FIRST DIVISION
August 11, 2014

No. 1-13-2901

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELIZABETH AGNEW NICHOLS, as Attorney-In-Fact for MARION H. AGNEW; and ELIZABETH AGNEW NICHOLS, as Trustee and beneficiary of the Richard K. Agnew Residuary Trust and the Marion H. Agnew Trust,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 11 L 6819
RICHARD K. AGNEW, JR.,	)	
Defendant-Appellant.	)	Honorable Thomas R. Mulroy, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held***: The jury verdicts on the plaintiffs' fraud, conversion, and unjust enrichment claims were not against the manifest weight of the evidence. The trial court did not err in refusing to submit the defendant's special interrogatories to the jury. The defendant's claim that the jury did not consider the money he repaid is not supported by the evidence. The trial judge's comments were not prejudicial because they could not have had any effect on the jury's verdicts. The trial court properly tendered certain jury instructions and correctly explained the applicable burdens of proof.

¶ 2 The main persons involved in this case are a mother and two of her adult children. Dr. Elizabeth Agnew Nichols (Betsy) brought the case in two capacities: as attorney-in-fact for her mother Marion H. Agnew (mother or Marion), and as trustee and beneficiary of the Richard K. Agnew (Dick) Residuary Trust and Marion H. Agnew Trust (trusts). We refer to Betsy as "plaintiffs" herein because of her dual capacities. She sued to recover money taken by Marion and Dick's son, *pro se* defendant-appellant Richard K. Agnew, Jr. (defendant or Rick). After a three-day trial, a jury found in favor of plaintiffs on three counts—fraud, conversion, and unjust enrichment—and awarded plaintiffs $3,159,356.65 in compensatory damages on each count (although not cumulatively) and $400,000 in punitive damages. The jury found in favor of the defendant, however, on a breach of fiduciary duty count. The trial court entered judgment on the verdict, and we affirm.

¶ 3 BACKGROUND

¶ 4 On June 30, 2011, the plaintiffs filed a six-count complaint against the defendant which was later amended. In the amended complaint, the plaintiffs alleged that Marion was a 93-year old widow who resided at the Presbyterian Homes located in Evanston, Illinois. Marion was Dick's widow; he passed away in November 2003. Marion and Dick had three children: Betsy, Rick, and Peter. Before his death, Dick established the two trusts to be used for his and his wife's care.

¶ 5 The plaintiffs alleged that the defendant took significant sums of money from Marion during a ten-year period from 2001 to 2010. They alleged the defendant regularly and repeatedly represented to Marion and Betsy that because he assisted with all aspects of Marion's affairs, he needed access to her money. Based on these representations, the plaintiffs allowed the defendant to manage Marion's financial accounts by, for example, overseeing the filing of her tax returns

and coordinating her caregivers. During this period, the defendant also received, read, and responded to Marion's mail, paid her bills, and dealt with her health insurance claims.

¶ 6 The plaintiffs also claimed that, as of December 31, 2000, the trusts were worth about $2,883,890, but by 2010 both trusts were completely depleted. In sum, the plaintiffs claimed the defendant improperly took and transferred $2,100,000 from Marion's accounts, which included the trusts.

¶ 7 Before trial, the parties agreed to use an evidence deposition of Marion's testimony because of her age and infirmity. The trial court offered the defendant a number of options as to how he would like Marion's deposition transcript read to the jury. After some discussion, defendant acquiesced to having only the questions and answers read, with the understanding that the plaintiffs' attorneys could interject objections orally if they chose to do so.

¶ 8 The plaintiffs called Betsy as their first witness. Betsy testified that she is the trustee of her parents' trusts and had a power of attorney over her mother's affairs. She explained she lived in Virginia and her mother and the defendant resided in two northern Chicago suburbs. Given the defendant's close proximity to Marion, he would often assist her. Betsy described her history of conversations with the defendant, which included assurances from the defendant that he was taking care of Marion and her finances were in order.

¶ 9 Betsy stated that the defendant first informed her that the trusts were nearly out of money in October 2010. She asked the defendant to account for the money but he never did so. After several months of discussions with the defendant, Betsy told Marion of her dire financial situation and Betsy then became the trustee of the trusts and assumed power of attorney over Marion's affairs.

¶ 10 As trustee, Betsy had the authority to investigate what happened to Marion's money. Betsy determined that Rick was responsible for depleting a substantial portion of Marion's money. When Betsy advised Marion of her financial status as a result of the defendant's actions, Marion dictated and signed a letter stating:

> "Dear Rick,
>
> As much as I love you, I have learned from Betsy how much of my money you have used up. We are counting on you to pay every cent back to my estate.
>
> Love,
>
> Mom."

¶ 11 Betsy next conducted a comprehensive investigation to determine how much money the defendant had taken from Marion and how he had used it. She found he made $171,301 in PayPal purchases, wrote $1,075,589 in checks from Marion's account at Harris Bank, deposited $642,000 into his own account from checks from the trust accounts, and made $265,568 in credit card charges. His spending caused Marion to incur $51,096 in fees and charges on her credit cards and bank accounts. Betsy claimed that, in all, the defendant took $2,205,554 from Marion from 2000 to 2010.

¶ 12 Betsy testified that she confronted the defendant about these expenditures a number of times and he acknowledged that he owed Marion money. He admitted that he owed a million dollars to her. The defendant left Betsy two voice mail messages regarding this matter. In the first voice mail, he stated:

> "Hey, Betsy, it's Rick.

> Listen, I've sat down and tried to review this whole thing. And, you know, we owe the estate over $500,000 dollars. I haven't gotten all the numbers yet. I am sure it is over 500. We have no equity in our house because of the market. And right now we could contribute $1000 a month toward Mom's care. We can sell the piano for whatever that's worth. And contribute that money to her funds. We would just have that apply against whatever balance we end up owing her."

¶ 13 In the second voice mail, the defendant stated, "You know this situation with the amount of money I borrowed is unbelievable. I have a bunch of excuses, but they don't carry a lot of water." The defendant admitted at trial he left these voice mail messages.

¶ 14 Ann Censotti testified that she was Marion's social worker and an employee of the nursing home where Marion resided. Censotti explained that she first met Marion in 2005 after Marion ran over another resident's foot with a motorized scooter but was oblivious to the incident. Cesotti provided an overview of Marion's physical and mental health, explaining that Marion's stroke in 2006 made her judgment even "more impaired." She stated Marion had poor memory and was easily confused.

¶ 15 The plaintiffs also called the defendant as an adverse witness. He conceded that the lawsuit "is not about whether [he] owe[s] the trust, but rather about how much [he] owe[s] the trust." He stated that he had set up a PayPal account in Marion's name and linked it to her bank and credit card accounts. He also testified that he had used the account to spend $171,314 of his mother's money. He admitted that he had never really discussed the PayPal account, or the amount spent on the account with his mother. He also kept Marion's checks at his home, signed

her name on checks for his benefit, and used her money for vacations, business trips, clothing, home appliances, and other items. He identified five of the plaintiffs' accounts from which he used or took money, which included a PayPal account, Marion's Harris Bank account, the trust accounts, Marion's credit card, and his late father's credit card. The plaintiffs also presented evidence that the defendant's use of Marion's accounts in this manner was not authorized. The plaintiffs then rested their case.

¶ 16 The defendant then called himself to testify and he presented testimony in a narrative form. The defendant explained that he had lived only a few miles from his mother and father and always had a close relationship with them. His family had dinner with his parents about once a week and spent almost all holidays together.

¶ 17 After his father passed away in 2003, the defendant continued to stay in close contact with his mother and oversaw her financial and medical affairs. He took her out to dinner weekly, did her errands, accompanied her to medical appointments, and talked to her daily on the telephone. The defendant undertook the task of arranging to have a 24-hour caregiver for his mother at her independent apartment by researching agencies, interviewing candidates, negotiating salaries, and checking in to see how the caregivers were treating his mother. He worked with his mother on Sundays to review her mail, pay bills, and review insurance claims. The defendant helped her with household chores, hooked up a special system for her television so that she could hear it better, and assisted with the preparation of her taxes. He explained that he kept his mother informed about what he was doing with her finances, however, she managed her own finances with the help of an accountant, stockbroker, and attorney. Furthermore, the defendant dealt with all of his mother's serious medical issues, including when she fractured her neck and was hospitalized.

¶ 18 The defendant testified that, in 2001, he declared business and personal bankruptcy. He explained that his parents began giving him money to help him rebuild his computer business. The defendant stated, in 2006, he looked into building a new house where his mother would live and where his computer business would be located. There were problems with the construction of the home, as the contractor underpriced the cost of the construction and caused severe delays. He then explained that his mother's finances changed in 2008 when the stock market crashed. The defendant testified that if his mother forgot to sign checks that she wanted deposited into her accounts, she would tell him to sign them himself. He explained that his mother wrote him personal checks to help him with his business and the construction of his house. His mother would sign over some of her trust checks so that they could be deposited directly into his account. He explained that his mother also gave him permission to use her credit card to purchase business equipment. The defendant made purchases through PayPal and eBay to obtain discounts on the equipment, and he claimed that his mother gave him permission to use her credit card with PayPal. The defendant also admitted making personal purchases with his mother's credit card but that he repaid $121,399.58 in money he borrowed from her. He refuted Betsy's claim that he used his mother's money for vacations. Furthermore, the defendant testified that he did not owe the estate as much as $2,205,554 because Betsy miscalculated that total by including money he received from this parents as gifts, money given to his sons for birthday and Christmas, reimbursements to his wife for clothing and other supplies purchased for his mother, and other expenses.[1]

¶ 19 The defendant next read Marion's evidence deposition to the jury. Marion testified that she and the defendant constantly talked on the telephone. During their conversations, Marion

[1] The court also allowed the defendant, over the plaintiffs' objections, to enter documents into evidence that had neither been introduced into evidence nor listed on his exhibit list.

would ask the defendant about his business. She stated: "I always asked him about his business." Marion knew that the defendant had a business and personal bankruptcy in 2000 and, as a result, did not have a credit card right after the bankruptcy. Although she did not recall the specific occasions, she testified that she helped him purchase equipment for his business. Marion did not know what "PayPal" was used for, but she had given the defendant permission to use her credit card and make purchases. Marion testified that the defendant never told her that he would stop loving her, helping her, or visiting her if she did not give him money. When asked if it was her desire to help the defendant financially, she testified: "Yes, it was."

¶ 20 Marion testified that the defendant helped her with some financial matters, including printing checks for her review and assisting with tax preparation. She explained that she would always get her mail and review it herself. She looked at her bills, bank statements, and stock statements. Marion paid attention to how much money was in her checking account and stock investment trust accounts for the period 2003 to 2010. When she needed to transfer money between her accounts, she would contact her broker. Marion made her own decisions about her finances. Marion debated with herself about whether to give the defendant money.

¶ 21 Marion testified that she and the defendant discussed the plans to build a new house "quite often." When asked if she agreed to give him money to help him finish the house, Marion stated: "I guess so." On cross-examination about the house, Marion was asked if the defendant ever said he would repay her for the money he received. She stated: "We never talked about it, the two of us." When asked if she just gave him the money, she responded: "Not really *** because I assumed he was going to make money off his house and pay me back *** I assumed it." Marion was asked the following questions by her attorney:

"Q. Did you ever tell Rick "no" when he asked for money?

A. No.

Q. You never told him "no?"

A. I argued with him, but never told him "no."

Q. Why didn't you tell him "no?"

A. Because I didn't — he should have it. I didn't want him to lose it.

Q. Why wouldn't you tell Rick "no" that he couldn't have any money. Was there ever a point where you said "no" to Rick when he asked for money?

A. Not in the end, I guess.

Q. In the beginning, was there ever a point when you said, "No, you can't have any money from me?"

A. No.

Q. Why would you not refuse his requests for money?

A. Because.

Q. Because why?

A. Because I loved him, and I thought he couldn't lose the house.

* * *

Q. So you were giving him money so that he wouldn't lose the house?

A. Yes.

Q. But did you assume he would pay you back for that money?

A. Yes, I kind of did, but I also knew Betsy had some money."

¶ 22 The defendant then rested. After the jury was excused, the defendant presented two proposed special interrogatories. The first interrogatory read, "The defendant lied to Marion Agnew." The trial court stated that the interrogatory was "confusing," "not complete," and "not relevant." The court offered some changes to the interrogatory and asked the defendant to rewrite the special interrogatory to ask, "Did the defendant make false representations or material omissions to Marion Agnew about defendant's use of her money, finances, and or her tax returns?" When asked whether the defendant wanted to give the revised interrogatory, Defendant said "No." The second interrogatory asked, "Did plaintiff Marion Agnew give defendant permission to use her money in the form of checks, cash, and credit cards?" The trial court and the plaintiffs' counsel suggested revising the interrogatory to account for the scope of the permission given to the defendant and to identify whether it was Marion's expectation that the money used by the defendant would be repaid. However, the defendant did not want the clarifications added to the interrogatory and the trial court ruled that it could not give the instruction as it was "misleading."

¶ 23 The parties and the trial court discussed the main jury instructions at the pretrial hearing and each trial day. The defendant specifically agreed to these instructions:

"The Court: [M]y question for you is do you have any objection to the jury instructions I'm giving?

Mr. Agnew: I guess not.

The Court: You mean you don't.

Mr. Agnew: I don't."

After closing arguments, the trial court read the agreed instructions to the jury. The instructions advised the jury of the plaintiffs' burden of proof for each count and advised the jury that it should find in favor of the defendant if the plaintiffs did not prove each element of their claims. The trial court gave Illinois Pattern Jury Instruction 21.01 (Illinois Pattern Jury Instructions, Civil, No. 21.01 (2008)), explaining the burden of proof as preponderance of the evidence on the conversion and unjust enrichment counts, and another instruction establishing the burden of proof on the fraud count as clear and convincing evidence.

¶ 24 The jury returned a verdict in favor of the defendant on the count for breach of fiduciary duty. The jury found in favor of the plaintiffs on their claims of conversion, fraud, and unjust enrichment. The jury separately, but not cumulatively, awarded the plaintiffs $3,159,356.65 in compensatory damages on the fraud, conversion, and unjust enrichment counts, and $400,000 in punitive damages. This appeal followed.

¶ 25 ANALYSIS

¶ 26 The defendant raises numerous issues on appeal, which we aggregate into eight basic categories. He asserts that: (1) the jury's verdicts of fraud, conversion, and unjust enrichment were erroneous because they were against the manifest weight of the evidence; (2) the trial court erred by refusing to submit his special interrogatories to the jury; (3) the trial court erred by limiting his reading of Marion's evidence deposition; (4) the jury erred by failing to give him credit for the money he repaid to Marion; (5) the trial judge prejudiced his case by making improper comments to the parties and jury; (6) the trial court erred in its wording of certain jury

instructions and its failure to properly explain the clear and convincing burden of proof to the jury; and (8) the award of punitive damages was unwarranted. We examine each claim in turn.

¶ 27 A. Fraud

¶ 28 The defendant asserts that the jury's verdict on the plaintiffs' fraud claim was against the manifest weight of the evidence. "A court of review is empowered to reverse a jury verdict only if it was against the manifest weight of the evidence." *Ford v. City of Chicago*, 132 Ill. App. 3d 408, 412 (1985). Typically, a verdict will be viewed as being against the manifest weight of the evidence "where it is palpably erroneous and wholly unwarranted [citation], is clearly the result of passion or prejudice [citation], or appears to be arbitrary, unreasonable, and not based upon the evidence [citation]." *Id*. In other words, "[w]hen considering whether a verdict was contrary to the manifest weight of the evidence, a reviewing court must view the evidence in the light most favorable to the appellee." *Id*.

¶ 29 The defendant first argues that the jury should not have considered Betsy's testimony regarding conversations the two of them had about Marion's financial condition because Betsy was merely a possible future beneficiary. Here, the defendant points out that Betsy was not appointed as a trustee until November 2010 and did not have power of attorney over Marion's affairs until April 2011. He also claims that there was no clear and convincing evidence of fraud because there was no corroborating evidence that the conversations about Marion's financial condition ever took place between he and Betsy. The defendant next argues that there is no evidence that he made material false statements to Marion because she knew he had filed for personal and business bankruptcy in 2000. In particular, he explains that he asked Marion for money and Marion never told him "no" when he asked her for money. Furthermore, according

to the defendant, Marion reviewed her bank, credit card, and stock statements every month, paid attention to how much money she had, and was perfectly competent.

¶ 30 The defendant's arguments fail for a number of reasons. First, nothing in Illinois law prevents a future beneficiary from suing a family member to recover damages. Betsy was a beneficiary and trustee of the trusts at all relevant times, and had a power of attorney over Marion's affairs. She was also a fact witness and had first-hand knowledge about the matters relevant to this case. The defendant never objected to this testimony at trial and first raised these arguments in his posttrial motion for reconsideration. Thus, he forfeited these objections. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36 ("Arguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal.").

¶ 31 The jury's finding of fraud is also supported by the record. To prove fraud, a plaintiff must establish: "(1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff to act; (4) plaintiff's reliance upon the truth of the statement; and (5) plaintiff's damages resulting from reliance on the statement." *Connick v. Suzuki Motor Co., Ltd*., 174 Ill. 2d 482, 496 (1996). A plaintiff must prove fraud by clear and convincing evidence. *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 343 (2011).

¶ 32 The fraud finding is supported not only by the plaintiffs; evidence, but by defendant's own admissions. The evidence showed that the defendant regularly made false statements to Betsy and Marion, assuring them both he was taking care of Marion so that he could access to her accounts. The defendant specifically told Betsy that he would "take care of [their] mother"; he would "step up and take care of her"; and he would tell Betsy and Marion that Marion's finances were "fine." Relying on these representations, the plaintiffs continued to allow the

defendant unfettered access to Marion's assets. The defendant conceded that he set up a PayPal account and linked it to Marion's credit card and bank account. He agreed that he spent $171,314 on the account. The defendant admitted at trial that he never discussed the account with Marion, which was confirmed by Marion's evidence deposition. Marion also repeatedly stated that she was unaware of the scope of the defendant's use of her money.

¶ 33 The evidence showed that the defendant's false statements to Marion caused her to acquiesce to his use of her accounts all while the defendant knew he would use the funds for purposes other than her care, support, and best interests, resulting in the depletion of her funds. Therefore, we cannot find that the jury's finding on the issue of fraud was contrary to the manifest weight of the evidence.

¶ 34 B. Conversion

¶ 35 The defendant similarly argues that the jury's conversion verdict was improper because Marion gave him money, authorized his use of her assets, and never demanded repayment. He argues that there is "no evidence of specifically identified property over which [he] took unauthorized control" because the evidence shows that Marion gave him money, authorized his use of her credit cards, and gave him permission to endorse certain checks. The defendant further argues that because a debtor/creditor relationship arose regarding a portion of the money he received from Marion, he cannot be held liable for conversion. He claims Marion intended to help him financially with his business and the construction of the house they were to live in.

¶ 36 " 'To prove conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization

assumed control, dominion, or ownership over the property.' " *Loman v. Freeman*, 229 Ill. 2d 104, 127 (2008) (quoting *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114 (1998)).

¶ 37 The jury's conversion verdict was not against the manifest weight of the evidence. Contrary to the defendant's assertions, the plaintiffs presented extensive evidence that identified numerous accounts from which the defendant wrongfully took her money without authorization. For example, the defendant set up a PayPal account and linked it to Marion's credit card and bank account. He conceded that he spent $171,314 on that account. When asked at trial if he had ever discussed the account with Marion, he confirmed that he had not. Marion's evidence deposition also confirmed that he had never discussed the PayPal account with Marion. In the defendant's direct examination of Marion, he asked "[d]id you give me permission to start a PayPal account to buy some business equipment" to which Marion responded, "I don't know anything about it."

¶ 38 On appeal, the defendant argues that because he borrowed his mother's money he was her debtor and so cannot be liable for conversion. He cites to *General Motors Corp. v. Douglass*, 206 Ill. App. 3d 881, 892 (1990), for the proposition that "conversion cannot lie for money represented by a general debt or obligation." However, the defendant never raised this defense below. " 'It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal.' " *Mortgage Electronic Registration Systems, Inc. v. Thompson*, 368 Ill. App. 3d 1035, 1039 (2006) (quoting *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996)). Additionally, " 'the theory upon which a case is tried in the lower court cannot be changed on review, and *** an issue not presented to or considered by the trial court cannot be raised for the first time on review.' " *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994)

(quoting *Kravis v. Smith Marine, Inc.*, 60 Ill. 2d 141, 147 (1975)). Accordingly, we find no reason to disturb the jury's verdict on the conversion claim.

¶ 39 C. Unjust Enrichment

¶ 40 The defendant argues that because there was no clear and convincing evidence of fraud, he can have no liability under the theory of unjust enrichment. He asserts that for an unjust enrichment cause of action to exist, there must be an independent basis that establishes a duty for the defendant to act, and the defendant must fail in this duty. Here, the defendant points out that he was not unjustly enriched because a substantial portion of the funds he received from Marion were meant to benefit her, such as the accessibility features in the new house.

¶ 41 The defendant also notes that he asked Marion for money to finish building the house because the initial contractor lied about the cost of the house and a fired project manager froze the construction loan. When asked whether she agreed to give money to the defendant to help finish the house, Marion stated, "I loved him and I didn't want him to lose the house." When asked by her own attorney if she was "giving him money so that he wouldn't lose the house," Marion responded, "Yes." Additionally, the defendant claims that the unjust enrichment finding was improper because he retained no benefit from the house which had little or no equity because of the housing market crash.

¶ 42 This court recently explained unjust enrichment as follows:

> "To state a claim for unjust enrichment, 'a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience.' [Citation.] Unjust enrichment is not an independent cause of

> action. [Citation.] Rather, 'it is [a] condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence' (internal quotation marks omitted) [citation], or, alternatively, it may be based on contracts which are implied in law [citation]." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25.

¶ 43 We agree with the defendant that unjust enrichment is a remedy for certain types of legally remedial misconduct and is not a separate cause of action. Even so, the plaintiffs demonstrated that the defendant retained a benefit through improper conduct—fraud and conversion—to the detriment of Marion and the trusts. *Id.* ¶ 25. His retention of that benefit violated fundamental principles of justice, equity, and good conscience. Therefore, the jury's verdict on unjust enrichment was not against the manifest weight of the evidence.

¶ 44 D. Special Interrogatories

¶ 45 The defendant argues that the trial court erred by not submitting his special interrogatories to the jury. The defendant claims that section 2-1108 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-1108 (West 2010)) mandates that the jury be required to find specially upon any material question of fact submitted to it in writing.

¶ 46 Section 2-1108 of the Code states in part:

> "The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or

> refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." 735 ILCS 5/2-1108 (West 2010).

¶ 47 A special interrogatory is considered to be proper if "(1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned." *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002)). A response to a special interrogatory is inconsistent with a general verdict only where it is "clearly and absolutely irreconcilable with the general verdict." *Id*. at 555-56. The purpose of a special interrogatory "is not to instruct the jury, but to serve as a check on the jury's deliberation and to enable the jury to determine one or more specific issues of ultimate fact." *Smart v. City of Chicago*, 2013 IL App (1st) 120901, ¶ 32. Typically, "[a] special interrogatory: (1) should consist of a single direct question; (2) should not be prejudicial, repetitive, misleading, confusing or ambiguous; and (3) should use the same language or terms as the tendered instructions." *Id*. We review a trial court's decision pertaining to a request for a special interrogatory *de novo*. *Id*.

¶ 48 The defendant's proposed special interrogatories were incomplete and confusing. The defendant's first special interrogatory read: "The defendant lied to Marion Agnew." The trial court found that the interrogatory was "confusing," "not complete," and "not relevant." This was correct, because the evidence of the relationship between the defendant and his mother was so extensive. Had the jury answered "yes" it would not have been clear when the lie occurred, or how that would have negated the general verdict. The trial court then offered some changes to

the interrogatory and asked the defendant to revise the special interrogatory to ask: "Did the defendant make false representations or material omissions to Marion Agnew about defendant's use of her money, finances, and or her tax returns?" When asked whether the defendant wanted to give the revised special interrogatory, he said "No."

¶ 49 The defendant's second interrogatory asked: "Did Marion Agnew give defendant permission to use her money in the forms of checks, cash, or credit cards?" Both the trial court and the plaintiffs' counsel suggested revising the interrogatory to account for the scope of the permission given to the defendant and to identify whether it was Marion's expectation that the money used by the defendant would be repaid. However, the defendant did not want the clarifications added to the interrogatory and the trial court ruled that it would not give the "confusing" and incomplete interrogatory to the jury. We conclude that the trial court correctly rejected the defendant's special interrogatories.

¶ 50 E. Marion's Evidence Deposition

¶ 51 The defendant contends that the trial court erred by not permitting him to read the objections from Marion's evidence deposition to the jury. The trial court limited the reading of Marion's deposition to only his questions to Marion and her answers. The defendant complains that the court denied his request to read the entire deposition, including the interruptions by Marion's attorney, whose lengthy strings of objections to the defendant's vague questions separated the questions from Marion's answers. According to the defendant, without the context of hearing the objections prior to Marion's answers, it appears as if Marion is confused or cannot remember the questions. Therefore, the defendant argues that reading the deposition was highly prejudicial to him, as it left the jury with the impression that Marion was somewhat incapacitated, which impacted the jury's determination of his liability.

¶ 52 "The admission of evidence is within the sound discretion of the trial court and a reviewing court will not reverse the trial court unless that discretion was clearly abused." *Calloway v. Bovis Lend Lease, Inc*., 2013 IL App (1st) 112746, ¶ 82 (quoting *Gill v. Foster*, 157 Ill. 2d 304, 312-13 (1993)). We have found that "an abuse of discretion occurs when the court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person would adopt the court's view." *Id*.

¶ 53 Our review of the record shows that the trial court did not abuse its discretion by excluding the objections raised at Marion's deposition when the defendant read her deposition to the jury. The objections are not evidence and, under Illinois law, it is common practice for a transcript to be read to the jury without the intervening objections. "The general practice is for one attorney to take the stand and read the answer after the other attorney has asked the question. Only the questions and answers are read." 2 R. Hunter, Trial Handbook for Illinois Lawyers, Civil, § 64:5, at 405 (8th ed. 2013). Thus, the trial court properly excluded the objections and its determination to do so did not amount to an abuse of discretion.

¶ 54 Furthermore, the defendant has waived this issue. Waiver " 'arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right.' " *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007) (quoting *Home Insurance Co. v. Cincinnati Insurance Co*., 213 Ill. 2d 307, 326 (2004)). At the pretrial conference, the defendant asked the trial court how Marion's deposition testimony would be presented to the jury. The trial court offered the defendant a choice as to how the deposition would be presented. The defendant summarized his options stating "So my understanding, then, is that the deposition will be read without [the plaintiffs'] objections," and after that understanding was confirmed, he concluded "[t]hat's the way I would prefer it to happen." Therefore, the defendant affirmatively voiced a preference for

having the testimony read exactly as it was read at trial and he has waived his right to now argue that the objections should have been read into the record.

¶ 55 Additionally, the defendant's argument that the trial court should have entered the full transcript as an exhibit for the jury to consider is also without merit because it is contrary to Illinois law. Illinois Pattern Jury Instruction 1.01[13] specifically cautions jurors to pay attention to testimony because they will not receive a written transcript of the testimony. See Illinois Pattern Jury Instructions, Civil, No. 1.01[13] (2008) ("Pay close attention to the testimony as it is given. At the end of the trial you must make your decision based on what you recall of the evidence. You will not receive a written transcript of the testimony when you retire to the jury room."). This instruction was given by the trial court and the defendant agreed to it. Therefore, the trial court did not abuse its discretion in refusing to give the jury a printed transcript of Marion's testimony. Accordingly, we find no error in the presentation of Marion's evidence deposition.

¶ 56 F. Damage Award

¶ 57 The defendant argues that the jury's damage award was improper. He believes that the jury did not credit him for money he had repaid to Marion, which had been designated as "loans" on the memo line of certain checks. He also claims that the award of punitive damages was unwarranted and violates his due process rights. He asserts that the award of punitive damages was improper because there is no evidence in the record that he acted with an evil motive or recklessly disregarded Marion's rights.

¶ 58 We may reverse the jury's damages award if that award is against the manifest weight of the evidence. *Southwest Bank of St. Louis v. Poulekefalos*, 401 Ill. App. 3d 884, 890 (2010). "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 on the evidence." *Rodriguez v. Northeast Illinois Regional Commuter Railroad Corp*., 2012 IL App (1st) 102953, ¶ 55. A jury's damages award will not be overturned unless: "(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." *Id*. A damages determination is "a question of fact for the jury to determine and its award is entitled to substantial deference." *Id*.

¶ 59 The defendant's contention that the jury failed to consider the amount of money he repaid to Marion is pure speculation. At trial, both sides put forth evidence regarding damages. After the defendant rested, the trial court read the agreed jury instructions, which required the plaintiffs "each element of damages claimed and that they occurred as a direct and natural result of" the defendant's actions. During deliberations, the jury sent the court a note asking "Is there a maximum amount of damages we can award? Specifically can we award more than $2,205,554 on any individual count?" The trial court suggested advising the jury that it must "consider the evidence and the jury instructions" to which the defendant responded, "That's fine with me." The jury then resumed deliberations and returned verdicts in favor of the plaintiffs on three counts of fraud, conversion, and unjust enrichment, and awarded $3,159,356.65 in compensatory damages and $400,000 in punitive damages. We cannot discern from this record exactly how the jury computed the damages as $3,159,356.65. Betsy's testimony, taken at face value, computed the amount the defendant took from the accounts as $2,205,554. The measure of damages for conversion, for example, is the "market value of the property at the time of the conversion plus legal interest." *Jensen v. Chicago and Western Indiana R.R. Co.,* 94 Ill. App. 3d 915, 932 (1981). The jury was instructed, in essence, that it should fix the damage award at an amount that would make the plaintiffs whole. Perhaps the jury added interest for the lost time value of

money or discovered that the voluminous written exhibits revealed additional sums were due. Regardless of how the jury arrived at its award, the defendant did not ask for a remittitur and therefore waived the issue. *Mazurek v. Crossley Construction Co.*, 220 Ill. App. 3d 416, 422 (1991) (to preserve an issue for appeal, a party must raise the issue in a timely posttrial motion). Based on the record, we find that the defendant has failed to show that the damage award was contrary to the manifest weight of the evidence.

¶ 60 Furthermore, the award of exemplary or punitive damages was not unconstitutional as the defendant claims. To determine whether punitive damages awarded are unconstitutionally excessive courts look to "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 470 (2006) (quoting *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996))). Whether a jury's punitive damage award violates this constitutional principle is subject to *de novo* review. *Id*. at 469.

¶ 61 Applying these principles, we find the jury's award of $400,000 in punitive damages was not improper. After hearing three days of testimony, the jury determined that the defendant's actions were sufficiently reprehensible and harmful to Marion that an award of punitive damages was warranted. We cannot find that the amount awarded by the jury, $400,000, which constitutes about 12.6% of the amount awarded in compensatory damages, $3,159,356.65, is constitutionally excessive. *Id*. at 490 (holding that a punitive damage award "for a double-digit ratio of approximately 11 to 1, would be reasonable and constitutional").

¶ 62 G. Trial Judge's Comments

¶ 63 The defendant argues that the trial judge made comments during the course of the three-day trial which were prejudicial to him. First, when Betsy's attorney was questioning her about a voice mail she received from the defendant and before the plaintiffs' attorney had established a foundation for the voice mail, put the voice mail in evidence, or suggested that Betsy read the voice mail, the trial court stated: "I am dying of suspense. Why don't you have — tell us what it said." According to the defendant, this comment allowed Betsy to read the voicemail without any opportunity for him to object. Second, during the defendant's cross-examination of Betsy, the trial judge interrupted Betsy in mid-sentence and stated: "Be strong." Thus, the defendant asserts that not only did the trial court improperly advise a witness how to answer a question, but also this statement led the jury to believe that the trial judge was prejudiced in favor of Betsy. Third, during the defendant's cross-examination of Betsy, the trial judge interrupted him, asking if he had "Any other subjects?" When the defendant responded, "I am getting to them as fast I can," the trial judge stated:

> "Well, you know you got your Smart phone there with all the questions and answers. I've got jurors here that are taking time off work, time away from their family. I don't want to stop court two hours early because – if you didn't have any notes – I mean as Judge Judy says, where did you think you were going today, to the beach? You should have been ready."

Such a comment, according to the defendant, could cause the jury to believe the trial judge was biased against him. Fourth, the defendant contends that before his narrative redirect examination

of himself, the trial judge's comment that "I have good news and bad news. The bad news is [the defendant] is going to continue to testify" again indicated his bias against him.

¶ 64 "[F]or comments by the trial judge to constitute reversible error the defendant must show that the remarks were prejudicial, and that he *** was harmed by them." *People v. Williams*, 209 Ill. App. 3d 709, 718 (1991). A defendant "regardless of the nature of the proof against him *** is entitled to a trial that is free from improper and prejudicial comments on the part of the trial judge." *People v. Heidorn*, 114 Ill. App. 3d 933, 936 (1983). Even though a "trial judge has wide discretion in the conduct of trial, he must not make comments or insinuations, by word or conduct, indicative of an opinion on the credibility of a witness or the argument of counsel." *Id*. Given his "great influence over the jury, the trial judge must exercise a high degree of care to avoid influencing the jurors in any way, to remain impartial, and to not display prejudice or favor toward any party." *Id.* at 937. Thus, "[t]here is no error where the court merely makes a ruling which is unfavorable to a party or where the court properly admonishes counsel." *Id*. A trial judge's comments should be evaluated in the context of the "total circumstances" regarding the handling of the case. *Id*. at 938.

¶ 65 While these four comments might raise an eyebrow when presented out of context, the record as a whole reveals they were hardly as problematic as defendant contends. Much of defendant's time at trial was devoted to complaining about Betsy's "high priced" attorneys and pressing how he, rather than the out-of-town resident Betsy, was the more devoted child and did so much to protect Marion's interests. None of this was particularly relevant to the issues at hand, and the defendant's decision to focus on those issues rather than the issues being tried, and his decision to proceed to a jury trial on complicated financial issues without the assistance of an attorney created significant trial management issues for the judge. The trial judge, however,

properly guided these difficult proceedings, frequently giving the *pro se* defendant leniency and working around his inability to follow strict courtroom protocol.

¶ 66 The "dying of suspense" comment came after pages of testimony and back-and-forth objections between Betsy's counsel and the *pro se* defendant, who was having difficulty applying and understanding the rules of evidence. It is clear from the record that the judge believed much useless banter could be avoided if the voice mail itself were simply spread of record so that he could better determine whether its content was objectionable. Similarly, the "be strong" comment came after numerous instances where the court admonished Betsy to answer questions "yes" or "no" without volunteering extraneous and non-responsive information. The "smart phone" colloquy is particularly important. Rather than bring written questions typed or written on paper, the *pro se* defendant was trying to read them off a smart phone. He had considerable difficulty doing so, apparently by constantly adjusting the phone so he could read questions from the small screen. This conduct significantly impeded the normal flow of the trial, causing frequent interruptions and pauses while the jury was seated. The final "bad news" comment similarly followed an extensive period during which the defendant had difficulty dealing with the challenge of testifying in a narrative format.

¶ 67 In light of the significant body of evidence against the defendant, we find that the trial judge's comments were neither prejudicial nor a factor in the jury's decision in finding the defendant liable on the three counts.

¶ 68 H. Jury Instructions

¶ 69 The defendant argues that the trial court erred in its wording of certain jury instructions and in its failure to give an instruction explaining the clear and convincing evidence standard. Here, the defendant explains that the trial court stated that "you can find in favor of the plaintiffs

for the entire amount requested" but it never explained to the jury that it could return a finding for a lesser amount. Next, when instructing the jury on the "meaning of burden of proof," the trial court stated that "when I say that 'a party has the burden of proof on a proposition' or use the expression 'if you find' or 'if you decide,' I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true."

¶ 70 The standard of review for whether a jury instruction accurately conveyed the law is subject to *de novo* review. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13. However, " '[a] party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court.' " *Id*. (quoting *Mikolajczyk v. Ford Motor Co*., 231 Ill. 2d 516, 557 (2008)). Our review of the record shows that the defendant affirmatively agreed to the jury instructions:

> "The Court: [M]y question for you is do you have any objection to the jury instructions I'm giving?
>
> Mr. Agnew: I guess not.
>
> The Court: You mean you don't.
>
> Mr. Agnew: I don't."

Accordingly, the defendant has waived his right to now object to the jury instructions.

¶ 71 Even if we were to find that the defendant had not objected to the instructions, the instructions were proper.

¶ 72 The trial court's instruction regarding fraud explained that "Plaintiffs have the burden of proving each of the follow propositions by *clear and convincing evidence*." [Emphasis added.] After reading the elements of fraud, the jury instructions reiterated that "[i]f you [the jury] find

from your consideration of all the evidence that each of these propositions have been proved by clear and convincing evidence, then your verdict should be for the plaintiff." The court then stated in the alternative—that if the plaintiffs failed to prove each element by "clear and convincing evidence"—the jury should find in favor of the defendant on the fraud count. The jury instructions properly apprised the jury of the burden of proof required for fraud.

¶ 73 CONCLUSION

¶ 74 Accordingly, we affirm the judgment of the trial court.

¶ 75 Affirmed.