not necessary."

¶ 67 Davis Friedman argues that the trial court properly rejected Kahn's proposed instruction because it sought to address a defense that had been withdrawn before the jury began its deliberation. Kahn responds that the court refused the proposed instruction before Davis Friedman withdrew its contributory negligence defense.

¶ 68 It is well settled that "[a] reviewing court may affirm the trial court's judgment on any basis appearing in the record, regardless of whether the trial court relied on that basis or whether the trial court's reasoning was correct." *In re Marriage of Chez*, 2013 IL App (1st) 120550, ¶ 26. In the instant case, it is reasonable to find that once Davis Friedman withdrew its affirmative defense of contributory negligence, the jury was no longer required to consider a defense predicated on Kahn's status as an attorney. Under the circumstances, we agree with the trial court that issuing an instruction that Kahn's status as an attorney was no "defense" to Davis Friedman's alleged negligence was entirely unnecessary where no such defense was being asserted.

¶ 69 Kahn argues that his proposed instruction was necessary because despite withdrawing its contributory negligence defense, Davis Friedman nonetheless still "suggested" that Kahn's involvement in his divorce proceeding relieved it of responsibility for its allegedly negligent advice. The record indeed shows that the jury heard evidence about Kahn's status as an attorney and involvement in the divorce proceeding. There was no evidence or argument presented by Davis Friedman to the jury, however, that Kahn's occupation as an attorney and his involvement in the proceedings barred Davis Friedman from being liable for any negligence. Therefore, under the circumstances, no basis exists for concluding that the trial court abused its discretion in refusing Kahn's proposed instruction.

¶ 70 2. Davis Friedman's duty to disclose risks

¶ 71 Kahn next claims that the trial court erred in refusing to instruct the jury that Davis Friedman had a duty to inform him of the risks and benefits of its strategies, particularly the risk that his claims would be waived. The trial court rejected the following nonpattern instruction,

which was purportedly based on this court's opinion in *Metrick v. Chatz*, 266 Ill. App. 3d 649 (1994):

> "It is the duty of every attorney to inform a client of the available options for alternative legal solutions, as well as to explain the foreseeable risks and benefits of each. The purpose of such a rule is to enable the client to make an informed decision as to whether the foreseeable risks of a proposed legal course of action are justified by its potential benefits when compared to other alternative courses of action.
>
> If a lawyer fails to advise his clients regarding the foreseeable risk of a course of action he advises the client to take, the lawyer is negligent regardless of the propriety of the course of action the lawyer recommends. A lawyer's negligence in such a case is based upon his failure to advise his client sufficiently in order to allow the client to decide whether or not it wants voluntarily to accept such risks."

Davis Friedman maintains that the trial court properly refused the above instruction because it in fact does not follow the language in *Metrick* and, as a result, inaccurately states the law.

¶ 72 Kahn's proposed instruction was purportedly based on the following language from *Metrick*:

> "It is the duty of every attorney to inform a client of the available options for alternative legal solutions, as well as to explain the foreseeable risks and benefits of each. The purpose of such a rule

> is to enable the client to make an informed decision as to whether the foreseeable risks of a proposed legal course of action are justified by its potential benefits when compared to other alternative courses of action. *If a client suffers damage because of the happening of a foreseeable risk of which he or she was not informed, the attorney may be liable*. In such a case, the attorney's liability is not predicated upon the impropriety of the chosen course of action, but rather upon the failure to inform the client sufficiently to enable him or her to voluntarily accept the risk attendant thereto." (Emphasis added.) *Id.* at 653-54.

Although the court in *Metrick* stated that an attorney "may" be liable if he fails to adequately inform a client of a foreseeable risk, Kahn's proposed instruction essentially states that an attorney is *per se* negligent for such a failure. Specifically, it states, "[i]f a lawyer fails to advise his clients regarding the foreseeable risk of a course of action he advises the client to take, *the lawyer is negligent* regardless of the propriety of the course of action the lawyer recommends." (Emphasis added.) We find that this is not only a misstatement of the law expressed in *Metrick*, but also a misstatement of the law generally.

¶ 73 The proposition of law announced in *Metrick*, as that court noted, was "nothing more than an application of the long-standing rule pertinent to a cause of action for medical negligence premised upon a lack of informed consent." *Id.* at 654 (citing *Green v. Hussey*, 127 Ill. App. 2d 174 (1970)). In *Green*, the case cited by the court in *Metrick*, the plaintiff in a medical malpractice action argued on appeal that " '[a] physician who fails to obtain his patient's consent to treatment must answer for the resulting damages,' " *i.e.*, the physician is *per se* negligent if he

failed to obtain informed consent. *Green*, 127 Ill. App. 2d at 179. The appellate court disagreed, finding that the plaintiff was required to prove by expert testimony that a reasonable medical practitioner in the same field, in the same or similar circumstances, would have informed the patient of the foreseeable risks of x-ray and cobalt therapy. *Id.* at 184. Insofar as Kahn believes that *Metrick* stands for the proposition that an attorney is *per se* negligent for failing to inform a client of foreseeable risks, we disagree. Such a *per se* rule was definitively rejected by in the *Green* decision, which the *Metrick* court followed. Since Kahn's proposed instruction inaccurately stated the law of negligence, we conclude that the trial court properly refused to give his proposed instruction to the jury.

¶ 74 3. Future contingency fee income as marital property

¶ 75 Kahn also claims that the trial court erred in refusing to instruct the jury that his law firm's contingent future income was not divisible marital property and could not be properly used in valuing his firm. The trial court refused the following nonpattern instruction, which was based on the supreme court's opinion in *In re Marriage of Zells*, 143 Ill. 2d 251 (1991):

> "In determining the division of a marital estate, where a spouse has a law practice, a spouse's contingent fee cases are not marital assets and may not be taken into account in dividing the marital estate."

It is undisputed that Kahn's proposed instruction is an accurate statement of the law. See *Marriage of Zells*, 143 Ill. 2d at 252 (holding that contingent fees are not divisible marital assets). Davis Friedman argues, however, that the trial court properly refused the instruction because it espoused a principle of law that was not applicable to Kahn's legal malpractice claim.

¶ 76 The record shows that Kahn's proposed *Zells* instruction was initially refused because the trial court did not "want to be instructing [the jury] on the details of divorce law." Later, when Kahn challenged the court's ruling in his motion for a new trial, the court gave additional reasons for its denial of this instruction. While the court acknowledged that Kahn's proposed instruction correctly stated the rule announced in *Zells*, it noted that "the jury [had not been] called upon to divide a marital estate." It further noted:

> "The proposed instruction was misleading as demonstrated by Kahn's posttrial argument in its favor: 'Without this instruction, the jury could have concluded that Davis Friedman was not negligent in stipulating that the value of the law firm was $477,000 …' But that was the point of the trial. The jury had a binary choice: the jury *could* conclude that Davis Friedman was negligent, *or* the jury could conclude that Davis Friedman [was] not negligent. The proposed instruction did not fully state the law applicable to the case, and as Kahn's argument now illustrates, it had the potential to mislead the jury." (Emphasis in original.)

¶ 77 A party is entitled to have the jury instructed on any theory of the case supported by the evidence so long as the tendered instruction *clearly* and *fairly* instructs the jury. *Mikolajczyk*, 231 Ill. 2d at 549. The expression "theory of the case" does not refer to the plaintiff's theory of liability, but rather, to each party's framing of the issues and arguments in support of its position. *Id.* at 549-50.

¶ 78 Here, one theory of the case advanced by Kahn was that Zavett negligently stipulated to the value of Kahn's law firm's bank accounts. To show negligence, Kahn was required to prove

that a reasonably careful divorce attorney would not have stipulated to the value of the law firm's bank accounts under the circumstances. Kahn testified that his firm was worth "functionally zero" and that the net balance for the firm at the end of the year was approximately $1600. He testified that, as a result of the stipulation that Zavett advised him to sign, the divorce court never considered the firm's outstanding obligations, which significantly reduced the firm's net value. Zavett and Pasulka called Kahn's theory of the case into question, suggesting that drawing attention to the firm's value might have had adverse consequences. Zavett testified that he did not want to draw too much attention to the value of Kahn's firm because of "other significant potential assets." He testified that Kahn had contingent fee cases in progress that could have potentially been argued to contribute to the firm's value. Pasulka similarly testified that Kahn was working on multiple contingent fee cases and that he was hoping, in one particular case, for "a large award of attorney's fees."

¶ 79 "While the threshold for permitting an instruction in a civil case is modest, the standard for reversing a judgment based on failure to permit an instruction is high." *Heastie*, 226 Ill. 2d at 543. "[A] new trial will be granted only when the refusal to give a tendered instruction results in serious prejudice to a party's right to a fair trial." *Id.*

¶ 80 We cannot say that the trial court's refusal to give Kahn's proposed instruction resulted in "serious prejudice" to Kahn's right to a fair trial. Both Zavett and Pasulka essentially admitted that future contingent fees cannot be counted in dividing marital assets. Through their combined testimony, however, they established that while contingent fee cases alone may not be considered as marital assets, such cases may nonetheless be relevant in determining the value of a law firm. At trial, Pasulka explained to the jury the concept of a "loadstar," which he described as "the work that we have in the case up to this point in time." He made the point that even

though a contingency case has no value, the "work in progress does have a value *** [and] [t]he loadstar is the same way." Pasulka testified that Kahn's law firm had a "loadstar" of $2.85 million in the "WRT" case and that Kahn was hoping for "a large award of attorney's fees" on that case. Pasulka's testimony about the loadstar explained Zavett's concern about drawing too much attention to the valuation of Kahn's firm. It further gave context to Zavett's testimony that Kahn's pending contingent fee cases could potentially be argued to contribute to the firm's value. While the jury was admittedly presented with a nuanced view of how contingency fee cases may impact the valuation of a law firm as a marital asset, we do not believe that the evidence was such to mislead the jury into thinking that a future contingency fee, itself, could be considered a marital asset. We therefore find that there was no serious prejudice to Kahn's right to a fair trial when the trial court refused his proposed instruction based on *Marriage of Zells*. See *id.*

¶ 81 D. Dalhart's Expert Testimony

¶ 82 Kahn lastly contends that the trial court erred in barring his damages expert, Dalhart, from testifying during the liability phase of trial. Davis Friedman argues that Dalhart's testimony was properly excluded because the issue of damages was not before the jury. Davis Friedman further argues that Dalhart's testimony was merely cumulative of other evidence offered at trial.

¶ 83 "[I]t is well settled that the decision whether to admit expert testimony is within the sound discretion of the trial court." *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006). The exclusion of cumulative evidence, including limiting the number of expert witnesses, also falls within the trial court's discretion. *Dillon*, 199 Ill. 2d at 495. We review for an abuse of discretion. *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 13.

¶ 84 Kahn first claims that the trial court erred in barring Dalhart's testimony regarding the value of Kahn's law firm. According to Kahn, Dalhart's testimony on this matter was essential

because in order to prove that Zavett acted negligently, Kahn was required to show that his law firm was worth less than the $477,000 that was listed in the pretrial stipulation.

¶ 85 The record shows that the trial court gave Kahn ample opportunity to establish that Davis Friedman violated the standard of care with respect to the stipulation. Kahn testified that his firm was worth "functionally zero" because of third party liabilities. Kahn's expert, Oney, opined that a reasonably careful divorce attorney would have either listed the firm's liabilities in the stipulation or have declined to make any stipulation at all regarding the law firm.

¶ 86 While Davis Friedman never offered a valuation expert to dispute Kahn's claim that his law firm was worth nothing, it offered testimony instead to demonstrate that it was a reasonable strategy to stipulate to the amount of cash in the firm's bank accounts in order to avoid drawing attention to the value of the firm's "other significant potential assets"—such as pending contingent fee cases. David Friedman's expert, Pasulka, testified that Kahn had a $2.85 million dollar "loadstar" in the pending "WRT" case, which could have raised the value of his law firm. Kahn later testified, in rebuttal, that the pending "WRT" case was not going well after 12 years and was basically worth nothing.

¶ 87 Based upon the record, it is evident that Kahn was given the opportunity to present both lay and expert testimony to establish that Zavett and Davis Friedman violated the standard of care with respect to the stipulation. We find that further expert testimony from Dalhart concerning the value of the firm would have been cumulative of the evidence offered to show that the firm was purportedly worth "zero." Therefore, we cannot say that the court abused its discretion in barring Dalhart's testimony.

¶ 88 Additionally, Kahn claims that the trial court erred in barring Dalhart's testimony regarding the extra tax costs resulting from the award of IRA accounts. We disagree. The

record shows that there was ample evidence at trial regarding the tax consequences of the divorce court's allocation of the IRA accounts. Kahn testified that the taxes on the IRA accounts could potentially total $980,000. Oney testified that "no taxes had been paid on $2.7 million, and that’s a lot of tax." Zavett admitted stating, in his motion for reconsideration, that Kahn's "potential tax [liability] could come to about $980,000." Although testimony from Dalhart regarding the tax consequences on the IRA accounts would have been relevant, there was no lack of evidence on that issue at trial. We find such testimony would have been merely cumulative and that the trial court did not abuse its discretion in barring it.

¶ 89 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 90 Affirmed.