FOURTH DIVISION
September 30, 2015

1-14-2966, 1-14-3594, and 1-14-3604, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HO CHUNK NATION,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee/Cross-Appellant,	)	Cook County.
	)	
v.	)	No. 09 L 7028
	)	
SOUTHLAND SPORTS and EXPO CENTER, LLC,	)	
MICHAEL Z. GOICH, and MZG ASSOCIATES, LLC,	)	Honorable
	)	John C. Griffin,
Defendants-Appellants/Cross-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence supported the jury's verdict that defendants were guilty of fraud to induce plaintiff to purchase property and the award of consequential damages, therefore, the judgment of the circuit court of Cook County entered in favor of plaintiff on its fraud claim is affirmed; plaintiff failed to adduce evidence in support of a punitive damages award based on defendants' conduct, therefore, the court's judgment notwithstanding the verdict in favor of defendants on plaintiff's claim for punitive damages is affirmed.

¶ 2 Plaintiff, Ho Chunk Nation, filed an amended complaint against defendants, Southland Sports and Expo Center, LLC (Southland); MZG Associates, LLC (MZG); and Michael Z. Goich, individually, for damages plaintiff allegedly suffered surrounding the purchase of improved land from Southland. MZG was the general contractor who improved the land and Goich was the sole owner of MZG. Goich was also a partner in Southland. Southland is not a party to this appeal. (Hereinafter we will refer to Goich and MZG collectively as "defendants.") The land was improved with a large building Southland was operating as an indoor sports complex at the time of the purchase (hereinafter "sports facility" or "facility"). Plaintiff wanted to purchase the property with the intention of converting the building into a casino and improving the land with a water park. The land is located in Lynwood, Illinois. On or about July 23, 2004, after several months of negotiations, buyer and seller entered a contract where plaintiff agreed to purchase the property for the sum $9,869,343. The closing of the sale took place approximately a week later on or about August 2, 2004.

¶ 3 Two years after the purchase, plaintiff learned the sewer system on the property was operating in violation of the rules of the Metropolitan Water Reclamation District (MWRD). Plaintiff paid $546,593.09 to bring the sewer system into compliance. Plaintiff filed suit against defendants for breach of contract, common law fraud, and violation of the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2012)). Plaintiff's suit is based, in part, on defendants' representations before the purchase that the storm water sewer system was complete, operational, and compliant.

Plaintiff's claims for breach of contract and common law fraud were tried to a jury while its claim for violation of the Fraud Act was tried to the court. The jury returned a verdict in favor of plaintiff on the common law fraud claim. The jury awarded as damages the cost to bring the sewer system into compliance and punitive damages.

¶ 4 Defendants filed a motion for judgment notwithstanding the verdict. The trial court granted defendants' motion with regard to the punitive damages claim only, on the grounds the jury was not properly instructed on punitive damages, and regardless, the evidence did not support a punitive damages award had the jury been properly instructed. The court denied defendants' motion as to the verdict in favor of plaintiff on the fraud claim. Defendants filed a notice of appeal before the trial court ruled on its posttrial motion. After the trial court ruled on the motion, defendants filed a new notice of appeal of the judgment denying the remainder of their motion for judgment notwithstanding the verdict. Plaintiff then filed a separate notice of appeal of the judgment granting defendants' motion for judgment notwithstanding the verdict as to punitive damages.

¶ 5 This court consolidated the appeals and, for the following reasons, in all respects, we affirm.

¶ 6 BACKGROUND

¶ 7 Plaintiff's amended complaint alleged breach of contract against Southland (count I), violation of the Fraud Act against all defendants (count II), and intentional misrepresentation against Goich and MZG (count III). The complaint generally alleged that defendants induced plaintiff to purchase the facility through misrepresentations regarding the condition of the

facility. Plaintiff alleged that in reliance on defendants' representations, the parties entered into an agreement for plaintiff to purchase the facility. Plaintiff's fraud count alleged defendants made material representations that were untrue and omitted or concealed material facts regarding the condition of the facility prior to the purchase. Plaintiff alleged defendants did so with the intent to induce plaintiff to purchase the facility, rather than alternative property, at an inflated price, and that plaintiff, in reliance on the representations and without knowledge of material facts defendants concealed, purchased the property at an inflated cost.

¶ 8 The parties' purchase agreement contains a provision which gives the buyer the right to inspect the property and terminate the purchase agreement if the property is not suitable for its needs:

> "After Seller has provided Buyer the materials described in Section 3.3 below, Buyer will have the right for sixty (60) days, without interference and without payment of any rent or other charge, to enter upon the Premises for the purposes of doing preliminary engineering work, conducting field surveys, geotechnical studies, well drilling, soil and ground water sampling, percolation and other tests, and doing other matters as may be necessary or advisable to enable buyer reasonably to determine whether the Premises are suitable for use as the Facility (as defined below) ***. *** If Buyer, in its sole discretion, determines that the Premises are not suitable for use

> as the Facility ***, Buyer will promptly so notify Seller within the Inspection Period, this Agreement will terminate at Buyer's option, the Deposit and any interest thereon shall be returned to Buyer, all without any further liability under this Agreement."

¶ 9 The materials described in Section 3.3 of the purchase agreement included, in pertinent part, "as-built drawings of all improvements and underground utilities located on the Premises," and "copies of all permits, licenses and approvals issued by any governmental authority related to the ownership or operation of the Premises." The purchase agreement gave plaintiff the right to terminate the agreement during the inspection period if it were unable to obtain all governmental authorizations needed to construct and operate "a retail facility desired by the Buyer."

¶ 10 The purchase agreement also contained warranties and covenants between plaintiff and the seller of the property. In pertinent part, the purchase agreement states that "Seller represents, warrants and covenants to Buyer that: *** Seller has received no notice of any violation of any law, ordinance (including zoning ordinances), regulation or other legal requirement pertaining to the Premises or about the use or occupancy of the Premises which Seller has not disclosed to Buyer." The purchase agreement further provided "that if Seller discovers after the Effective Date [of the purchase agreement] any information which results in any inaccuracy of a representation made herein by Seller, Seller shall promptly notify Buyer in writing of such new information ***" and required the seller to notify plaintiff if the seller became "aware of any facts that modify the Representations and Warranties ***." The

purchase agreement "merges and supersedes all prior negotiations, representations and agreements and constitutes the entire Agreement between Seller and Buyer concerning the conveyance of and consideration for the Premises." The Chief Executive Officer of Southland Sports and Expo Center, LLC (defendant Goich's father) signed the purchase agreement.

¶ 11 At trial, Timothy Brent, plaintiff's real estate broker, testified Goich emailed him about the building. That email included a statement that sewer and water at the facility had been finished. The email stated: "We have municipal infrastructure, sewer and water installed and active." Brent also understood other statements in that email to mean that the facility had MWRD approval for storm water. Goich stated in his email to Brent that: "In order to secure the appropriate Water Reclamation storm water approvals, we needed to raise our site an average of five feet." Brent understood that to mean the facility had MWRD approval for storm water. Prior to plaintiff's purchase of the facility, Goich told Brent that the storm water and sewer system at the facility had been completed, and Goich told Brent that the facility had obtained MWRD approval for the storm water and sewer system, both in writing and verbally. Goich's email also stated that the facility had already been prepared for expansion to the east, which Brent understood to mean that the storm and sewer had been installed on the east side of the property.

¶ 12 Brent provided Goich's email and verbal statements to plaintiff and, based on those statements and writings, plaintiff authorized Brent to begin negotiating for the purchase of the facility. Brent also testified that although the contract called for the seller to provide plaintiff with "as-built" drawings of all improvements and underground utilities, he never received

them, but plaintiff still went forward with the purchase of the facility. Brent testified: "We visually looked at the property and saw nothing that would make us doubt that everything we were being told was not true. So we did not go any further than that." Brent testified that Goich informed Brent that the price Goich wanted was what Goich had put into the property, and this was how they arrived at the purchase price.

¶ 13 The Director of Public Works for the Village of Lynwood, Robert Myers, testified that when defendants owned the facility, they received an occupancy permit to open despite his opinion that "[n]othing on the storm water was completed to [his] satisfaction." Myers testified that after the occupancy permit was issued, he had "numerous conversations" with Goich in which he told him that "the storm water system wasn't progressing and it needed to get finished." By August 31, 2003, MWRD had sent defendants three notices requesting a final inspection. The Village of Lynwood was copied on those notices as a co-permittee of the storm water system. Myers testified MWRD will not inspect a property until the Village agrees the work is completed. Myers walked the property in April 2003 and could determine visually that components of the storm water system were not complete. Specifically, he testified that the detention pond was not finished and the storm sewers needed to be cleaned, among other observations. In August 2006, after the sale to plaintiff, Myers received notice of a violation at the facility from MWRD. In response, he prepared a letter based, at least in part, on his knowledge of the situation at the facility. The letter read, in part:

"Unfortunately the previous owners of the property never followed through on all of the compliance issues that they were supposed to have completed prior to opening and the district

is now looking for full compliance or there is a chance of serious penalties being levied." Myers knew the storm water sewer system was not complete in 2004 and he would have so told a representative of plaintiff had he been asked.

¶ 14 Goich testified that once construction on the facility began an adjoining property owner's drainage was causing flooding to the property at the facility. The adjoining property was not draining as had been approved by the Village and MWRD. Goich testified that when the facility first opened, he did not believe he was violating any ordinance because "[t]he Village was on site. The water department was right across the street. They gave us our occupancy permits to operate." Once the facility opened with a "temporary occupancy permit" Goich was no longer on site at the facility on a regular basis. Goich testified that when Brent approached him in 2004 regarding purchasing the facility and surrounding property, Goich allowed Brent to use office space at the facility. At that time, construction continued inside the facility and outside on components related to the storm water sewer system. Some physical components of the storm water system (drain covers, catch basins, and pipe extensions) were lying on the property while Brent had an office there.

¶ 15 Goich testified that when he stated the ground had been prepared for extension to the east, he meant that the ground had been cleaned and the soil brought up and compacted. Goich recalled emailing Brent but testified he does not believe his email contained the statements about drainage and water reclamation approvals. He denied writing that "municipal infrastructure, sewer and water, was active and installed." He denied writing that the site had been raised an average of five feet "to ensure the appropriate water reclamation

storm water approvals." Goich admitted writing that the facility had been prepped for expansion to the east so that construction could begin without further earth work, plumbing, or related activities, and that he was trying to convince plaintiff to buy the facility. He denied writing that the drainage and infrastructure was value added to the facility. Goich testified he had a meeting with Brent and others at which they discussed what was left to be done with the storm water sewer system at the facility "to get us to be identical to the approved Metropolitan Water District's drawings." He also told Brent on another occasion "those items needed to be completed."

¶ 16 Goich testified that at some point Brent told Goich to halt construction on anything outside of the building on the property, including the storm water sewer system, because "the whole development would change relating to storm water and ponds, *et cetera*" based on plaintiff's plans for the site. Plaintiff sent representatives to the site to tour the property at which time there was a presentation of plaintiff's plans for the site. At that time, the storm water components were still on the ground. Goich testified he did not know of a request for final inspection of the storm water system because the engineering group handled that. The engineering group did not inform him it believed there was a violation with respect to the storm water system, and Goich never received notice of a violation. Goich testified no one ever informed him that the storm water sewer had to be completed and approved by MWRD. Goich testified that Myers testified falsely when Myers testified he informed Goich that despite the occupancy permit the storm water sewer system had to be completed and MWRD approval had to be obtained. Goich denied seeing any notice letter from MWRD advising the

facility that it could not put a storm water sewer in service without final testing or approval by MWRD and denied that any Village official or the engineer for the storm water sewer ever contacted him about any such notices. He testified no one contacted him about an August 2003 MWRD notice stating the notice was final with a violation pending.

¶ 17 In Fall 2006, plaintiff received a document titled "Violation Report" from the MWRD. The MWRD Violation Report indicated two problems: placing the sewer in service without prior testing or approval by MWRD and "failure to submit a properly executed RFI." Later, plaintiff received a letter from the Director of the Lynwood Public Works Department suggesting certain steps plaintiff should take in response to the MWRD Violation Report. Plaintiff hired an engineering firm to proceed as suggested. The engineer developed a remediation plan that plaintiff implemented to avoid fines and penalties by the MWRD. An engineer for the company plaintiff hired testified at trial. The engineer testified that a survey discovered that major components of the storm sewer were missing and that the storm sewer was not constructed on the east side of the facility.

¶ 18 The jury returned a verdict in favor of plaintiff on its fraud claim against Goich and MZG. The jury found that plaintiff proved defendants made one or more false statements of material fact regarding the condition and approval of the storm water system, they knew the statement(s) were false or made them in reckless disregard of whether they were true or false, made the statement(s) to induce plaintiff to purchase the facility, plaintiff reasonably believed the statement(s), and plaintiff proved damages resulting from its reliance. The jury awarded damages in the "amount of money [plaintiff spent] to make the storm water management and

sewer system compliant with the MWRD's regulations." The jury found plaintiff did not prove defendants made a false statement of material fact regarding the costs incurred to acquire the land and develop the property. The jury also found that defendants acted "with an actual or deliberate intention to harm [plaintiff] or which, if not intentional, showed an utter indifference or conscious disregard for [plaintiff.]"

¶ 19 Defendants filed a posttrial motion to vacate the judgment on count II (the Fraud Act claim) on the grounds plaintiff failed to demonstrate a consumer nexus that would bring the claim within the Fraud Act. Defendants' motion argued plaintiff had offered no credible reason to conclude the parties' agreement is the kind the Fraud Act is meant to address and that this commercial real estate transaction does not fall under the Fraud Act. Defendants also filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial or remittitur. Defendants' motion for judgment notwithstanding the verdict argued plaintiff failed to produce evidence to support punitive damages, failed to introduce evidence the condition of the storm water sewer system was material, and failed to introduce evidence plaintiff relied on any misrepresentation regarding the storm water sewer system.

¶ 20 With regard to plaintiff's fraud claims, defendants' motion agued plaintiff failed to introduce evidence of materiality or reliance to support a verdict for fraud under count III. Defendant argued plaintiff failed to introduce any evidence it relied upon any representations regarding the condition of the storm water sewer system or that any such representation was material. Defendants argued plaintiff's legislature made the decision to purchase, no member of the legislature testified, and plaintiff produced no evidence of what if any statements about

the storm water sewer system the legislature received or relied upon. Plaintiff also presented no evidence of how the legislature would have acted differently had it known the storm water sewer system was not complete.

¶ 21 Finally, with regard to punitive damages, defendants' motion argued plaintiff made no allegations in its pleadings and presented no evidence at trial to support an award of punitive damages, thus the question never should have gone to the jury. Specifically, defendants argued plaintiff had not pled or adduced any evidence "over and above what is required for fraud such as oppression, violence, or wanton disregard of rights." Defendants noted their objections at various stages of the litigation to plaintiff's eligibility for punitive damages based on both plaintiff's pleadings and the evidence. Defendants also argued the punitive damages award violated Illinois common law and principles of due process. Defendants argued plaintiff presented no evidence of "the reprehensibility of the defendants' conduct" in this case, as that factor is analyzed by the United States Supreme Court. Defendants also argued the punitive damages were excessive.

¶ 22 The trial court denied defendants' motion with regard to the verdict in favor of plaintiff under the Fraud Act and common law fraud. The trial court granted defendants' motion and entered a judgment notwithstanding the verdict in favor of defendants on the jury's punitive damage award.

¶ 23 This appeal followed.

¶ 24 ANALYSIS

¶ 25 A motion for a judgment notwithstanding the verdict presents a question of law as to whether, when all of the evidence is considered together with all of the reasonable inferences from the evidence in a light most favorable to the nonmoving party, there is a total failure or lack of evidence to prove a necessary element of the nonmoving party's case. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37. Our standard of review is, therefore, *de novo*. *Id.* The motion should be granted only if the evidence so viewed so overwhelmingly favors the movant that no contrary verdict could ever stand. *Id.* The motion should not be granted if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. *Id.* The credibility of the witnesses and the decision of what weight to assign their testimony are matters within the province of the jury. *Johnson v. National Super Markets, Inc.*, 257 Ill. App. 3d 1011, 1014 (1994).

¶ 26 I. Defendants' Appeal

¶ 27 Defendants appeal the trial court's October 29, 2014 judgment denying their motion for judgment notwithstanding the verdict as to the verdicts in favor of plaintiff on the common law and Consumer Fraud Act claims. We will address each in turn, but first, one issue raised in defendants' appeal is easily disposed. Defendants' argue there is no basis to implicate Goich individually in the putative contract debts of Southland Sports, and that the "only liability on the contact, if any, should be on Southland Sports & Expo." The jury did not award any damages for breach of contract. The only issues raised in this appeal concern defendants' liability for their misrepresentations. The trial court instructed the jury: "The rights of defendants Southland and MZG are separate and distinct. You will decide each of

these defendants' cases separately as if it were a separate lawsuit." The court had already instructed the jury that MZG was the principal and Goich was MZG's agent. Defendants have not challenged the legal basis for imposing liability on them for those acts. We will proceed to address defendants' arguments concerning the claims for which they were actually found liable.

¶ 28 A. Common Law Fraud Claim--Reasonable Reliance

¶ 29 Defendants argue the trial court should have granted their motion for judgment notwithstanding the verdict on plaintiff's common law fraud claim because plaintiff failed to prove it reasonably relied on defendants' alleged misrepresentations. "The elements of a claim for fraudulent misrepresentation, also referred to as common law fraud, are: (1) a false statement or omission of material fact; (2) knowledge or belief of the falsity by the party making it; (3) intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statements; and (5) damage to the other party resulting from such reliance. [Citation.]" *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1087 (2010).

¶ 30 Defendants argue plaintiff did not justifiably rely on any statement because plaintiff did not exercise its right under the contract to inspect the property. Defendants argue the inspection provision in the contract constitutes "meaningful cautionary language" which makes reliance immaterial, and that "it was obvious to the naked eye that construction was not completed." Plaintiff responds defendants have waived this issue by failing to raise it in their posttrial motion. Waiver aside, plaintiff argues defendants' representations about the

storm water sewer system were not accompanied by cautionary language, and the latent defects in those systems were not readily apparent.

¶ 31 Defendants did not reply to plaintiff's waiver argument. A party must object to an error at trial and also include it in a written posttrial motion to preserve an issue on appeal. *Fraser v. Jackson*, 2014 IL App (2d) 130283, ¶ 37. Defendants' motion for judgment notwithstanding the verdict did not argue plaintiff did not reasonably rely on any assertion by defendants as a matter of law. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 19 (1995) ("cautionary language, if sufficiently substantive and tailored to the projections, estimates, and opinions *** can render alleged misrepresentations and omissions immaterial as a matter of law"). Accordingly, defendants have waived their argument the language in the contract negates the materiality of any alleged misrepresentations as a matter of law.

¶ 32 Even if this argument were not waived, it would fail. The court has held that "meaningful cautionary language in an offering document can negate the materiality of any alleged misrepresentation or omission." *Lagen*, 274 Ill. App. 3d at 18. Cautionary language, to negate any misrepresentations, must be sufficiently substantive and tailored to the alleged misstatement. See *Lagen*, 274 Ill. App. 3d at 19. The contract language granting an inspection is not sufficiently tailored to the status of the storm water sewer system to constitute cautionary language. Moreover, the inspection period granted to plaintiff does not show that defendants' statements about the storm water sewer system were "not statements of fact upon which the plaintiffs can rely." (Internal quotation marks omitted.) *Id.* at 19 (quoting *In re Integrated Resources Real Estate Limited Partnerships Securities Litigation*, 850 F. Supp. 1105,

1141 (S.D. N.Y. 1993). We do not find that the allegedly false statements were accompanied by meaningful cautionary statements. Accordingly, defendants' argument plaintiff did not reasonably rely on any statements as a matter of law would fail.

¶ 33 Defendants' arguments could be construed to mean that plaintiff could not show reasonable reliance on their misrepresentations because the condition of the storm water sewer system was apparent. "[R]eliance is generally not justified where the parties have equal knowledge or means of obtaining knowledge of the misrepresented facts. [Citation.] The plaintiff, may, however, justifiably rely where the defendant has created a false sense of security ***." (Internal quotation marks omitted.) *Los Amigos Supermarket, Inc. v. Metropolitan Bank & Trust Co.*, 306 Ill. App. 3d 115, 127-28 (1999). "Where a plaintiff's inquiries are inhibited by a defendant's statements which create a false sense of security, the plaintiff's failure to investigate further is not fatal." (Internal quotation marks omitted.) *Cement-Lock v. Gas Tech. Institute*, 618 F. Supp. 2d 856, 883 (N.D. Ill. 2009) (quoting *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 166 (1986)). Plaintiff disputes the condition of the system could be discovered upon a simple visual inspection. Regardless, the evidence is sufficient to find that defendants gave plaintiff a false sense of security regarding the storm water sewer system. Plaintiff's realtor testified defendants used the work that had allegedly been done on the storm water system as a major selling point. Plaintiff's reliance on defendants' representations was justifiable.

¶ 34 Plaintiff produced sufficient evidence to prove the reliance element of plaintiff's claim for common law fraud. The trial court's judgment denying the portion of defendants' motion

for judgment notwithstanding the verdict as to the jury's verdict in favor of plaintiff on the common law fraud claim is affirmed.

¶ 35 B. Common Law Fraud Claim--Damages

¶ 36 Defendants argue the trial court erred in denying their motion for judgment notwithstanding the verdict as to the verdict in favor of plaintiff on the common law fraud claim because plaintiff never sought consequential damages and the trial court did not properly instruct the jury as to how to calculate damages. Defendants assert the proper measure of damages for plaintiff's claim of fraudulent misrepresentation is the "benefit of the bargain rule" as embodied in unmodified Illinois Pattern Jury Instruction 800.05. The trial court gave the jury a modified version of Illinois Pattern Jury Instruction 800.05 that read as follows:

> "If you decide for Plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Plaintiff for any of the following elements of damages proved by the evidence to have resulted from the conduct of the defendants:
>
> (1) The difference between the actual value of the property and the value the property would have had if the representations had been true;

(2) The expenses incurred by Plaintiff to make the storm water management and sewer system at the property compliant with the MWRD's regulations.

Whether any of these elements of damages has been proved by the evidence is for you to determine." Illinois Pattern Jury Instruction, Civil, No. 800.05, modified, (2012) (hereinafter IPI Civil (2012) No. 800.05, modified).

¶ 37 The trial court also gave the jury a modified version of Illinois Pattern Jury Instruction 800.01 which read, in pertinent part, as follows:

"For its fraud claim, Plaintiff claims that defendants made one or more of the following statements regarding the condition of the premises and the expenses incurred to acquire and develop the property:

(1) That defendant Goich and/or Southland paid $1,440,000.00 for the undeveloped land on which the Sports Center was built.

(2) That defendants paid a general contractor $626,546 for improvements to the premises;

(3) That the storm water management and sewer system installed at the property prior to Plaintiff's purchase had been

approved by the MWRD and was operating in compliance with MWRD's regulations; and

(4) That defendants incurred $7,802,794.43 in other expenses, including payments to contractors and vendors for improvements to the premises.

Plaintiff further claims that these statements were false statements of material facts.

Plaintiff further claims that defendants knew the statements were false or made the statements in reckless disregard of whether they were true or false.

Plaintiff further claims that defendants made the statements with the intent to induce Plaintiff to purchase the Sports Center rather than alternative property, and to induce Plaintiff to purchase the Sports Center at an inflated price.

Plaintiff further claims that it reasonably believed the statements and purchased the Sports Center in justifiable reliance on the truth of the statements.

Plaintiff further claims that it sustained damages as the result of its reliance." Illinois Pattern Jury Instruction, Civil, No. 800.01, modified, (2012) (hereinafter IPI Civil (2012) No. 800.01, modified).

¶ 38 Defendants argue the modified IPI 800.05 and 800.01 were not an accurate statement of the law. Defendants argue a properly instructed jury could have found no damages because plaintiff failed to produce evidence that the actual value of the property was any different than the value of the property as promised.

¶ 39 If the jury was improperly instructed then granting judgment notwithstanding the verdict is an appropriate remedy. *Grothen v. Marshall Field & Co.*, 253 Ill. App. 3d 122, 127 (1993) (holding judgment notwithstanding the verdict "resulted in a properly considered award as to liability based on correct instructions respecting the totality of the damages issue"). Plaintiff argues defendants waived this issue by failing to submit a proper instruction to the court. "To preserve an objection to a jury instruction a party must both specify the defect claimed and tender a correct instruction." *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 176. Defendants mention that the instructions given were plain error but offer no argument to support a plain error argument. Nonetheless, the instructions were not plain error because no error occurred. See generally *Palanti v. Dillon Enterprises, Ltd.*, 303 Ill. App. 3d 58, 66 (1999).

¶ 40 Initially we note the pleadings were sufficient because plaintiff's complaint put defendant on notice it sought to recover the amount it paid to bring the storm water sewer system into compliance. *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 251 (2006) ("The purpose of requiring a specific prayer for relief in a complaint is to inform defendant of the nature of the claims against him and the extent of damages sought, so that he may prepare to meet the demand or permit a default to be taken against him."). Defendants argue the court's decision

in *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, supports their argument that the difference in the purchase price of the property as represented and what the purchase price would have been absent the misrepresentations was the correct measure of damages in this case and, thus, the trial court improperly instructed the jury. *Sheth* does not support defendants' position.

¶ 41 The *Sheth* court did hold that "[i]n cases like this, where fraud resulted in an inflated sale price, the proper calculation for damages is the difference between what the defrauded party paid and what it would have paid had there been no fraud." *Sheth*, 2013 IL App (1st) 110156, ¶ 94. In this case, the jury did not award damages based on an inflated sale price. The *Sheth* court also stated that "[d]amages for fraud are typically calculated using the benefit-of-the-bargain rule, where the plaintiff's recovery is limited to an amount needed to compensate for the loss *occasioned by the fraud*." (Emphasis added.) *Sheth*, 2013 IL App (1st) 110156, ¶ 90. The *Sheth* court cited with approval *Tan v. Boyke*, 156 Ill. App. 3d 49, 55 (1987), for the proposition that in an action for fraud, consequential damages proximately resulting from the fraud are recoverable. *Sheth*, 2013 IL App (1st) 110156, ¶ 90.

¶ 42 *Sheth* does not stand for the proposition that the difference in the price paid and what the defrauded party would have paid is the only possible measure of the amount needed to compensate for the loss occasioned by the fraud. In *Sheth*, the defrauded party claimed that Illinois law required the disgorgement of all ill-gotten profits from the transaction. *Id.* ¶ 85. The court found that the defrauded party had essentially argued to the jury for a forfeiture, and "forfeiture is not a proper calculation of fraud damages." *Id.* ¶ 93. Rather, the defrauded

party "had the burden of presenting evidence and argument as to how their damages should be calculated." *Id.* ¶ 93. In *Sheth*, the court found the defrauded party only proved that they paid an inflated price but did not prove the amount of the inflation. *Id.* ¶ 94. The court held that absent such evidence or argument the defrauded party failed to prove its right to a new trial on the issue of damages. *Id.* ¶¶ 92-94.

¶ 43 Defendants concede that in *Home Saving & Loan Ass'n of Joliet v. Schneider*, 127 Ill. App. 3d 689, 695 (1984), reversed on other grounds, *Home Savings and Loan Ass'n of Joliet v. Schneider*, 108 Ill. 2d 277, 285-86 (1985), the court held that in addition to actual damages, consequential damages proximately resulting from the fraud are recoverable. *Schneider*, 127 Ill. App. 3d at 695. But defendants return to their argument that plaintiff failed to present evidence of the differential in the price it paid and what it would have paid for the property absent their fraudulent assertions by arguing plaintiff failed to prove on what it based the price it paid for the facility. Defendants then imply the instructions were plain error because plaintiff argued they overpaid for the facility based on defendants' assertions. Plaintiff was obligated to produce evidence of damages on all of its claims. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 33 ("The party seeking damages bears the burden to establish not only that it has sustained damages, but also a reasonable basis for computation of those damages."). The fact that it did so does not preclude a jury from awarding damages on one claim and not another. "[O]nce the existence of damage has been established, evidence tending to reasonably approximate the extent of damage is admissible." *Giammanco v. Giammanco*, 253 Ill. App. 3d 750, 765 (1993). "[I]t is only necessary that the evidence tend to

establish a basis for the assessment of damages with a fair degree of probability." *Giammanco*, 253 Ill. App. 3d at 765. As plaintiff points out, it pursued separate claims against defendants for misstating the value of the facility and for fraudulently inducing plaintiff to purchase the facility by misrepresenting the status of the storm water sewer system. The jury found in favor of defendants on the facility value claim.

¶ 44 Although "a jury should generally be given applicable IPI instructions" that rule yields when the trial court is faced with a factual situation or point of law not addressed by the pattern instructions. *Duffin v. Seibring*, 154 Ill. App. 3d 821, 831 (1987). In that circumstance the trial court "should provide the jury with modified versions of the pattern instructions which accurately state the law." *Seibring*, 154 Ill. App. 3d at 831. The trial court properly gave the jury the modified jury instruction on plaintiff's claim for consequential damages. Such damages are clearly recoverable. *Tan*, 156 Ill. App. 3d at 55 (citing Restatement (Second) of Torts § 549(1)(b) (1977) (expenses incurred in preparing to use property in a manner the defendant has represented as appropriate are recoverable)). The instruction was an accurate statement of the law. See *City of Chicago v. Michigan Beach Housing Co-op.*, 297 Ill. App. 3d 317, 326 (1998) ("As a general rule, a plaintiff may recover damages for injuries proximately caused by defendant's representations. [Citation.] *** In an action for fraud, damages must be a proximate, and not remote, consequence of the fraud." (Internal quotation marks omitted.)). There exists and defendants do not dispute the evidence of the damages the jury awarded plaintiff: plaintiff's consequential damages resulting from the fraud measured by the amount to repair the sewer system. Accordingly, the trial court's judgment denying

defendants' motion for judgment notwithstanding the verdict based on the jury's award of consequential damages for defendants' fraud is affirmed.

¶ 45 C. Consumer Fraud Act Claim--Reliance

¶ 46 "The elements of a claim under the Consumer Fraud Act are: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the occurrence of the deception in the course of conduct involving trade and commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 933 (2003). Defendants argue plaintiff's claim defendants failed to disclose the noncompliance status of the storm water sewer system is not actionable under the Consumer Fraud Act because, according to defendants, the Consumer Fraud Act "is not meant to cover promises concerning the *legal status* of something--whether there is an ordinance and whether the ordinance is violated." (Emphasis in original.) Defendants also argue the "failure to disclose a[n] 'apparent' violation of the ordinance is a *point of law* not actionable under the Consumer Fraud Act." (Emphasis added.) Defendants rely on the holding in *Randels v. Best Real Estate, Inc.*, 243 Ill. App. 3d 801 (1993), a case relied on by the court in *Capiccioni*, 339 Ill. App. 3d at 935-36.

¶ 47 In *Randels*, the court abandoned the "fact versus law dichotomy." *Randels*, 243 Ill. App. 3d at 807. The question is not whether the fact misrepresented or omitted is a "fact" or a "law" but is "whether a defendant's misrepresentations or omissions were discoverable through the exercise of ordinary prudence by the plaintiff, and a finding of liability is made when the defendant misrepresents or omits facts of which he possess almost exclusive

knowledge the truth or falsity of which is not readily ascertainable by the plaintiff." *Randels*, 243 Ill. App. 3d at 807. Defendants' argument that the "legal status of the permit" is "not meant to be covered by the act" is therefore a misstatement of the law, and defendants' argument must fail. Defendants also argue the same rationale applies to demonstrate plaintiff did not reasonably rely on defendants' misrepresentation. This argument also fails.

¶ 48 In *Randels*, the defendants did not disclose the requirement that a residential property be connected to the municipal sewer system, but neither did the defendants make any misrepresentations about that requirement. *Id.* at 804. The plaintiffs in that case did not make any inquiries about the requirement to connect the property to the sewer system. *Id.* at 807. The court concluded that "defendants' failure to disclose the ordinance was an omission of law readily discoverable by plaintiffs and therefore did not violate the Consumer Fraud Act because the omission was not of a material fact." *Randels*, 243 Ill. App. 3d at 807.

¶ 49 In reviewing this line of cases we find situations exist where a plaintiff may justifiably rely on a defendant's omissions or misrepresentations even where some information is discoverable by reviewing publicly available information. The *Randels* court cited two earlier decisions in support of its holding the proper inquiry is whether the misrepresentation or omission was discoverable through the exercise or ordinary prudence. *Randels*, 243 Ill. App. 3d at 807. In the first case cited by the *Randels* court, *Gilmore v. Kowalkiewicz*, 234 Ill. App. 3d 522 (1992), the court held the plaintiffs in that case justifiably relied on the defendants' misrepresentations that property could be used for a certain commercial use. *Gilmore*, 234 Ill. App. 3d at 530. In discussing justifiable reliance, the *Gilmore* court cited *Kinsey v. Scott*, 124

Ill. App. 3d 329, 337-38 (1984), which held that "it is only where, under the circumstances, the facts should be apparent to one of [plaintiff's] knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own. [Citation.]" (Internal quotation marks omitted.) *Gilmore*, 234 Ill. App. 3d at 527-28 (quoting *Kinsey*, 124 Ill. App. 3d at 338).

¶ 50 In *Stichauf v. Cermak Road Realty*, 236 Ill. App. 3d 557 (1992), cited in *Randels*, the court held that the statements at issue did "not constitute false statements of material fact sufficient to support an action for fraudulent misrepresentation." *Stichauf*, 236 Ill. App. 3d at 568. In *Stichauf*, the issue was that two buildings occupied a single lot. *Stichauf*, 236 Ill. App. 3d at 560. In that case when the plaintiff in *Stichauf* bought the property, the municipality had issued a certificate of compliance stating the property had been inspected and found to be in compliance with zoning laws. *Stichauf*, 236 Ill. App. 3d at 560. Similarly here, defendants note the mayor had issued the facility a permit to operate in Lynwood. The plaintiff in *Stichauf* complained, in part, that the defendants fraudulently misrepresented that the property consisted of " 'two buildings for the price of one' " because both buildings could not stand. *Id.* at 561. The court cited the rule that "liability will be found when the defendant misrepresents facts of which he possesses almost exclusive knowledge and the truth or falsity of which are not readily ascertainable by the plaintiff." (Internal quotation marks omitted.) *Stichauf*, 236 Ill. App. 3d at 568. The court found in that case the fact there were two buildings on the lot was readily apparent, and no facts in the exclusive possession of the

defendants, "or not readily ascertainable by the plaintiff," had been alleged. *Id.* The court found that even a cursory review of the zoning ordinance would have put the plaintiff on notice the property may have been in violation of the ordinance. *Stichauf*, 236 Ill. App. 3d at 568.

¶ 51 Applying these principles to this case we find there was not a failure of evidence that plaintiff justifiably relied on defendants' misrepresentations about the storm water sewer system, or that ordinary prudence did not require plaintiff to investigate the status of that system in the eyes of the MWRD. Plaintiff presented evidence of the fact that the storm water sewer system was incomplete was not apparent from a cursory glance or readily apparent. Plaintiff's engineer testified that when he visited the facility and walked the premises, he could not make the judgment that there was a problem with the storm water sewer system without a survey of the components. See *Gilmore*, 234 Ill. App. 3d at 527-28; *Stichauf*, 236 Ill. App. 3d at 568. Plaintiff presented evidence it received nothing which served as a warning it was being deceived. See *Gilmore*, 234 Ill. App. 3d at 527-28. See also *O'Brien v. Noble*, 106 Ill. App. 3d 126, 130 (1982) ("liability will be found when the defendant misrepresents facts of which he possesses almost exclusive knowledge and the truth or falsity of which are not readily ascertainable by the plaintiff"). Even had an inquiry at the MWRD revealed the fact the facility was not in compliance with that agency's rules, plaintiff was under no obligation to make such an inquiry. *Gilmore*, 234 Ill. App. 3d at 527-28; *Kinsey*, 124 Ill. App. 3d at 336-38 (1984) ("fact that plaintiff did not inquire specifically whether the

[nonconforming] basement apartment itself was in compliance with the building code is not required under the facts here").

¶ 52 The trial court properly denied defendants' motion for judgment notwithstanding the verdict because defendants' misrepresentation the storm water sewer system was in compliance with all local ordinances is actionable under the Consumer Fraud Act, and there is not a total failure of evidence to prove defendants' misrepresentations were not discoverable through the exercise of ordinary prudence by plaintiff under the circumstances.

¶ 53 II. Plaintiff's Appeal

¶ 54 Plaintiff appeals the trial court's judgment granting defendants' motion for judgment notwithstanding the verdict as to punitive damages. "A plaintiff has a common law right to punitive damages in a fraud case." *Stump v. Swanson Development Co., LLC*, 2014 IL App (3d) 110784, ¶ 67. "To determine whether punitive damages are appropriate, the trier of fact can properly consider the character of the defendant's acts, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant. [Citation.]" (Internal quotation marks omitted.) *Id.* ¶ 65. Punitive damages are in the nature of a punishment, and because of their penal nature, they are disfavored in the law. *Parsons v. Winter*, 142 Ill. App. 3d 354, 360 (1986).

¶ 55 Plaintiff, as the party appealing that portion of the trial court's judgment granting defendants' motion for judgment notwithstanding the verdict as to punitive damages, bears the burden to show error. *Redlin v. Village of Hanover Park*, 278 Ill. App. 3d 183, 193 (1996) ("It is the burden of the *** appellant, to affirmatively show error from the record on

appeal."). Although this court designated defendants as "appellants" for purposes of this consolidated appeal, and defendants have dutifully raised several arguments in support of the trial court's judgment on the issue of punitive damages, we will address plaintiff's contentions of error first. As previously stated, on review of an order on a motion for judgment notwithstanding the verdict we determine *de novo* whether, when all of the evidence is considered together with all of the reasonable inferences from the evidence in a light most favorable to the nonmoving party, there is a total failure or lack of evidence to prove a necessary element of the nonmoving party's case. "In reviewing the trial court's grant of [judgment notwithstanding the verdict] on the issue of punitive damages, we must determine whether the evidence contained in the record on appeal, when viewed in the light most favorable to [plaintiff,] so overwhelmingly favors [defendants] that the jury's verdict awarding punitive damages cannot stand." *Medow v. Flavin*, 336 Ill. App. 3d 20, 36-37 (2002).

¶ 56 A jury may award punitive damages if the defendant's tortious acts are malicious or display reckless disregard for another's rights. [Citation.]" (Internal quotation marks omitted.) *Stump, LLC*, 2014 IL App (3d) 110784, ¶ 64. A jury may also award punitive damages when fraud, actual malice, deliberate violence, or oppression accompanies the tort, or when the defendant acts willfully or with such gross negligence as to indicate a wanton disregard of the rights of others." *Parsons*, 142 Ill. App. 3d at 360. However, punitive damages should only be awarded in cases with aggravated circumstances--they should not be awarded where the defendant's conduct "is not above and beyond the conduct needed for the basis of the underlying cause of action." *Stump*, 2014 IL App (3d) 110784, ¶ 64. We reiterate

that the conduct needed for the basis of the underlying claim in this case is that defendants (1) made a false statement or omission of material fact; (2) had knowledge or belief of the falsity; and (3) intended to induce plaintiff to act. *Karlin*, 402 Ill. App. 3d at 1087.

¶ 57 Defendants objected at trial to submitting the issue of punitive damages to the jury on the grounds the evidence did not support an award of punitive damages and raised the issue in their motion for judgment notwithstanding the verdict. On appeal, defendants raise arguments to the form of the instructions on punitive damages. Plaintiff asserts those arguments are waived because defendants failed to submit a proper instruction to the jury. For the reasons stated below, we decide the issue of punitive damages on the sufficiency of the evidence to support such an award, not on the form of the instructions. Plaintiff's wavier argument is, therefore, inapposite.

¶ 58 Plaintiff's arguments that defendants "deliberately misrepresented" and "concealed" facts and information about the storm water sewer system to "induce" plaintiff to purchase the facility are ineffectual because they are no more than restatements of the conduct needed for the basis of the underlying cause of action. Plaintiff argues the trial court erred in granting defendants' motion for judgment notwithstanding the verdict because sufficient credible evidence supported the verdict. Specifically, plaintiff argues defendants engaged in a "pattern of deceit" that showed "conscious disregard" of their rights. Plaintiff asserts defendants' misrepresentations "were willfully and wantonly made to induce plaintiff into purchasing" the facility with "a deliberate intent on their part to enrich themselves regardless of the harm caused to plaintiff." Plaintiff cites *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 179 (2008),

where the court held that punitive damages are proper in a fraud action "where the false representations are wantonly and designedly made." *Gehrett*, 379 Ill. App. 3d at 179.

¶ 59 *Gehrett* offers little analysis of what constitutes a "false representation *** wantonly and designedly made." Our supreme court has explained that "[w]hile deceit alone cannot support a punitive damage award, such damages may be allowed where the wrong involves some violation of duty springing from a relation of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly showing malice and willfulness. [Citation.]" (Internal quotation marks omitted.) *Home Savings & Loan Ass'n of Joliet v. Schneider*, 108 Ill. 2d 277, 284 (1985). See also *Jordan v. Jewel Food Stores, Inc.*, 83 F. Supp. 3d 761, 771 (N.D. Ill. 2015) finding that in Illinois, "[i]n short, 'willful' in the context of punitive damages means something like 'actual malice, deliberate violence or oppression,' 'some element of outrage similar to that found in crime,' or 'an evil motive.' "

¶ 60 In this case, we find a complete lack of evidence of extraordinary or exceptional circumstances showing malice and willfulness. Plaintiff attempts to cast defendants in a bad light by asserting the facility was having financial difficulty and defendants operated it without MWRD approval prior to the sale. Those facts do not evince an evil motive or wanton disregard for the rights of others. Restatement (Second) of Torts § 908, Comment b, at 464-65 (1979) ("The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others."). Plaintiff has pointed to no more than the deceit that is the basis of the underlying cause of action.

¶ 61 The Seventh Circuit, applying Illinois law, has held that "[i]n a fraud action like this one, deceit alone cannot support a punitive damage award, but such an award is appropriate where the false representations are wantonly and designedly made. [Citations.]" (Internal quotation marks omitted.) *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 511 (7th Cir. 1997). In that case, the plaintiffs established that the defendants routinely used shell corporations to avoid obligations it promised in numerous leases. See *Jannotta*, 125 F.3d at 512 ("The evidence at trial further demonstrated that [the parent company defendant] routinely used leasing companies like [the shell company defendant] to execute leases with landlords in order to avoid imposing rental obligations on [the parent.]"). The plaintiffs entered those leases induced by promises the defendants never intended to keep. See *Jannotta*, 125 F.3d at 512 (citing testimony that it was the defendants' policy not to perform the leasing company's obligations under a lease once a franchisee failed as promised; they would instead only attempt to find a new franchisee for the property, as they attempted to do in this case. "Yet that policy was not disclosed to [the plaintiffs] while the parties were negotiating the present lease."). That case also produced evidence of the defendants' lack of regard for harm to the plaintiffs above and beyond the fraud used to induce entering the contract. See *Jannotta*, 125 F.3d at 512 ("in addition to the evidence suggesting that [the defendants] had no intention of paying the rent and keeping the property in good repair, plaintiffs also presented evidence from which a reasonable jury could have found that [the defendants] had no intention of honoring the restricted trade area in the [plaintiffs'] lease."). Given the evidence in that case, the court had "no doubt that the far-reaching fraud proven in this case could be

found to satisfy the stringent punitive damage standard employed in the State of Illinois." *Jannotta*, 125 F.3d at 512.

¶ 62 In this case, plaintiff has failed to point to evidence of a similar type of wide-spread and ongoing fraud by defendants in this case. The only allegation of fraud is in a single commercial transaction. Nor is the evidence enough to prove that defendants in this case misrepresented or omitted facts to enrich themselves regardless of the harm to plaintiff so as to overcome the "stringent punitive damage standard." Any enrichment defendants enjoyed from the sale of the property is beside the point. Defendants' fraud was intended to induce plaintiff to purchase the facility--that is the underlying cause of action against them--it was not an ongoing scheme to make money. In *Jannotta*, the defendants were "enriched" when they fraudulently entered leases for franchise locations based on false promises they never intended to keep. Those promises involved a financial burden on the defendants to pay rent to the defrauded parties when defendants' franchisees failed, and the defendants in that case were further "enriched" when they failed to meet that burden. See *Jannotta*, 125 F.3d at 512. See also *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035, 1044 (7th Cir. 1990) ("there is no suggestion that the fraud was designed to make money"). Plaintiff's engineer testified that the purpose of storm water management was so that you "do not discharge too much water to your downstream neighbors" and cause flooding after development. He also testified a developer cannot increase downstream flow above what occurs naturally. Plaintiff has not directed this court to evidence of the severity of any increased risk to the facility's neighbors or of actual flooding sufficient to find intent to harm due to flooding of their

properties. *Jannotta*, 125 F.3d at 511 ("One way to satisfy that standard is through evidence indicating that a fraud was *** intended by him to harm the plaintiff."). Any potential harm to plaintiff in this case was economic and did not extend beyond the harm occasioned by the conduct needed for the basis of the underlying cause of action.

¶ 63 Plaintiff also argues that the jury's punitive damage award--the amount of the award--was reasonable under Illinois common law and principles of due process. However, as we have determined punitive damages should not have been awarded because there is a complete failure of evidence to support an award of punitive damages, where the only conduct alleged is that needed for the basis of the underlying complaint and there is no evidence of malice or reckless indifference to the potential harm to others approaching criminal culpability, we need not reach the issue of whether the award was excessive. The trial court properly granted judgment notwithstanding the verdict in favor of defendants.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, the trial court's judgment is affirmed.

¶ 66 Affirmed.