No. 2—09—1288
Order Filed March 16, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GLORIA J. WIGGINS,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant and Cross-Appellee,	)	
	)	
v.	)	Nos. 94—L—49 cons. with 95—L—530
	)	
WILLIAM A. FEDA,	)	
	)	Honorable
Defendant-Appellee and Cross-Appellant.	)	Stephen C. Pemberton,
	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Hudson concurred in the judgment.

ORDER

Held: (1) Any errors in allowing purported speculative or hearsay testimony were harmless and would not have affected the outcome;
(2) The trial court did not err in ignoring unrebutted testimony by plaintiff because the plaintiff's evidence failed to prove causation;
(3) The trial court's determination of defendant's liability for failing to pursue plaintiff's portion of her deceased ex-husband's pension while he was still living was not erroneous;
(4) The trial court's determination of plaintiff's entitlement to her portion of the proceeds of her deceased ex-husband's pension was correct, but its determination of the amount of plaintiff's portion of the proceeds was against the manifest weight of the evidence.

This matter returns to us for the third time. Originally, plaintiff appealed the dismissal of her complaint based on an argument that the statute of limitations had run, and we reversed and remanded the cause. *Wiggins v. Feda*, No. 2—94—0957 (April 27, 1995) (unpublished order under Supreme Court Rule 23) (*Wiggins I*). The case returned to us a second time when plaintiff appealed the denial of leave to amend her complaint, and we again reversed and remanded the cause. *Wiggins v. Feda*, No. 2—02—1190 (Dec. 9, 2003) (unpublished order under Supreme Court Rule 23) (*Wiggins II*). In this third return to us, plaintiff, Gloria J. Wiggins, appeals from the judgment of the circuit court of Kane County awarding her $11,865.49 for uncollected pension payments following the conclusion of the trial of her legal malpractice action against defendant, William A. Feda. Plaintiff argues that the trial court erred in admitting certain evidence, disregarded plaintiff's unrebutted testimony, and rendered a verdict that was against the manifest weight of the evidence. Defendant cross-appeals, challenging plaintiff's entitlement to the damages award of $11,865.49 in uncollected pension payments. We affirm as modified.

We summarize the facts adduced at trial. In 1975, plaintiff married Robert Wiggins. When they married, plaintiff had a child from a previous marriage, and Robert had two children from his previous marriage. In 1979, a daughter was born to the couple. Plaintiff explained that, during the course of the marriage, Robert had problems with alcohol and displayed erratic and threatening behavior. On October 3, 1987, Robert pushed plaintiff as he was confronting plaintiff's son, causing her to fall and hit her head, resulting in a cut to her head that required five stitches. Plaintiff took the children and left the marital home.

On October 5, 1987, plaintiff met with defendant, an attorney specializing in family law, pursuant to a referral. Plaintiff and defendant discussed plaintiff's marital issues. According to plaintiff, defendant counseled her and recommended filing for an order of protection against

Robert as well as a petition for dissolution of her marriage. On October 6, 1987, defendant filed a petition for an order of protection, a petition seeking to allow plaintiff and the children to return to and have sole possession of the marital home, and a petition for dissolution of plaintiff's marriage with Robert. At a hearing on the order of protection, Robert expressed surprise, indicating that defendant told him that she wanted a separation, not that she was going to take the children and move out. The court granted defendant's order of protection and gave her sole possession of the marital home.

Aside from the marital home, the only other substantial marital asset was Robert's police pension from the Village of Carpentersville police force, which had been accumulating during Robert's years of service. Defendant estimated that, when Robert retired, he would receive 65% of his income, amounting to around $1,600-$1,700 per month. At that time, defendant also estimated the value of Robert's disability pension to be approximately $233,000.

The dissolution matter eventually went to trial, and, on November 23, 1988, a judgment of dissolution of marriage was entered. The judgment ordered that plaintiff receive the marital home and certain personal items. The judgment noted that, during the marriage, Robert had acquired a disability or retirement pension while he was employed by Village of Carpentersville police department. The judgment ordered that plaintiff receive 50% of the pension that was accumulated from the date of the marriage to the date she and Robert separated. The judgment order further provided that a Qualified Domestic Relations Order (QDRO) "shall be entered, if applicable to insure compliance with the terms of this judgment." More than 11 months later, on October 25, 1989, defendant, on plaintiff's behalf, filed a motion to have the QDRO entered. Defendant opposed the motion (and we note that it was defendant who first raised the issue, not the Carpentersville pension board) on the grounds that a QDRO was not applicable to a municipal pension like Robert's. On February 20, 1990, Robert began to receive his pension, retroactive to May 19, 1989, but Robert never paid plaintiff her portion of the pension proceeds. Defendant did not file any pleadings in order to enforce plaintiff's interest in Robert's pension.

Almost immediately after the entry of the judgment of dissolution, Robert remarried. Robert died in 1991. At some point thereafter, the police pension board denied that plaintiff was considered to be a surviving spouse. Instead, it awarded Robert's pension to the child of Robert and plaintiff until she attained 18 years of age. Plaintiff filed suit for legal malpractice against defendant.

The matter eventually advanced to trial on the legal malpractice action. Defendant testified under adverse examination that, in the initial interview, plaintiff asked him to represent her in a dissolution of marriage action. Defendant testified that plaintiff did not indicate that she preferred a separation. Plaintiff discussed with defendant the final incident in which Robert was confronting her son and caused her injury. Defendant testified that plaintiff was interested in protecting herself and her minor children due to Robert's violent nature and his excessive consumption of alcohol. Plaintiff asked defendant to file a petition for dissolution of marriage and whatever else was necessary to secure possession of the marital home and to guarantee Robert's payment of child support. Defendant testified that plaintiff was also concerned about establishing sole custody of the children and supervised visitation with Robert. Amplifying, the following colloquy occurred:

> "Q [Defense Counsel]. Okay. Was she worried about the pension or disability payments at the time?
>
> A [Defendant]. No, no. She was concerned about her safety and the safety of her children. She said she had been brutalized by her husband over the course of 13 years.

There was no discussion of the marriage ever being good. There was no discussion of reconciliation. She did not want to reconcile.

Q. Did she tell you that she loved her husband still?

A. No.

Q. Did she express any other emotion about her husband?

A. She was fearful, because she had been injured, and she received stitches as a result of this most recent incident."

Defendant testified that he filed a petition for dissolution of marriage because plaintiff requested it. Defendant testified that he did not file for a legal separation because plaintiff indicated to him that she did not want the marriage to continue. Defendant testified that plaintiff authorized him to initiate the dissolution.

Defendant also testified that plaintiff discussed the abuse to which Robert subjected her. Defendant testified that, regarding the most recent incident, Robert threw or struck her, and she hit her head, requiring stitches. Plaintiff also informed defendant that Robert had held a gun to her head. Defendant testified that, in his judgment, plaintiff needed a divorce in order to stay alive.

Defendant testified that, in February 1988, he considered and discussed legal separation as an option for plaintiff. Defendant testified that, in the discussion of legal separation, defendant would not have advised plaintiff that her marital benefits would be guaranteed as long as she stayed married, because in a legal separation, the court cannot distribute the marital property unless the parties agree to do so.

According to defendant, legal separation was not a viable option for plaintiff. Defendant testified that, in the first place, Robert's attorney, Jeffrey Hammerlund, repeatedly informed defendant that Robert would not agree to a separation. Hammerlund further informed defendant that, if plaintiff filed for a separation or voluntarily dismissed the dissolution action, he had been instructed to and had prepared a countercomplaint or new action for a dissolution of marriage. Thus, Robert would have pressed for a divorce if plaintiff discontinued her dissolution action. Defendant testified that legal separation was not a realistic choice for plaintiff because, throughout defendant's representation, plaintiff continued to insist that she wanted a divorce. Defendant testified that the final reason that a separation was not viable was because the court could not divide the marital property between the parties absent their consent; Robert had made it quite clear that he would not agree to anything.

Defendant also testified that he never considered the fact that Robert might predecease plaintiff. Defendant was also confronted with his notes, which indicated that plaintiff at least raised the issue of whether she would be considered a surviving spouse of defendant, and that she was concerned about the pension because neither she nor Robert paid into social security. Defendant also testified that he did not research the applicability of a Qualified Domestic Relations Order (QDRO) to a municipal pension or educate himself about the applicability of a QDRO in spite of knowing that the law regarding his ability to secure plaintiff's share of the pension was "unsettled." Defendant further testified that he did not inform plaintiff that the law about the applicability of a QDRO to Robert's pension was unsettled.

Plaintiff testified that, in 1975, she and Robert were married. Plaintiff testified that shortly after she and Robert were married, she first observed him lose his temper and have an issue with alcohol. In 1979, a daughter was born to her and Robert. While pregnant with their daughter, plaintiff went to see an attorney about obtaining a legal separation.

Plaintiff testified that, in 1983, an incident occurred while she was out with her mother and a girlfriend. Robert threw plaintiff's clothes in the yard and smashed the refrigerator. Plaintiff testified that she called the police. Plaintiff testified that, in 1983, Robert went to a rehabilitation clinic for his problem with alcohol.

Plaintiff also testified that Robert pulled her hair several times during the course of the marriage. In addition, plaintiff believed that Robert cut the brake lines in her car in an effort to kill her. Plaintiff filed a police report over the brake-line incident. Plaintiff also testified that, twice during the marriage, Robert threatened her with a gun.

Plaintiff testified that, by the fall of 1987, the situation was bad. Early in October 1987, Robert was chasing plaintiff's son and pushing him. When plaintiff tried to stop Robert and protect her son, Robert "flung" her and she cut her head, requiring five stitches to treat the wound. Plaintiff left the house with the children and went to see a lawyer. She was referred to defendant.

Plaintiff testified that defendant never spoke to her about legal separation or explained to her the benefits of a separation versus a divorce. Plaintiff testified that defendant told her that she was entitled to a portion of Robert's pension for the rest of her life, and that the filing of a QDRO would ensure that the pension board would view her as a surviving spouse. Plaintiff maintained that her belief had been reinforced when defendant sent her a copy of the QDRO (which was never filed).

Plaintiff testified that, notwithstanding Robert's actions, she never stopped loving him. She stated that if she could have stayed married to Robert, she would have. Plaintiff also stated that, if she had known that she would not be able to secure her share of Robert's pension by means of a divorce, then she would have chosen a legal separation to protect her family's financial status: "[i]f I would have lost my whole life savings and a way of me being able to financially take care of my children, I would have chosen a separation."

Joy Feinberg testified as an expert witness on defendant's behalf. She testified that, in 1986, the United States Congress passed the Retirement Equity Act which allowed pensions to be distributed by a QDRO. At that time in Illinois, however, municipal pensions, like Robert's, were not subject to the Retirement Equity Act, but were controlled by the Illinois Constitution. It was not until 1999 that Illinois adopted the Qualified Illinois Domestic Relations Order (QILDRO) to address the situation. According to Feinberg, the law in this area was confusing from 1986 to 1999. She believed that a pension board could not voluntarily accept a QDRO unless, perhaps, the participant consented.

Feinberg testified that an attorney should consider a legal separation if it is something the client wants. Further, a legal separation could have been a possible option if the pension board would have considered plaintiff to be a surviving spouse, an issue about which Feinberg had no opinion. Feinberg also testified that defendant could not have filed for a legal separation for plaintiff and Robert because they had not actually separated. Feinberg opined that, if plaintiff had decided to file for separation, the Robert could have filed a counterpetition for dissolution of marriage, either at the time plaintiff filed for separation or any time thereafter, and the dissolution action would have trumped the separation. Feinberg opined that, under the law in effect between 1987 and 1991, plaintiff and Robert would have been unable to divide the marital property under a legal separation, absent the agreement of both parties. Additionally, Feinberg opined that, during the time period beginning 1987 through 1991, a reasonable lawyer in defendant's situation would not have advised plaintiff to seek a legal separation.

William White testified as an expert witness on plaintiff's behalf. White opined that, in 1988 or 1989, municipal pensions, such as Robert's, were not susceptible to distribution by a QDRO. White opined that legal separation was a viable option, and plaintiff would have remained a surviving spouse for purposes of the pension had she and Robert obtained a legal separation. White testified that he did not personally favor separation, however, because it only delayed the inevitable divorce. White testified, contrary to Feinberg, that, in a legal separation, the court had the jurisdiction and ability to divide the marital property. White acknowledged that, if one spouse filed for a separation and the other filed a counterpetition for a divorce, the court would first adjudicate the counterpetition for the divorce.

White also testified that, in his opinion, defendant breached the standard of care by failing to explain to plaintiff that a legal separation would have preserved her rights to her portion of Robert's pension. White also opined that defendant breached the standard of care by not taking alternative measures to preserve plaintiff's rights to her portion of the Robert's pension.

Jeffrey Hammerlund testified that he represented Robert in the dissolution action. Before the trial commenced in this matter, the trial court ruled on two of plaintiff's motions *in limine* concerning Hammerlund's testimony. The trial court precluded testimony about conversations with Robert as well as conclusions about what Robert intended to do. The trial court also precluded testimony about statements Robert made to Hammerlund regarding Robert's desire to obtain a divorce.

Hammerlund testified that he was retained by Robert to try the dissolution case. At the time he was retained, he had less than a week to prepare for the trial. Hammerlund testified that the case was unusual in many respects. For instance, when Hammerlund entered the courtroom for the trial, he observed that there were eight bailiffs present. This was because Robert had threatened the life of the judge, the guardian *ad litem*, defendant, and Ben Schwartz. When plaintiff left the courtroom, she was escorted by two bailiffs; Robert was not allowed to leave the courtroom until plaintiff had reached her car, and the car was moving.

Hammerlund testified that the case boiled down to two issues: Robert's pension, which he "did not want [plaintff] to have a dime of it," and restricted visitation with the child born during the marriage. Hammerlund testified that plaintiff absolutely insisted on supervised visitation.

Hammerlund testified that, from 1989 until the end of the case, he had conversations with defendant, the guardian *ad litem*, and the judge about what would happen if the trial court ordered unsupervised visitation. During a pretrial hearing, the trial court informed defendant that he believed it very unlikely that he would require supervised visitation. Defendant informed the court that, if that happened, he had been instructed to dismiss the case. Hammerlund testified that he informed the court and defendant that, if the case were to be dismissed, he had prepared a petition for dissolution and had been instructed to file it immediately.

The topic of whether a separation or voluntary dismissal was further pursued when Hammerlund was asked to give his opinion:

> "Q. Based on your experience in this case and within a reasonable degree of legal certainty and based on your qualifications as a domestic relations attorney, what would have happed had [plaintiff] filed for legal separation while you were representing [Robert]?

A. We would have immediately filed our petition for dissolution and filed an objection to any separation. We would not agree to it on the basis that he would not agree to be separated and it would not be a no-fault separation."

Hammerlund further opined that, between 1987 and 1989, the standard of care for a domestic relations lawyer in Kane County did not require that he discuss a legal separation. In order to effect a legal separation, both parties must agree. Hammerlund testified that, after the QDRO was prepared, he told defendant that Robert would not agree to the order.

Following the presentation of evidence, the trial court heard the parties' arguments. On September 1, 2009, the trial court issued its written order. The court reviewed the applicable law and testimony of the witnesses. The court then stated:

"14. Basically the Plaintiff asserts that the Defendant is liable to her because he failed to properly secure to her survivorship benefits in Robert's pension in two ways: by not advising her both of the then existing concerns about the applicability of a QDRO to Robert's pension and as to the separation option (which she states she would have pursued), and by failing to use means at his disposal to protect her loss of benefits both during Robert's lifetime and in the event Robert predeceased her after the divorce (*e.g.* life insurance).

15. The Defendant, by his own testimony, failed to investigate by legal research or otherwise the applicability of a QDRO to a municipal pension, and particularly survivorship rights contained therein. He did not contact Robert's pension board prior to trial and could produce no physical evidence that he had done any legal research on this issue. In fact, by his own testimony, the Defendant never considered the survivorship issue of the fact that the Plaintiff might outlive Robert until after the trial.

16. The defendant's failure to even consider a means to preserve the Plaintiff's potential right of survivorship in Robert's pension prior to trial, failure to research the issue, and failure to discuss the existing uncertainties in the law in regard to it with the Plaintiff violated the standard of care applicable to Illinois lawyers at that time."

The trial court then determined that a finding of negligence did not end the inquiry, but it had to consider issues of proximate causation: whether plaintiff would have elected to pursue a legal separation and whether plaintiff would have been successful if she had pursued it. The court held:

"18. On the question of the Defendant's failure to discuss the legal separation option, the Plaintiff has failed to sustain not only her burden that such omission violated the Defendant's standard of care, but also her burden to show that she would have chosen that option if presented with it."

The trial court then noted that the law of separation had been extensively discussed during the proceedings. As relevant here, the trial court analogized an attorney's duty to inform his or her client about all of the options, dissolution and separation, "to the rules governing informed consent in medical malpractice." The court then analyzed the evidence to determine whether the standard of care required defendant to discuss the legal separation option with plaintiff:

"21. The testimony established that the Plaintiff actively sought and requested of the Defendant that her marriage be terminated. She told him that Robert was such an abusive alcoholic that she would never agree to anything less than supervised visitation with their daughter. Despite the Plaintiff's testimony to the contrary the evidence supports a finding that at all times she told the Defendant that her primary goal was an end to this relationship ***. The Defendant knew that she had been the victim of severe domestic abuse. A legal separation would not have achieved the finality which the Plaintiff expressed that she wanted nor which the standard of care required the Defendant to consider as to her best interest. Additionally, in considering this aspect of proximate cause and what the Defendant should have done the Hammerlund testimony is particularly significant. The Defendant knew that if he dismissed the case or petitioned for legal separation that Hammerlund had been instructed to file for dissolution. He also knew that eventually a petition for dissolution would likely have been successful even if Robert had had to wait out the two year separation requirement for a no fault divorce because such an action would have taken precedence over legal separation. His belief based upon these conversations, that any separation action would have been fruitless, was reasonable. Furthermore, his belief that a QDRO could apply to Robert's pension, despite his lack of research on the issue, was also objectively reasonable given the state of the law. As noted the Defendant's expert opined that a legal separation, although obtainable, would not have been an appropriate option under these circumstances. The Plaintiff's expert's opinion in this regard is discounted based both on his relative inexperience with this type of case and his mistaken belief that property could be divided in a legal separation case regardless of whether the parties agreed to it or not. His opinion that the Defendant should have known that a QDRO would not apply to Robter's pension is not supported by the evidence as this was an area of uncertainty in the law at that time. Under all of these circumstances the applicable standard of care did not require the Defendant to discuss the legal separation option with the Plaintiff."

The trial court then turned to proximate causation:

"22. Furthermore, the Plaintiff has failed to establish proximate cause on the issue of the legal separation option. As in an informed consent medical malpractice case a plaintiff must prove as an aspect of proximate cause that she would have chosen the option in question if offered. This analysis must be based upon an objective standard, what a reasonable person in the Plaintiff's position would have done (citation). The pleadings referred to *** above and the defendant's testimony of his conversations with the Plaintiff belie her claim that she would have chosen the legal separation option if the Defendant had informed [her] of it. Her testimony in regard to her warm feelings toward Robert are not credible. Admirably her primary goal throughout the litigation was to protect both herself and her family from Robert. The evidence did not establish that a reasonable person in the Plaintiff's position would have opted for a legal separation even if adequately advised by her attorney."

Next, the trial court focused on whether defendant could have secured plaintiff's portion of Robert's benefits after the divorce:

"23. Similarly on the issue of what means were available to secure her survivorship benefits after divorce, the Plaintiff has failed to sustain her claim that the applicable standard of care was violated. The evidence at trial did not establish, despite the Defendant's negligence in failing to research or discuss the pension issue with the Plaintiff, that given the uncertainties in the law the Defendant should have obtained a better result for the Plaintiff at trial. The trial judge, following the contested hearing, ordered a QDRO. In the context of the dissolution hearing it was not unreasonable for the Defendant to request that a QDRO be entered to protect the Plaintiff's survivorship rights, or to believe that it would have been effective in doing so. In the context of the time the Defendant's actions to secure these rights were objectively reasonable and within the standard of care. Additionally, nothing could have been done to require Robert, without his consent, to obtain insurance on his life naming the Plaintiff as his beneficiary."

The court then related its holdings:

"24. Certain recent Illinois cases have held that a court has the inherent power to order a pension plan provider to direct payments (citations), however no such precedent existed at the time this case was pending. When Robert died the Plaintiff had something the law abhors: a right without a remedy, and while this Court has great sympathy for her plight, it does not follow that the Defendant is legally responsible for it. The Defendant's actions in attempting to preserve the Plaintiff's survivorship rights were not negligent and not a proximate cause of the Plaintiff's claimed damages.

25. The Defendant was negligent in failing to pursue the Plaintiff's interest in the pension benefits paid to Robert during his lifetime. That failure violated the applicable standard of care and proximately caused damage to the Plaintiff in the amount of $11,865.49 (13 months - 5/90-5/91 x $912.73). Judgment will be entered accordingly.

26. Based upon the findings made herein the Court does not reach the question of the case within a case, whether the Plaintiff would have been successful in preserving her survivorship rights if she had filed for separation, or address a calculation of her claimed damages.

27. The evidence as to the affirmative defense, statute of limitations, proves that the Plaintiff's cause of action accrued within the five year statute of limitations, that that

limitation period is applicable here, and that she timely filed her action within that time frame. Her action is not barred by the statute of limitations."

The parties filed motions to modify the judgment and these motions were denied. Plaintiff timely appeals and defendant timely cross-appeals.

We first consider plaintiff's contentions on appeal. Plaintiff contends that the court made erroneous evidentiary rulings: (1) allowing Hammerlund to "speculate" about Robert's intentions; (2) allowing Hammerlund to testify to Robert's hearsay statements; and (3) disregarding plaintiff's unrebutted testimony that she would have opted for a legal separation. Plaintiff also contends that the trial court's verdict was against the manifest weight of the evidence regarding defendant's duty fully to inform plaintiff about her options in obtaining and securing her interest in Robert's police pension and in the calculation of plaintiff's damages.

Plaintiff first argues that the court made several errors in its evidentiary rulings. The decision on whether to admit or exclude evidence resides within the sound discretion of the trial court, and that decision will not be disturbed absent an abuse of discretion. *City of Chicago v. St. John's United Church of Christ*, 404 Ill. App. 3d 505, 518-19 (2010). An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful, or where no reasonable person would take the view adopted by the trial court, or where the ruling rests on an error of law. *Peeples v. Village of Johnsburg*, 403 Ill. App. 3d 333, 339 (2010). Additionally, a party is not entitled to a reversal stemming from a trial court's evidentiary rulings unless the error substantially prejudiced the party and affected the outcome of the case. *St. John's United Church*, 404 Ill. App. 3d at 519.

Plaintiff initially argues that the trial court erred when it permitted Hammerlund to "speculate" as to Robert's intentions to file a counterpetition for dissolution of marriage if plaintiff either voluntarily dismissed her dissolution action or moved to change it to an action for a legal separation. Plaintiff contends that the trial court considered Hammerlund's testimony about what Robert would do to be expert opinion testimony and considered Hammerlund's testimony about what Robert told him to be admissible in support of that opinion even though it was hearsay. Plaintiff challenges the opinion-testimony basis for admissibility, arguing that defendant failed to disclose the "opinion" in his Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) disclosure. Plaintiff also maintains that the "opinion" was not the proper subject of expert testimony, because it was not the product of specialized knowledge outside the ken of a normal finder of fact. Further, plaintiff argues that Hammerlund's testimony was not really an opinion, because the topic of Robert's intentions presented a factual issue, and not an issue about which an expert witness would be allowed to offer an opinion.

Defendant responds that plaintiff opened the door and actually offered the testimony about Robert's intentions to file a counterpetition for divorce in her case in chief. Defendant points to the following exchange:

> "Q [Plaintiff's Counsel]. Mr. Feda, how does a divorce make someone safer than having a separation?
>
> A [Defendant]. The difference between the two is it terminated her relationship with him, and although it continued because he failed to comply with the terms of the order, but what you're suggesting is that if I told Gloria, reconcile or get a legal separation, you're suggesting that miraculously somehow we would be able to control Bob, and he would say, yes, that's exactly what I want, let's get a legal separation or let's reconcile. And to me, suggesting that, in my judgment, was just to prolong the inevitable, that *Mr. Wiggins would have filed a counter-complaint for divorce and he*

> *would be entitled to a divorce*, and we would be in the same position we were in 1988 at some later point in time." (Emphasis added.)

Defendant argues that, "[s]ince the plaintiff introduced this issue, she cannot now claim error."

Based on the foregoing, we believe that defendant is attempting to construct his argument as follows: The issue of Robert's intentions and whether he would file a counterpetition for a divorce at his first opportunity was first raised during plaintiff's case in chief. Because plaintiff introduced the issue, she opened the door to allow the evidence of Robert's intentions in. Because she opened the door, she cannot now complain about the propriety of the evidence of Robert's intentions. The issue of Robert's intentions, however, was raised as part of a nonresponsive answer in the above-quoted exchange. Plaintiff asked defendant how a obtaining a divorce instead of a separation would make a party safer. The initial part of defendant's answer was responsive: defendant stated that, if the other party is reasonable, unlike plaintiff's husband, the termination of the relationship would serve to make the party safer. Defendant continued speaking after answering the question, offering his opinion on the utility of a separation in a situation such as Robert's and plaintiff's. This portion of defendant's answer was not responsive to the question actually posed by plaintiff.

Even though the part of defendant's response on which he bases his contention that plaintiff opened the door was nonresponsive to plaintiff's actual question, plaintiff still did not interpose an objection to the nonresponsive testimony and did not move to strike the nonresponsive testimony. Plaintiff's failure is significant, because a trial court must strike nonresponsive answers when a proper motion to do so is made. *People v. Fritz*, 84 Ill. 2d 72, 80 (1981). Further, in order to preserve an evidentiary issue for appeal, a party must make a timely objection in the trial court. Failure to timely object will forfeit both the objection and the issue on appeal. *Simmons v. Garces*, 198 Ill. 2d 541, 567 (2002). We perceive the crux of defendant's contention on this point to be that, because plaintiff failed to object or to move to strike the nonresponsive answer, plaintiff forfeited any contention on appeal that defendant's testimony, "that Mr. Wiggins would have filed a counter-complaint for divorce and he would be entitled to a divorce," was improperly admitted and should not have been placed before the fact finder.

Defendant's chain of reasoning concludes with the assertion that plaintiff opened the door to testimony about Robert's intention to file a counterpetition for divorce if he was given an opportunity to do so. Defendant reasons that his testimony, "that Mr. Wiggins would have filed a counter-complaint for divorce and he would be entitled to a divorce" if plaintiff filed an action for a legal separation or dismissed her dissolution claim, opened the door to such testimony by defendant and others during defendant's case. Plaintiff did not object to the testimony when it initially occurred, despite it being nonresponsive to the question actually posed to defendant. As a result, plaintiff introduced this evidence during her case in chief. Defendant notes that a party cannot complain that the trial court erred by admitting evidence that the party itself introduced. *Simmons*, 198 Ill. 2d at 569. Defendant concludes that plaintiff cannot challenge the propriety of the testimony about Robert's intent to file a counterpetition for divorce because plaintiff forfeited her objections to this testimony and actually introduced the testimony into the trial.

Defendant's argument has surface appeal. We note, however, that cases involving opening the door to adverse (and otherwise inadmissible) evidence appear to fit into two categories. In the first category, the cases appear to suggest that, once the door has been opened, either because the party directly raised the hitherto forbidden issue, or because the party acquiesced to the raising of the issue, such as by failing to object, then the issue becomes fair game, and the court will allow evidence to be elicited on that issue. See, *e.g.*, *People v. Lopez*, 228 Ill. App. 3d 1061, 1075 (1992) ("If a [party] procures, invites, or acquiesces in the admission of improper evidence, [the party] cannot claim that its admission is error"); *People v. Daniels*, 164 Ill. App. 3d 1055, 1078 (1987) ("A [party] may [forfeit] the issue of the improper admission of evidence on appeal by failing to object to it during trial (citation), or by procuring, inviting or acquiescing in the admission of the evidence, even though it is improper"). The second category encompasses the doctrine of curative admissibility. In this category, where a door to a particular issue is opened by a party, the other party may elicit evidence on the issue in order to rebut or correct any adverse inferences caused by the previous examination. *People v. Manning*, 182 Ill. 2d 193, 216 (1998). Further, the doctrine of curative admissibility "is limited in scope and design to those situations where its invocation is deemed necessary to eradicate *undue* prejudicial inferences which might otherwise ensue from the introduction of the original evidence." (Emphasis added.) *People v. Higgins*, 71 Ill. App. 3d 912, 931 (1979). The doctrine, moreover, "is not a panacea; it does not permit a party to introduce inadmissible evidence merely because the opponent brought out some evidence on the same subject." *Manning*, 182 Ill. 2d at 216.

We must, then, choose which line of cases to follow in resolving this issue. Defendant's contention is, in fact, supported in the case law (see, *e.g.*, *Lopez*, 228 Ill. App. 3d at 1075). However, we note that defendant did not advance this theory in the trial court; rather, defendant's contention (as we see it) has the character of a *post hoc* justification of the trial court's result. While it is, of course, entirely proper for defendant, as appellee, to raise any ground appearing in the record capable of supporting the trial court's judgment (see *Fritzsche v. LaPlante*, 399 Ill. App. 3d 507, 523 (2010) (appellate court reviews the trial court's judgment, not the reasoning or rationale that led to that judgment); *Hope v. Hope*, 398 Ill. App. 3d 216, 220

(2010) (same)), defendant's argument is nevertheless unavailing. Instead of defendant's "you-made-your-bed-now-lie-in-it" rationale, we choose to follow *Saputo v. Fatla*, 25 Ill. App. 3d 775 (1975), a case employing the curative admissibility doctrine, which neither party cited and which is closely analogous to the circumstances of this case. In *Saputo*, the defendant offered a gratuitous and unresponsive answer to the plaintiff's inquiry. *Saputo*, 25 Ill. App. 3d at 783. The plaintiff did not object or move to strike the gratuitous remark. *Saputo*, 25 Ill. App. 3d at 783. The defendant thereafter elicited further testimony on the issue, even though the remark had not created any inference adverse to his position needing explanation or rebuttal. The appellate court determined that the trial court erred in allowing the defendant to further explore the issue, albeit the error was harmless. *Saputo*, 25 Ill. App. 3d at 783.

Saputo is directly on point regarding the issue plaintiff raises. Like the defendant in *Saputo*, defendant here, gratuitously and nonresponsively, commented on Robert's intention to file a counterpetition for divorce, should the opportunity arise. This remark did not cause any undue prejudice to defendant's case. Even though plaintiff did not object to or move to strike defendant's comment at the time it was made, the trial court erred in allowing defendant to elicit further testimony on the issue when plaintiff did object, at least based on the idea that plaintiff opened the door. Accordingly, we reject the argument that plaintiff opened the door to Hammerlund's testimony during her direct examination of defendant in her case in chief.

Defendant next seeks to refute plaintiff's contention by arguing that Hammerlund's testimony was cumulative of other testimony admitted at trial. Defendant points to his own testimony during his direct examination during his case in chief, in which he stated that, if he amended the complaint to request a separation or dismissed the complaint and filed a petition for separation, Robert, through Hammerlund, would have immediately filed a countercomplaint or a new petition for a divorce:

> "A [Defendant]. Mr. [Hammerlund] told me on many occasions, Mr. Wiggins would never agree to any form of legal separation. If I filed an amended pleading, dismissed our complaint and filed a petition for legal separation, he would immediately file a counter-complaint or a new lawsuit for a divorce.
>
> Q [Defense counsel]. Did there—
>
> MR. BOYLE [Plaintiff's counsel]: Your Honor, just a second, please. The question given was whether or not, I believe, a legal separation was considered. The Defendant testified that he's basing his testimony on the testimony that has been given in the case by experts. If the court reporter reads it she will—the last half of the question answered [(which we quoted above)], it was unresponsive to the question, so I move that the answer be stricken.
>
> MR. McGARRY [Defense counsel]: First off, I asked him if it was a viable option, so Mr. Boyle didn't hear the question. And, secondly, I don't know what the objection is.
>
> THE COURT: I think the objection is not responsive, is solely for the questioner. It's not for the other side to object. It's certainly an issue of cross[-]examination, but only Mr. McGarry posed the question. If he doesn't feel it's responsive, it's his objection to make, so I will deny the objection.
>
> MR. BOYLE: Well, it becomes also a hearsay objection as well, because he based his testimony—
>
> THE COURT: That's a different—

MR. BOYLE: Mr. [Hammerlund]—excuse me, if I might, your Honor, his testimony was offered only for the purposes of supporting his opinion relative to the basis of what the facts were in the case. This testimony that was given here by [defendant] on this point of legal separation is objectionable on a hearsay basis, as well as being nonresponsive.

THE COURT: Now that's a different objection[.] Mr. McGarry.

MR. McGARRY: Overruled, Judge.

THE COURT: Thank you.

MR. McGARRY: Judge, I've been waiting to just say that.

In all seriousness, Mr. [Hammerlund] was a witness testifying at trial, so it's really not hearsay, and the declarant is testifying at trial, and so it's not hearsay, it's not hearsay. He's relying on a statement made to him by opposing counsel, so it's not hearsay, opposing counsel testified it was available.

THE COURT: What about the part that Mr. [Hammerlund] said Mr. Wiggins said to him, that is a little less clear. I know we've talked about state of minds [*sic*] issues before, and—but this is Mr. [Hammerlund]. He says to him, if you file for separation, I'm going to file for divorce. He said that yesterday.

MR. McGARRY: You know, Judge, the problem is the case rises to the level really of what a reasonable lawyer would advise, knowing A, B, C, D and E. You know, if I knew Mr. Boyle was going to object to a question I might frame it differently.

THE COURT: So the [Hammerlund] testimony as to—is the testimony here, [defendant], as to what he was told by Mr. [Hammerlund]. I mean, even the Wiggins part

> of it, if it's not for the truth of the matter asserted, it's to explain why he did what he did, it seems it's admissible that way.
>
> MR. McGARRY: Yes.
>
> THE COURT: So I will admit it over objection. That way what Mr. [Hammerlund] said what Wiggins said to [Hammerlund] said to [defendant] is only admissible in regard to why [defendant] did what he did or didn't do—what he didn't do, and not for the truth of the matter asserted, but I will admit it on that limited basis."

Regarding the above-quoted colloquy, defendant argues that, while plaintiff objected at trial, she did not present any argument why *defendant's* testimony should not have been admitted, thereby forfeiting any contention on appeal that defendant's testimony was improperly admitted. See *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 852 (2010) (failure to argue issue on appeal results in forfeiture of point on appeal). Plaintiff rejoins, in a footnote, that she argued voluminously why Robert's statement to Hammerlund was inadmissible at trial. While this is true, it also fails to respond to defendant's contention, that plaintiff did not argue on appeal why *his* testimony, that, when he suggested that plaintiff might amend her pleading to request a separation or file a new pleading requesting a separation, Hammerlund informed him that Robert would file an appropriate pleading seeking a divorce was inadmissible. We have searched plaintiff's submissions in this case and have found no argument challenging defendant's testimony about Robert's and Hammerlund's intentions to file an appropriate pleading seeking a divorce. We therefore agree with defendant and conclude that plaintiff has forfeited any contention that defendant's testimony on the issue of Robert's intentions was improperly admitted. *Wilbourn*, 398 Ill. App. 3d at 852. For purposes of defendant's argument, then, his testimony, which was admitted for the limited purpose of demonstrating his state of mind and explaining why he did not suggest or advise plaintiff to pursue a legal separation, was properly before the finder of fact.

Shortly after the colloquy quoted above, to which plaintiff objected, defendant testified on his direct examination in his case in chief:

> "[T]he question came up as to whether or not there was a way to perhaps have another judge hear the case that might be more receptive to supervised visitation [because the divorce trial judge did not think he would order supervised visitation]. And I believe I had suggested to Mr. [Hammerlund] that we were going to either nonsuit our case and see if we can get another judge, and that's when Mr. [Hammerlund] countered that he would file a petition for dissolution of marriage, or if I filed a petition for legal separation or something, that he would immediately counter and file for divorce."

Plaintiff did not object, but the admissibility of the testimony about Robert's intentions had been deemed admissible for the limited purpose of explaining defendant's state of mind and explaining why he did not advise plaintiff to seek a legal separation.

Defendant also testified about Robert's intentions during plaintiff's cross-examination during his case in chief. The following colloquy occurred:

> "Q [Plaintiff's counsel]. With the filing of a petition for legal separation and a filing of a counter-petition—
>
> A [Defendant]. For divorce?
>
> Q. For divorce, [plaintiff] would have been right back where she started, in the best case she would be the surviving spouse; is that correct?

A. What if—well, if there is a counter-petition for dissolution of marriage, a judgment is entered on the basis of the judgment for dissolution of marriage, so she would have been divorced. ***

Q. Was it ever, in your mind, advisable to inform her of her option of legal separation?

A. No, because of the history of the case and the fact that Mr. [Hammerlund] had suggested that there would be no legal separation, there would be a divorce. ***"

Plaintiff did not object to defendant's testimony that a divorce would occur if plaintiff tried to obtain a legal separation.

Finally, Feinberg testified that, if plaintiff had filed for a legal separation, Robert could have filed a counterpetition for a divorce. The following colloquy occurred:

"Q [Defense counsel]. Would a reasonable lawyer in [defendant's] situation in the time 1987 through 1991, as you understand the facts, advise [plaintiff] or a client like [plaintiff] in her condition to seek marital separation?

A [Feinberg]. Advise her to do that?

Q. Yes.

A. No.

Q. Why not?

A. Well, for several reasons.

Number one, [plaintiff] was a client coming to you at a point in time where you want her to look to her future and have a true future, not a future where she can't really become involved in another relationship that could become a marriage, and you think of that at that time [*sic*] point in time.

> You also know that if [plaintiff] had decided to file for legal separation, her husband could have filed a counter petition for a divorce then or at any time in the future.
>
> So if a legal separation had been granted and there hadn't been a counter petition filed, then it could be filed at any time. You're causing extra legal fees to go on."

Plaintiff did not object throughout this line of questioning, so it was admitted with no limitations.

Based on the foregoing testimony, it appears that Hammerlund's testimony about Robert's intentions is cumulative. Defendant testified that he believed Robert would file for a divorce if plaintiff filed for a legal separation. Defendant also testified to that point on cross-examination without any objection or limitation. Additionally, Feinberg, defendant's expert, testified that, if plaintiff sought a legal separation, then Robert could, at any time, immediately or in the future, file for a divorce. The foregoing testimony was admitted and plaintiff did not challenge it (with the exception of defendant's direct examination testimony during his case in chief, which was admitted for a limited purpose). Thus, Hammerlund's testimony that Robert would file a divorce action should plaintiff ever seek a legal separation was cumulative to other testimony admitted during the trial.

It is a longstanding rule that, where cumulative evidence has been erroneously admitted, it is not prejudicial and any error admitting it is harmless. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 537 (2007); *Morelli v. Ward*, 315 Ill. App. 3d 492, 498 (2000); *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 895 (1995); *Pharr v. Chicago Transit Authority*, 220 Ill. App. 3d 509, 517 (1991). Here, defendant has demonstrated that other witnesses provided evidence that Robert would file for a divorce immediately after plaintiff sought a legal separation. Hammerlund's testimony to the same effect, then, was cumulative, and error, if any, accruing from its admission was harmless.

Our conclusion regarding the harmlessness of the error, if any, is bolstered by Robert's actions following the entry of the judgment of dissolution. Almost immediately after the entry of the judgment, Robert remarried. It is reasonable to infer from this that Robert was anxious to complete his divorce so he could get married again. Because Robert was anxious to complete the divorce and remarry, it is also reasonable to infer that Robert would have definitely instructed Hammerlund to file a divorce action should plaintiff dismiss her action or modify it to seek a legal separation. Hammerlund's challenged testimony, then, is bolstered by the indicium of reliability provided by Robert's actions, which also independently create the inference that Robert was focused on seeking a divorce and would not have acquiesced to a legal separation.

The trial court held that Hammerlund's testimony was admissible pursuant to the rule that allows an expert to use hearsay evidence to support his opinion. Even if this is not true, we may nevertheless sustain the trial court's judgment on any ground appearing in the record. See *Fritzsche*, 399 Ill. App. 3d at 523 (appellate court reviews the trial court's judgment, not the reasoning or rationale that led to that judgment). Because Hammerlund's testimony was cumulative to other testimony admitted without objection, even if it were admitted pursuant to an improper basis, any error from that admission would be harmless. Accordingly, we reject plaintiff's contention that the trial court's admission of Hammerlund's constituted reversible error, because any error accruing from that admission was harmless.

Plaintiff next contends that the trial court erred by permitting Hammerlund to testify about hearsay statements made by Robert. Plaintiff argues that Hammerlund's testimony was inadmissible for two reasons: first, it was hearsay. This contention is essentially the same as plaintiff's initial contention on appeal and our resolution of the first issue pertains to this contention as well. Where cumulative evidence is admitted, even if in error, that error will not cause prejudice and any error accruing from the admission of cumulative evidence is harmless. See, *e.g.*, *Pharr*, 220 Ill. App. 2d at 517 (specifically considering hearsay evidence). Accordingly, we reject plaintiff's contention based on hearsay.

Plaintiff also argues that Hammerlund's testimony was inadmissible because it violated Robert's attorney-client privilege. Plaintiff argues that the privilege belongs to the client and may be waived only by the client's voluntary disclosure, relying on *Chavez v. Watts*, 161 Ill. App. 3d 664, 672 (1987). Plaintiff further contends that the party seeking disclosure from the attorney must establish that the attorney-client privilege does not apply. Plaintiff's conception of attorney-client privilege is flawed and her argument, as a result, is misplaced.

The attorney-client privilege belongs to the client, and can only be waived or invoked by the client. *Lama v. Preskill*, 353 Ill. App. 3d 300, 305-06 (2004); *Hayes v. Burlington Northern & Santa Fe Ry. Co.*, 323 Ill. App. 3d 474, 478 (2001); *Chavez*, 161 Ill. App. 3d at 672. Here, Robert was Hammerlund's client and the attorney-client privilege belonged to Robert. *Lama*, 353 Ill. App. 3d at 305-06, *Hayes*, 323 Ill. App. 3d at 478; *Chavez*, 161 Ill. App. 3d at 672. Because the privilege belonged to Robert, only Robert (or his agent) could raise it to preclude the introduction of certain evidence. *Lama*, 353 Ill. App. 3d at 305-06. Plaintiff was Robert's adversary, not his agent. Accordingly, she cannot raise the attorney-client privilege between Hammerlund and Robert to preclude Hammerlund's testimony about Robert's intentions. We reject plaintiff's argument on this point.

Next, plaintiff contends that the trial court impermissibly rejected her unrebutted testimony in finding that "a legal separation would not have achieved the finality which the

Plaintiff expressed she wanted nor which the standard of care required the Defendant to consider as to her best interests." Plaintiff had testified, "If I would have lost my whole life savings and a way of me being able to financially take care of my children, I would have chosen separation." Based on this testimony, according to plaintiff, the proper question in the case became whether, had plaintiff been properly advised, first, that a QDRO could not secure her lifetime interest in Robert's pension, and second, about the risks and benefits of a legal separation, she would have chosen financial security over finality. Plaintiff contends that her unrebutted testimony indicated that she would have chosen financial security, so the trial court's error in rejecting that testimony resulted in reversible error.

In considering this issue, it is helpful to take a small step back and consider the nature of plaintiff's action in this case. Plaintiff has alleged that defendant committed legal malpractice. In order to establish legal malpractice, plaintiff must " 'prove the existence of an attorney-client relationship; a duty arising from that relationship; a breach of that duty; a proximate causal relationship between the breach of duty and the damages sustained; and actual damages.' " *Merritt v. Hopkins Goldenberg, P.C.*, 362 Ill. App. 3d 902, 909-10 (2005), quoting *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1995). Additionally, plaintiff must prove the case within the case, meaning that plaintiff must prove the underlying action and what her result would have been absent the alleged malpractice. *Merritt*, 362 Ill. App. 3d at 910. Plaintiff must "establish that 'but for' the attorney's negligence, [she] would not have suffered the damages alleged." *Merritt*, 362 Ill. App. 3d at 910. Injuries resulting from legal malpractice are not personal injuries, but pecuniary injuries to intangible property interests; further, damages are not presumed, but must be affirmatively pleaded and proved. *Merritt*, 362 Ill. App. 3d at 910.

This framework has dispositive implications for plaintiff's contentions. Plaintiff argues that, had she been so advised, she would have opted for a legal separation in order to preserve her status as a surviving spouse regarding Robert's police pension. In other words, the case within a case that plaintiff must prove is whether she would (or, more to the point, could) have achieved a legal separation from Robert, and would have thereby qualified as a surviving spouse regarding Robert's police pension. The evidence in the record demonstrates that, regardless of whether plaintiff would have chosen to pursue a legal separation, such a choice would have been unavailing, because Robert had the ability to and would have filed for a divorce from plaintiff. Because Robert would have divorced plaintiff if plaintiff had not divorced Robert, plaintiff is unable to demonstrate any scenario whereby she could be considered a surviving spouse with regard to Robert's police pension. Because plaintiff would not have been a surviving spouse under any circumstances presented by the evidence adduced in this case, she cannot prove the case within the case. Thus, while plaintiff may be able to prove that defendant was negligent for failing to adequately advise her about the risks and benefits of seeking a legal separation as opposed to a dissolution of her marriage, she cannot prove causation, because she cannot prove that Robert would not have filed for a divorce from her, given the opportunity. Accordingly, even if we were to determine that plaintiff prevailed on all of her arguments about the trial court improperly rejecting her unrebutted testimony that she would have chosen to pursue a legal separation, the upshot remains that Robert would have filed for a divorce, which would have trumped plaintiff's action for a separation, and plaintiff would not have become a surviving spouse. In other words, plaintiff's contentions on this point are futile: even if the trial court erred by rejecting her unrebutted testimony that she would have chosen to pursue a legal separation, that error did not affect the outcome of the case because the properly admitted evidence showed that Robert would have pursued a divorce from plaintiff if plaintiff stopped prosecuting her divorce action against Robert. This conclusion obviates the need to further address plaintiff's contentions about the trial court rejecting her unrebutted testimony. We further note that, to the extent that plaintiff argues that the evidence of what Robert would have done had she pursued a legal separation was improperly admitted, we have already dealt with those issues above, and do not need to reiterate our analysis regarding those points.

We note that plaintiff challenges our conclusion that she cannot prove causation by referring to our order in *Wiggins II*, in which we noted that defendant's causation argument was "problematic" and "wholly speculative." *Wiggins II*, slip op. at 10. From this, plaintiff appears to attempt to argue that our judgment of defendant's causation argument in *Wiggins II* forecloses defendant from making that argument in this case. While it is true that we labeled defendant's argument in *Wiggins II*, that if plaintiff sought a separation, Robert would have pursued a divorce, which would have prevented plaintiff from demonstrating causation and thereby defeated plaintiff's case within a case, as "problematic" and "speculative," that holding does not control here. In *Wiggins II*, we were considering whether plaintiff could amend her complaint to allege the cause of action on which she actually proceeded at trial, and we were determining whether it was adequately pleaded and adequately supported by the evidence then adduced in discovery. See *Wiggins II*, slip op. at 10-11. Here, by contrast, we are dealing with the evidence of record adduced during the trial on the merits of the amended complaint. Evidence that, in other words, directly supports defendant's causation argument, as opposed evidence adduced in discovery that did not directly address the causation argument. Because our holding in *Wiggins II* was addressing a somewhat different question on a different record in a different procedural posture, it does not foreclose our consideration of that question now. We reject plaintiff's argument.

Plaintiff also raises a number of arguments disputing defendant's alternative contentions. Because we conclude that defendant's causation argument is dispositive, we do not address the alternative arguments; likewise, we need not address plaintiff's contentions regarding those alternative arguments.

In her final argument on appeal, plaintiff contends that the trial court's judgment was against the manifest weight of the evidence. Specifically, plaintiff argues that the trial court's holding that plaintiff failed to prove that she would have chosen legal separation if she were given the option was against the manifest weight of the evidence. Likewise, plaintiff contends that the trial court's determination that defendant did not breach his standard of care by failing to apprise plaintiff about legal separation and its risks and benefits was also against the manifest weight of the evidence. Plaintiff further contends that the trial court's holding, that defendant reasonably believed a QDRO would apply to Robert's pension and secure her interests in the pension, was also against the manifest weight of the evidence. Finally, plaintiff argues that the trial court improperly calculated the amount of damages she should receive resulting from defendant's failure to obtain her portion of Robert's pension proceeds while Robert still lived.

Again, with regard to plaintiff's first three sub-issues, choosing legal separation, breach of defendant's standard of care, and believing a QDRO would apply to secure her interests in Robert's pension, our conclusion regarding plaintiff's inability to prove her case within a case renders any errors by the trial court in resolving those three sub-issues harmless. See *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 295 (2009) (errors regarding damages were harmless when the jury determined the issue of liability in favor of the defendants). As we noted above, even if the trial court erred and should have found that plaintiff would have chosen a legal separation, it would not change the outcome of the case because defendant demonstrated that Robert would have filed for a divorce, which would have trumped the legal separation, and which would have precluded plaintiff from becoming a surviving spouse. Likewise, had the trial court determined that defendant breached his standard of care by failing adequately to advise plaintiff about the option of legal separation, the outcome of the case would not have changed, because, even had she been sufficiently advised and chosen legal separation, then Robert would have filed for a divorce, trumping the legal separation and precluding plaintiff from becoming a surviving spouse. Further, if the trial court erred in holding that defendant reasonably believed that a QDRO would secure plaintiff's interest in Robert's pension, the outcome remains unchanged: the evidence showed that, effectively, there was nothing defendant could do to preserve plaintiff's interest in Robert's pension should Robert (as he did) predecease plaintiff. The QDRO was ineffective and there was no way to ensure that plaintiff would be a surviving spouse for the pension. Thus, even if defendant were deemed to have committed no errors in his representation, the outcome would have been the same. Accordingly, even if plaintiff is correct and the trial court erred in its determination of the three sub-issues, the outcome would not have changed, and any error associated with those three sub-issues is harmless.

In the final sub-issue, plaintiff contends that the trial court erred in calculating the damages she incurred resulting from defendant's failure to pursue her portion of Robert's pension when Robert was still alive. Plaintiff contends that the trial court's judgment that she was entitled to 13 months of her one-half interest in Robert's pension was against the manifest weight of the evidence. Plaintiff notes that, in April 1990, Robert retired following a period of disability and was awarded police pension benefits from May 1990 to his death in May 1991.

Plaintiff also notes that the police pension board made the award of pension benefits retroactive to May 19, 1989, the date Robert began disability. Plaintiff argues that the trial court calculated her portion benefits as comprising only 13 months (May 1990 to May 1991) instead of 24 months and 11 days (May 19, 1989, to May 30, 1991).

Plaintiff's calculation is supported by the evidence in the record. The trial court did not explain why it chose May 1990 as the starting date of Robert's pension benefits (other than Robert was awarded pension benefits then, but they were retroactive to May 1989) when the evidence in the record demonstrated that Robert's pension was awarded retroactively to begin on May 19, 1989. Defendant does not challenge plaintiff's contention in his response on appeal, and we deem defendant to have acquiesced to plaintiff's argument, apart from his cross-appeal, which deals exclusively with the trial court's holding that he was negligent in failing to pursue plaintiff's portion of the pension benefits while Robert was still alive. We cannot, therefore, decide this issue without first considering defendant's arguments in his cross-appeal, to which we now turn.

On cross-appeal, defendant challenges the propriety of the trial court's determination that he was negligent in failing to pursue plaintiff's portion of Robert's pension benefit payments while Robert was still alive, as well as the amount of damages attributable to this finding of negligence. Specifically, defendant argues that, (1) plaintiff did not elicit expert testimony that defendant breached his standard of care in not pursuing plaintiff's portion of the pension payments; (2) plaintiff did not prove her case within the case that defendant would have been able to successfully obtain any money from Robert; (3) recovery of the pension payments made after January 1, 1991, was barred by the two-year statute of limitations; and (4) the plaintiff did not seek relief in her first amended complaint for defendant's failure to pursue her portion of the pension payments made during Robert's life. We address each contention in turn.

Defendant first argues that plaintiff failed to elicit expert testimony regarding the defendant's standard of care. Generally, the standard of care against which the defendant attorney's conduct will be measured must be established through expert testimony. *Barth v. Reagan*, 139 Ill. 2d 399, 407 (1990). Failure to present expert testimony describing the standard of care will usually be fatal to the plaintiff's legal malpractice action. *Barth*, 139 Ill. 2d at 407. There are, however, exceptions to this rule. For example, where the common knowledge or experience of lay persons is sufficient for them to recognize or infer negligence from the facts, or where the defendant attorney's negligence is so grossly apparent that a lay person would have no difficulty in assessing it, expert testimony about the standard of care will not be required. *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 757 (2008). Similarly, where the defendant attorney admits the standard of care, the admissions may suffice to establish the standard of care without the need for plaintiff to provide separate expert testimony. *Nettleton*, 387 Ill. App. 3d at 757.

Defendant contends that plaintiff did not provide any expert testimony concerning the standard of care regarding the payments of Robert's pension benefits. Our review of the record is in accord: White, plaintiff's expert witness, did not mention anything about the pension benefit payments and defendant's duty or standard of care to be used in pursuing them. This is not, however, the end of our inquiry. Defendant testified repeatedly that he could have used the trial court's powers of contempt in seeking to enforce plaintiff's right to receive her portion of Robert's pension. Defendant also conceded that he did nothing to collect plaintiff's portion of Robert's pension benefits while Robert was still alive and ignoring his obligation regarding plaintiff's portion of the pension proceeds. We believe, as plaintiff argues, that this nonaction falls under the category of negligence that a lay person would be able to determine without the benefit of expert testimony. Plaintiff also argues that defendant suggested the standard of care in his testimony. We agree that defendant suggested the method he could have used to secure plaintiff's interest in Robert's pension. We believe that it would be clear to any lay person that defendant's complete failure to do anything to secure or collect her interest would obviously breach the applicable standard of care. Accordingly, we conclude that plaintiff did not need to present expert testimony on the standard of care required of defendant in pursuing plaintiff's interest in Robert's pension.

Defendant next argues that, with regard to collecting her portion of Robert's pension, plaintiff failed to prove the case within a case, that she would have been able to collect successfully any funds from Robert. Defendant argues that the only evidence adduced at trial showed that plaintiff would have needed to institute contempt proceedings against Robert, requiring that she prove his conduct willful and contumacious in refusing to pay out her portion of the pension benefits. Additionally, defendant argues that plaintiff would have had to prove that Robert had the financial ability to pay. Defendant concludes that plaintiff offered no proof that contempt proceedings would have been successful against Robert, and so she cannot maintain her claim for damages resulting from defendant's negligence in failing to pursue her portions of Robert's pension benefits while Robert was alive. We disagree.

The trial court's power to enforce its orders to pay money in a contempt proceeding is limited to cases where the contemnor wilfully refuses to obey the court's order. *In re Marriage of Barile*, 385 Ill. App. 3d 752, 758 (2008). Additionally, the financial inability to pay is a defense to a contempt proceeding, unless that inability to pay is the result of a wrongful act. *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 332 (2001). In a legal malpractice action based on contempt, the plaintiff would be required to prove the feasibility of recovering any damages proved. *Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C.*, 279 Ill. App. 3d 469, 478 (1996). However, collectability must not be equated with solvency; rather, the plaintiff need prove only that the contemnor is solvent, and not that the full amount could have been recovered from him or her. *Bloome*, 279 Ill. App. 3d at 478. With this framework in mind, we consider defendant's arguments.

We first note that evidence adduced at trial indicated that Robert was not going to voluntarily turn over to plaintiff her portion of his police pension benefits. Indeed, Robert threatened that he would kill plaintiff before she received any part of his pension. We further note that the evidence indicated that Robert, in fact, had not voluntarily forwarded to plaintiff any of her portion of the pension at any time extending from when he first received the pension to when he died. Based on the evidence of his attitude, along with his actions, it is reasonable to conclude that Robert wilfully refused to comply with the court's order dividing his pension benefits. Indeed, the failure to make court-ordered payments constitutes *prima facie* evidence of contempt, shifting the burden to the contemnor to prove that the noncompliance with the court order was not wilful, or that he had a valid excuse for the noncompliance. *Petersen*, 319 Ill. App. 3d at 325. This leads into defendant's next point.

Defendant next asserts that there is "no evidence that any amounts were ever collectible from" Robert. The evidence indicated, however, that Robert was receiving his pension benefit payments each month, in addition to a lump sum to cover the retroactive award of pension benefits from May 1989 to May 1990. The evidence, then, unequivocally shows that Robert was solvent. Defendant points to no other evidence providing any sort of explanation that would excuse Robert's obligation to provide plaintiff with her portion of the pension benefits. In light of the evidence, plaintiff has sufficiently demonstrated that a contempt proceeding would have been successful in securing her portion of the proceeds from Robert's pension benefits, and we reject defendant's argument on this point.

Defendant next argues that a change to the statute of limitations has precluded plaintiff's ability to recover her portion from the five pension benefit payments occurring after January 1, 1991. Defendant argues that the accrual of a legal malpractice action requires an actual injury, citing *Warnock v. Karm Winand & Patterson*, 376 Ill. Ap. 3d 364, 369 (2007). Defendant argues that plaintiff was not injured by defendant's failure to pursue collecting her portion of the pension payments until after the payments were made to Robert. Defendant reasons that, when the statute of limitations was reduced from five years (Ill. Rev. Stat. 1989, ch. 110, par. 13—205) to two years (Ill. Rev. Stat. 1991, ch. 110, par 13—214.3), those payments made to Robert occurring after January 1, 1991, were subject to the new two-year limitation period, and, because plaintiff did not file her malpractice action against him until more than two years had elapsed, plaintiff cannot recover the five payments made between January and May 1991, when Robert died.

Plaintiff responds, contending that defendant has forfeited this contention because it was never raised in the trial court below. See *Haudrich v. Howmedica Inc.*, 169 Ill. 2d 525, 536 (1996) (issues not raised in the trial court are deemed to be forfeited and may not be raised for the first time on appeal). Defendant rejoins, that, to the contrary, he raised the two-year statute of limitations as an affirmative defense to the entirety of plaintiff's complaint. Our review of the record shows this to be true. Defendant continues, arguing that, rather than forfeiture or waiver, the true issue concerns the scope of the cross-appeal. According to defendant, the trial court determined that the five-year limitation period applied to plaintiff's action. Defendant did not cross-appeal from that determination, but instead, limited his cross-appeal to challenging the damages for the injuries incurred after the two-year limitation period became effective, *i.e.*, when Robert was paid his pension benefits after January 1, 1991, until his death. Defendant concludes that the damages for the last five payments (January to May 1991) are precluded by the lapse of the two-year statute of limitations.

We agree with defendant. This appears to be more in the nature of the scope of the cross-appeal rather than an issue of waiver or forfeiture. Under defendant's view, each payment that defendant neglected to pursue was a separate occurrence of negligence, triggering the statute of limitations. As this matter was filed in January 1994, the payments before January 1, 1991, are clearly within the five-year statute of limitations; those occurring thereafter are clearly outside of the two-year statute of limitations. Thus, defendant can only be liable for his failures to pursue plaintiff's portions of the monthly payments made before January 1, 1991. We therefore modify the judgment of the trial court to exclude the five payments from the total damage award.

Defendant last contends on cross-appeal that plaintiff has forfeited any right to the damages accruing from defendant's failure to pursue her portion of Robert's pension benefits because she failed to seek that relief in her amended complaint. We disagree. "The issues in controversy and the theories upon which recovery is sought are fixed in the complaint." *IMC Global v. Continental Insurance Co.*, 378 Ill. App. 3d 797, 804 (2007). The trial court will lack jurisdiction to adjudicate an issue not properly presented in the pleadings. *IMC Global*, 378 Ill. App. 3d at 804-05. In her amended complaint, plaintiff alleges that defendant failed to provide in the judgment that she would receive notice that Robert had begun receiving his pension benefits and that defendant failed to secure plaintiff's interest in or proceeds from Robert's pension. This adequately pleads the negligence for which defendant was found liable, namely, failing to pursue plaintiff's portion of the pension benefits as they were paid to Robert. As plaintiff sufficiently raised the issue in her pleadings, the trial court had the jurisdiction to render judgment on it.

We now return to plaintiff's final issue on appeal: that the trial court incorrectly calculated the number of payments that defendant failed to pursue. We deferred our full consideration because defendant's cross-appeal considered the issue of plaintiff's entitlement to her portion of the pension benefits. We note that the record supports plaintiff's contention that the Robert received payments from May 1990 to May 1991, as well as a lump sum distribution representing the amount of pension he should have received beginning in May 1989. Defendant does not challenge plaintiff's contention regarding the number of months that Robert effectively received pension benefits. Plaintiff urged that she should have received damages equivalent to 24 months and 11 days' worth of payments. We have held above that plaintiff was entitled to all payments except those made to Robert after January 1, 1991, *i.e.*, subtracting five months' worth of payments. We conclude, therefore, that plaintiff is entitled to 19 months and 11 days' worth of payments (May 1989 to December 1990). Accordingly, we modify the trial court's damage award to $17,761.98 ((19 months x $912.73) + (11 days x $30.01)).

For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed as modified.

Affirmed as modified.