2013 IL App (2d) 121186-U
Nos. 2-12-1186, 2-12-1187, 2-12-1188 cons.
Order filed August 8, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROSE CONSTRUCTION 1, LLC, and RANDALL LOT II, LLC,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiffs-Appellees and Cross-Appellants,	)	
v.	)	No. 09-L-50
CES, INC., d/b/a SURVEY TECH, INC., and SINGLEY CONSTRUCTION, INC.,	)	
Defendants-Appellants and Cross-Appellees,	)	
(Rockford Blacktop Construction Company, Defendant.)	)	Honorable Kurt P. Klein, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment against two defendants was affirmed where the verdict was not against the manifest weight of the evidence, the damages award fell within the range supported by the evidence, and none of defendants' arguments pertaining to evidentiary rulings or improper jury instructions were meritorious; the award of attorney fees was affirmed where the cross-appellants failed to provide a sufficiently complete record on appeal to permit review of the fee award.

¶ 2 Plaintiffs, Rose Construction 1, LLC, and Randall Lot II, LLC (Rose), sued defendants, CES, Inc., d/b/a Survey Tech, Inc. (Survey Tech), and Singley Construction, Inc. (Singley), for breach of contract arising out of the construction of a Walgreens in Rochelle, Illinois. Rose contracted with Survey Tech for construction surveying and staking and with Singley for curbs and other concrete work. According to Rose, Survey Tech improperly surveyed and staked one of the entrances to the Walgreens parking lot, and Singley improperly installed the curbs. As a result, Rose had to rebuild the entrance. A jury returned verdicts against Survey Tech and Singley and found that Rose's damages totaled $67,814.50. Survey Tech and Singley appeal. Rose cross-appeals from an order awarding it attorney fees of $10,000 against Survey Tech. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Evidence at Trial

¶ 5 Rose was the general contractor responsible for constructing the Walgreens. Peter Gasparini was Rose's director of construction. Gasparini drafted the contracts between Rose and all of its subcontractors, using a standard template. Each contract, including the contracts with Survey Tech and Singley, provided that the subcontractor "shall start, perform and complete its Work as directed by Contractor and in accordance with the most current Schedule provided to Subcontractor." Each contract further provided that it was the subcontractor's responsibility "to coordinate its work so that a conflict does not arise with other trades." Each contract went on: "In the event of a conflict, Subcontractor shall report it to Contractor and receive instructions on how to proceed. If Subcontractor proceeds without instructions or fails to coordinate its work with other trades, any corrections that may be required will be at Subcontractor's expense." Each contract further provided

that "[s]ubcontractor is required to correct in a timely fashion any Subcontract Work rejected by Contractor or Owner for failing to comply with the Contract Documents."

¶ 6 Gasparini testified that construction began in October 2007 and was completed in August 2008. One of the parking lot entrances was from Illinois Route 251, which runs north and south. The Walgreens was located on the west side of Route 251. When construction began, Rose did not have a permit from the Illinois Department of Transportation (IDOT) to construct the entrance. Gasparini testified that curbs for most of the parking lot, but not for the entrance, were installed in 2007. The curbs installed in 2007 included a median located just west of the entrance. Asphalt paving of the parking lot also was completed in 2007. The paving extended several feet to the east beyond the median. Gasparini testified that, before the curbs at the entrance could be installed in June and July of 2008, the asphalt beyond the median had to be cut. Gasparini testified that the asphalt installed to the east of the median in 2007 was not pursuant to any staking by Survey Tech, but was installed for the convenience and at the discretion of the paving subcontractor.

¶ 7 Gasparini testified that, on June 16, 2008, Rose received the permit from IDOT to construct the Route 251 entrance. Gasparini testified from the daily logs prepared by Rose's superintendent, Jack Hayes. Gasparini testified that the June 19, 2008, log indicated that Survey Tech performed staking of the curbs north and south of the entrance. The log for June 27, 2008, stated that Survey Tech restaked the "curbs and grade" along Route 251 on the south side of the entrance. The log for June 30, 2008, reported that Singley started forming curbs along Route 251 on the south side of the entrance and cut back the existing pavement at the entrance for the curbs.

¶ 8 Gasparini testified that, once the curbs were finished, it was discovered that two storm catch basins—one each on the north and south sides of the entrance—had been missed. The log for July

3, 2008, noted that the catch basins had been missed and that Survey Tech would stake them by Monday, July 7, 2008. Gasparini testified that Survey Tech subsequently staked the locations of the missed catch basins and that the catch basins were installed. He further testified that Survey Tech did not notify Rose of any problems with the elevations at that time.

¶ 9 After the entrance had been paved with asphalt, Hayes reported to Gasparini that "something didn't look right" with the entrance. At Rose's request, Survey Tech completed an "As Built" drawing of the entrance, which revealed that the two catch basins and the curbs adjacent to them had been constructed at the wrong elevations. The rim of the south catch basin was approximately 7 inches too high, while the rim of the north catch basin was approximately 1 foot 11 inches too high. As a result, water puddled in the entrance.

¶ 10 Gasparini testified that, on July 29, 2008, Rose received a letter from IDOT notifying it that the Route 251 entrance had not been constructed in accordance with the permit and needed to be replaced. According to Gasparini, the only option was to tear out and rebuild a portion of the entrance. The cost of reconstruction was $95,622, which consisted of $2,673 to Survey Tech; $16,433 to Singley; $37,689 to Rockford Blacktop; $33,534 to Flagg; $3,218 to Testing Service Corporation; $488 to Becmar Sprinkler Systems; and $1,587 to Twin Oaks Landscaping.

¶ 11 Gasparini identified Rose's Exhibit 4C as a photograph of the north side of the entrance that he took in late June 2008, and he identified surveyor's stakes, flags, and hubs in the photo, which he testified were installed by Survey Tech. Rose's Exhibit 4C is not included in the record. Gasparini also identified Rose's Exhibit 4D, which is included in the record. Exhibit 4D was a photograph of the south side of the entrance and also showed surveyor's elevation stakes.

¶ 12 Josh Polley testified that he worked as a surveyor for Survey Tech. He recalled staking the north and south sides of the entrance. When shown Singley's Exhibit 1, which was a construction drawing of the entrance, Polley testified that he did not do any staking between the catch basin on the north side of the entrance and the point where stakes had been placed in 2007. He further testified that he did not do any staking in the same stretch of curb on the south side of the entrance. When shown Rose's Exhibit 4D, Polley testified that the three surveyor's stakes in the photograph most likely were placed there by Survey Tech.

¶ 13 Randy Phillips testified that he worked for Survey Tech and had been a surveyor for more than 30 years. He testified that he surveyed and staked the entire Route 251 entrance. When shown Rose's Exhibits 4C and 4D, he first testified that the surveyor's stakes depicted in the photographs "[p]robably" were placed there by Survey Tech, but later testified that they were in fact placed there by Survey Tech. On cross-examination, Phillips testified that the stakes in Exhibits 4C and 4D were roadway rather than entrance stakes. When shown Singley's Exhibit 1, Phillips testified that Survey Tech did not perform staking between the catch basins "down to the mark on both sides." Singley's Exhibit 1 has numerous markings, so it is unclear to which marks Phillips referred. Phillips further testified that, when he said that he staked the "entire entrance," he meant that he "staked the entrance from the time day one to day end, from the beginning to the end." During redirect examination, Phillips testified that he installed the stakes shown in Exhibit 4C on June 27, 2008, when Survey Tech restaked the entrance, but that he was "totally confused" on dates.

¶ 14 John Bay testified that he had been a surveyor for Survey Tech for 23 years. He testified that Polley and Phillips staked the Route 251 entrance after Rose received the IDOT permit. Bay testified that, in 2007, before Rose received the IDOT permit, he staked the curbs and the median up to the

right-of-way line at the entrance. In June 2008, Bay staked some of the north turn lanes off of Route 251, and Polley and Phillips staked the south turn lanes. Bay testified that Survey Tech did not stake the area between the turn lanes and the point where the staking from 2007 stopped. When shown Rose's Exhibits 4C and 4D, Bay testified that he could not be sure that the surveyor's stakes in the photographs were placed there by Survey Tech but that "more than likely" they were curb and gutter stakes for the Route 251 turn lane. Bay believed that the cause of the improperly constructed entrance was the asphalt installed in 2007 that extended approximately 15 feet to the east beyond the median. Bay opined that Singley simply matched the curbs for the entrance to the asphalt.

¶ 15 Kevin Bunge testified that he was the owner and president of Survey Tech. He did not personally perform any of the surveying or staking but was on site two times during the year-long project. His opinion that Survey Tech did not stake the Route 251 entrance was based on reviewing documents and speaking with his employees. Bunge was impeached with his deposition testimony in which he testified that Survey Tech staked the entrance after receiving the IDOT-approved plans. He clarified that Survey Tech had worked "in the areas of the whole entrance" but had not staked the entire entrance. Referring to an unidentified exhibit, Bunge testified that Survey Tech did not stake "from that line to approximately where the inlet is, [and] from that line to approximately where that inlet is." When shown Rose's Exhibit 4C and asked whether someone from Survey Tech placed the stakes shown in the photo between June 17 and June 30, 2008, Bunge responded, "I believe so." Again referring to an unidentified exhibit, Bunge explained that Survey Tech staked "up to this point" in 2007, then staked "from this inlet out here on 251" in 2008. When asked why Survey Tech did not stake in between the two points he had identified, Bunge responded that it had not been requested and apparently had been unnecessary because the asphalt already was in place beyond the

median. Bunge testified that the storm catch basins were not staked before the curbs were installed the first time because Rose did not ask for the catch basins to be staked. Bunge testified that as soon as he received a request from Hayes to stake the catch basins, Survey Tech had it completed the next day. Because the curbs had already been poured, the catch basins had to be installed at the elevation of the curbs. Bunge opined that the pavement installed beyond the median in 2007 was put in place without the benefit of staking and that the curbs were installed at the elevation of the pavement.

¶ 16 Jeff Singley[1] testified that he was an employee of Singley. He testified that, when Singley installed the curbs and gutters at the entrance in 2008, it installed them using the IDOT-approved plans. Jeff further testified that, generally, Singley used surveyor's stakes to set the heights and grades of curbs and gutters. When Singley began installing the curbs at the entrance on June 30, 2008, it had to saw cut the asphalt that extended into the curb line. Singley cut the asphalt to the front edge of the curbs to be installed, so that the curb would match the asphalt. When asked how he determined where to cut the asphalt to accommodate the curbs, Jeff denied that Survey Tech had staked that area. Rather, Jeff had used a combination of measuring and looking at the plans. Upon further questioning, Jeff testified that he measured off of two stakes placed by Survey Tech. One stake was located "a little bit behind" the work completed in 2007, and the other stake was just past the catch basin. Jeff estimated that the two stakes were approximately 34 to 35 feet apart. He matched the curb to the stakes at the ends and to the existing asphalt in between the two stakes. When shown Rose's Exhibit 4C, Jeff testified that the surveyor's stakes depicted in the photograph appeared to be "in the vicinity" of the curb line. When asked whether those were the stakes Singley

[1]Although we have referred to the other witnesses by their last names, we refer to Mr. Singley by his first name in order to avoid confusion with the company of the same name.

used when installing the curbs, Jeff stated, "That question I couldn't answer." He explained that the asphalt in the photograph had not yet been saw cut, and the area for the curbs had not yet been excavated, so that the area depicted in the photograph was not ready for curbs. He further explained that the surveyor's stakes could have marked underground utilities or a light pole base.

¶ 17 Rose rested its case, and Survey Tech recalled Bunge as its only witness. Bunge testified that he prepared invoices based on daily time sheets completed by his employees. The invoices did not reflect that Survey Tech provided staking for the entrance in the fall of 2007 or summer of 2008. The invoices showed only "generic pavement and curbs" on June 27, 2008, and "sidewalks" on June 14, 2008. Bunge further testified that the noncompliance with the IDOT-approved plans occurred in areas that Rose never asked Survey Tech to stake. When Survey Tech staked the catch basins in July 2008 after they had been missed, there was no need to provide a rim elevation because the curbs were already installed. Bunge opined that Rose had removed too much of the entrance when repairing the defects and that Rose used approximately one-third more materials than necessary in completing the repairs. According to Bunge, all the defects with the entrance resulted from extending the pavement too far beyond the median in 2007.

¶ 18 During its case-in-chief, Singley called Carla Singley and Jeff Singley. Carla testified that she owned Singley. On cross-examination, she testified that Singley received the IDOT-approved plans and was required to form the curbs and gutters in accordance with those plans. When asked if Singley did so, Carla testifed, "Uh-huh."

¶ 19 Jeff testified that, during the 14 or 15 weeks he spent on the job site, he never saw Gasparini and he saw Hayes very few times, because Hayes spent most of his time in the construction trailer. He further testified that Singley followed the IDOT-approved plans when it installed the curbs the

first time. Jeff explained that the plans required the curbs to "take the water down the inlets," which he contended the curbs accomplished. He opined that it was the asphalt that caused the drainage problems. On cross-examination, Jeff admitted that the elevations of the curbs were incorrect.

¶ 20 B. Jury Instruction Conference

¶ 21 At the jury instruction conference, Rose's jury instruction No. 5 was Illinois Pattern Jury Instruction, Civil, No. 30.07 (2011) (hereinafter IPI Civil (2011) No. 30.07). The instruction stated, "The value of time, earnings, profits, and benefits lost and the present cash value of the time, earnings, profits and benefits reasonably certain to be lost in the future." Survey Tech objected to the instruction on the basis that it was not an appropriate measure of damages for a breach of contract case. The court reasoned that the instruction was "a definition instruction, nothing more," and indicated that it would give the instruction over Survey Tech's objection.

¶ 22 Rose's jury instruction No. 8 was IPI Civil (2011) No. 700.01, which may be given as an introduction to any contract dispute in which there is no factual dispute as to the formation of the contract and no dispute as to its material terms. Notes on Use, IPI Civil (2011) No. 700.01. Survey Tech objected to the instruction on the basis that it was inconsistent with Rose's pleadings. The instruction stated that Rose must prove that Survey Tech "failed to provide elevation points for the IDOT approved plans for the Route 251 entrance." According to Survey Tech, this was inconsistent with Rose's allegation in its complaint that "Survey Tech identified survey locations which did not comport with IDOT approved plans." Singley stated, "same objection, same basis." The court gave the instruction over Survey Tech's and Singley's objections.

¶ 23 Rose's jury instruction No. 9 was IPI Civil (2011) No. 700.06, which states, "A written contract may consist of more than one document." Singley objected on the basis that the instruction

improperly suggested to the jury that the IDOT-approved plans were part of the contract. The court noted that the instruction made no reference to the IDOT-approved plans and gave the instruction over Singley's objection.

¶ 24 Rose submitted a damages verdict form based on IPI Civil (2011) No. 700.13V. The instruction did not provide for separate damages awards against Survey Tech and Singley. Survey Tech objected on the basis that no verdict form had yet been offered that asked the jury to determine liability. Survey Tech maintained that liability needed to be determined before damages. The court gave the verdict form over Survey Tech's objection.

¶ 25 Rose then submitted a general verdict form on the issue of liability. Singley objected on the basis that there needed to be separate verdict forms for Survey Tech and Singley. The court agreed and directed Rose to prepare separate general verdict forms for the two defendants.

¶ 26 C. Exhibits Sent to the Jury

¶ 27 Following the close of testimony, the parties reached a stipulation regarding which exhibits would be admitted into evidence. However, the parties could not reach an agreement regarding Rose's Exhibit No. 3, which was a letter that Gasparini testified he sent to notify Survey Tech of its claim prior to any lawsuit being filed, as required under the contract. The letter contained several references to insurance, which Rose indicated it had redacted. Nevertheless, Survey Tech argued that the letter should not be admitted because, despite the redactions, it was obviously an insurance claim letter. The trial court admitted the letter but clarified that it had not yet decided whether the letter would be sent to the jury.

¶ 28 Later, when discussing which exhibits would be sent to the jury, Survey Tech again objected to the letter. The court decided that it would send the first page of the letter to the jury, but not the

other pages, which contained a discussion of why Rose thought it should prevail on its claim. The first page was relevant to the issue of whether Rose sent notice of its claim to Survey Tech.

¶ 29 D. Posttrial Motions and Fee Petitions

¶ 30 The jury returned verdicts in favor of Rose on its breach of contract claims against Survey Tech and Singley. The jury calculated Rose's damages to be $67,814.50. Survey Tech and Singley filed posttrial motions seeking, in the alternative, a new trial, a judgment notwithstanding the verdict, or a remittitur. Rose filed a petition for attorney fees, seeking $87,955.93 in fees and costs against Survey Tech and Singley. On September 20, 2012, the trial court denied Survey Tech's and Singley's motions and granted in part and denied in part Rose's fee petition. In its written order, the court found that $30,000 was a reasonable amount of attorney fees, that Survey Tech was liable for one-third of the fees, and that Singley was not liable for any of the fees because Rose had failed to provide it with notice of its claim as required under the contract. Survey Tech and Singley timely appealed, and Rose timely cross-appealed.

¶ 31 II. ANALYSIS

¶ 32 A. Survey Tech's Appeal

¶ 33 On appeal, Survey Tech argues that the trial court erred in failing to (1) order a new trial, (2) enter a judgment notwithstanding the verdict, or (3) order a remittitur.

¶ 34 1. New Trial

¶ 35 Survey Tech argues that the trial court abused its discretion in denying the portion of its posttrial motion that requested a new trial. A reviewing court will not reverse a trial court's ruling on a motion for a new trial unless the court abused its discretion. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38. A trial court abuses its discretion when it acts arbitrarily, without

conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice. *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 37.

¶ 36 a. *Manifest Weight of the Evidence*

¶ 37 Survey Tech argues that the trial court abused its discretion in not ordering a new trial because the jury's verdict was against the manifest weight of the evidence. On a motion for a new trial, it is proper for a trial court to order a new trial if the verdict is against the manifest weight of the evidence. *Lawlor*, 2012 IL 112530, ¶ 38. A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary, or not based on evidence. *Lawlor*, 2012 IL 112530, ¶ 38.

¶ 38 Survey Tech argues that the verdict was against the manifest weight of the evidence because (1) Rose controlled the work and sequence of work with no exceptions, (2) Survey Tech had not placed stakes in the driveway entrance east of the median before Singley installed the curbs, (3) Singley matched the curbs to the existing asphalt at Hayes' direction, and (4) Rose never directed Survey Tech to stake the Route 251 entrance. Survey Tech further argues that the evidence established that Rose breached the contract by not giving Survey Tech an opportunity to repair or replace the entrance before Rose replaced the entrance itself.

¶ 39 Survey Tech ignores the substantial evidence supporting the jury's verdict. Even assuming for purposes of argument that, during June 2008, Survey Tech did not stake the curbs at the entrance, the evidence established that Survey Tech staked the locations of the catch basins after Rose discovered they had been missed. The log for July 3, 2008, stated that the catch basins had been missed during the initial installation of the curbs and that Survey Tech would have them staked by

Monday. Bunge testified that as soon as he received a request from Hayes to stake the catch basins, Survey Tech had it completed the next business day. Gasparini testified that, when Survey Tech returned to stake the catch basins, it did not notify Rose that there was a problem with the elevations. Survey Tech's contract with Rose required it "to coordinate its work so that a conflict does not arise with other trades." The contract further provided: "In the event of a conflict, Subcontractor shall report it to Contractor and receive instructions on how to proceed. If Subcontractor proceeds without instructions or fails to coordinate its work with other trades, any corrections that may be required will be at Subcontractor's expense." Once the catch basins were installed, the rim of the north catch basin was nearly two feet too high, and the rim of the south catch basin was approximately seven inches too high. Based on this evidence alone, the jury's verdict in Rose's favor against Survey Tech was not against the manifest weight of the evidence.

¶ 40 Furthermore, the evidence established that, during June 2008, Survey Tech staked the curbs for at least a portion of the entrance. Bunge and his three employees—Polley, Phillips, and Bay—all testified to this. Polley testified that he recalled staking the north and south sides of the entrance. Phillips testified that he surveyed and staked the entire Route 251 entrance, but later clarified that he meant that he "staked the entrance from the time day one to day end, from the beginning to the end." Bay testified that he staked some of the north turn lanes off of Route 251 and that Polley and Phillips staked the south turn lanes. Bunge testified that Survey Tech worked "in the areas of the whole entrance" but did not stake the entire entrance. Gasparini testified that the log for June 19, 2008, indicated that Survey Tech performed staking of the curbs north and south of the entrance. The daily log sheet for June 27, 2008, stated that Survey Tech restaked the curbs and grade along Route 251 on the south side of the entrance.

¶ 41 Although all four Survey Tech witnesses testified that a portion of the curb was never staked before Singley installed the curbs, Rose introduced evidence to contradict their testimony. The four Survey Tech witnesses (Bunge, Polley, Phillips, and Bay) identified the areas that were not staked as roughly between the catch basins on the north and south sides of the entrance and the points where stakes had been placed in 2007. The areas the witnesses described corresponded roughly with the areas in which asphalt had been installed in 2007 beyond the eastern edge of the median. Yet, Rose introduced Exhibits 4C and 4D that showed surveyor's stakes in what the jury could have concluded were those areas. Gasparini testified that he took the photograph in Exhibit 4C during late June 2008, that it was of the north side of the entrance, and that the surveyor's stakes shown in the photo were installed by Survey Tech. Polley testified that the surveyor's stakes shown in Exhibit 4D, which was a photograph of the south side of the entrance, most likely were placed there by Survey Tech. Phillips testified that the surveyor's stakes in Exhibits 4C and 4D were in fact placed there by Survey Tech. When shown Exhibit 4C and asked whether someone from Survey Tech placed the stakes shown in the photograph between June 17 and June 30, 2008, Bunge responded, "I believe so." Jeff Singley testified that the surveyor's stakes depicted in Exhibit 4C appeared to be "in the vicinity" of the curb line. Based on this evidence, the jury reasonably could have concluded that Survey Tech installed the stakes shown in Exhibits 4C and 4D during June 2008 and that the stakes were located in the areas that Survey Tech claimed it never staked. "[I]t is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony." *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). We cannot say that the jury's weighing of the evidence was unreasonable or arbitrary, or that its verdict was not based on evidence.

¶ 42 Survey Tech also argues that the evidence established that Rose breached the contract by not giving Survey Tech an opportunity to repair the entrance before Rose replaced the entrance itself. This argument pertains to Survey Tech's affirmative defense of "right to cure." The jury was instructed that, to succeed on its affirmative defense, Survey Tech had to prove that (1) the contract required Rose to notify Survey Tech of claimed defects in its work, (2) Rose failed to immediately notify Survey Tech of claimed defects in its work, (3) the contract required Rose to afford Survey Tech an opportunity to correct its defective work before Rose corrected the work itself, and (4) Rose failed to afford this opportunity to Survey Tech.

¶ 43 The evidence that Survey Tech presented failed to prove any of these four propositions. The contract provided, "Subcontractor is required to correct in a timely fashion any Subcontract Work rejected by Contractor or Owner for failing to comply with the Contract Documents whether observed prior to the commencement of the warranty period(s) or during the warranty period(s)." This was an obligation imposed on Survey Tech, not on Rose. Nothing in the contract required Rose to "immediately notify" Survey Tech of defects in its work. Furthermore, Rose noticed that something was wrong with the entrance very shortly after it was completed. Rose requested Survey Tech to prepare an "As Built" drawing of the entrance, which Survey Tech completed on July 28, 2008. The drawing revealed that the catch basins and curbs were installed at the wrong elevations, and Rose almost immediately began reconstructing the entrance. By the time Rose discovered that Survey Tech's work had been defective, it could not have simply asked Survey Tech to correct its surveying work. Rather, Rose was required to use a number of subcontractors to tear out and replace the asphalt, curbs, and landscaping at the entrance. Rose's actions were reasonable under the circumstances and did not absolve Survey Tech of liability under the contract.

¶ 44 b. *Exclusion of Rose's Oral Admission*

¶ 45 Survey Tech next argues that the trial court should have ordered a new trial because it abused its discretion when it did not permit Survey Tech to introduce an "oral admission of the plaintiff." According to Survey Tech, when cross-examining Phillips, it attempted to elicit testimony about a comment by Hayes that the excavation subcontractor was responsible for the defective entrance. Survey Tech does not cite to the pages of the transcript in which this exchange occurred, in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (requiring the argument section of an appellant's brief to include "citation *** of the pages of the record relied on"). Our search of the record revealed an exchange between Survey Tech's attorney and Phillips in which the attorney attempted to ask Phillips what Hayes said at a July 30, 2008, meeting. Rose's attorney objected, without stating a basis, and the court held a sidebar, which was not transcribed. Following the sidebar, the court instructed Survey Tech's attorney to proceed with a new question.

¶ 46 This court reviews evidentiary rulings for an abuse of discretion. *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 365 (2011). A trial court abuses its discretion when it acts arbitrarily, without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice. *Sobieski*, 2013 IL App (2d) 111146, ¶ 37. Errors in the exclusion of evidence warrant a new trial only where the errors are serious and prejudicial, and the party seeking reversal has the burden of establishing prejudice. *Ayala v. Murad*, 367 Ill. App. 3d 591, 601 (2006).

¶ 47 Survey Tech has not provided a sufficient record on appeal to determine whether the court abused its discretion in excluding Phillips' testimony. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence

of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392. Here, the sidebar following Rose's objection was not transcribed, and, following the sidebar, the court directed Survey Tech's attorney to ask a new question. Based on the record before us, we do not know whether the court sustained Rose's objection or whether Survey Tech's attorney withdrew his question. Moreover, lacking a transcript of the sidebar or even the basis for Rose's objection, we would be unable to review the trial court's reasoning even if we were to presume that the court sustained Rose's objection. See *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 685 (2003) ("Without the transcript, we are unable to discern the trial court's reasoning and whether it abused its discretion."); see also *York v. El-Ganzouri*, 353 Ill. App. 3d 1, 17-18 (2004) (noting that objections must have a specified basis and that mere objections are not enough to preserve errors for review).

¶ 48 c. *Exhibits Sent to Jury Room*

¶ 49 Survey Tech next argues that a new trial is warranted because the court abused its discretion by permitting a redacted copy of Rose's contract with Survey Tech, along with a redacted copy of an insurance claim letter, to be sent to the jury during its deliberations. According to Survey Tech, it is obvious that the redacted portion of the contract dealt with insurance, because it immediately preceded article 9 of the contract, entitled "Indemnification." Survey Tech further argues that, despite the redactions, it is apparent that the letter was an insurance claim letter. Survey Tech maintains that the two exhibits "impl[ied] insurance coverage" and prejudiced Survey Tech.

¶ 50 Survey Tech cites the rule from negligence cases that a reference to a defendant's liability insurance constitutes reversible error. See, *e.g.*, *Hinrichs v. Mabrey*, 138 Ill. App. 3d 160, 161 (1985). "The rationale underlying this rule is that such information is not only irrelevant to the determination of negligence but also artificially inflates any verdict." *Neyzelman v. Treitman*, 273 Ill. App. 3d 511, 515 (1995). Not every reference to insurance coverage is reversible error, however. *Koonce ex rel. Koonce v. Pacilio*, 307 Ill. App. 3d 449, 456 (1999). A court is to consider all of the relevant circumstances surrounding a reference to insurance, and the critical inquiry is whether any prejudice resulted. *Hinrichs*, 138 Ill. App. 3d at 161. We note that Survey Tech cites no Illinois case, and our research has uncovered none, applying this rule in a breach of contract case. Nevertheless, assuming *arguendo* that the rule applies in a breach of contract case, any implication of insurance coverage occasioned by the exhibits sent to the jury does not require reversal.

¶ 51 The exhibits did not explicitly reference insurance coverage but required the jury to infer from the redactions that Survey Tech had insurance coverage. While we agree that a juror who studied the exhibits might have suspected insurance coverage, this is far from a situation in which an attorney has attempted to influence a jury by eliciting testimony regarding insurance or by referencing insurance coverage during closing argument. See *Mondelli v. Checker Taxi Co.*, 197 Ill. App. 3d 258, 274-75 (1990). Although Survey Tech suggests that Rose had an improper motive, nothing in the record suggests this. The contract and the letter both were admitted into evidence (the letter was admitted because it was relevant to whether Rose had notified Survey Tech of its claim as required under the contract), and thus both exhibits were subject to being sent to the jury room. 735 ILCS 5/2-1107 (West 2010) ("Papers read or received in evidence, other than depositions, may

be taken by the jury to the jury room for use during the jury's deliberation."). We decline to infer any improper motive on Rose's part.

¶ 52 Further, Survey Tech has not articulated an argument as to how it was prejudiced by the implication of insurance coverage. After a thorough review of the record, there is no indication that any suggestion of insurance coverage occasioned by the redacted exhibits prejudiced Survey Tech. See *Mondelli*, 197 Ill. App. 3d at 275 ("Where a finding of liability has a complete basis in the evidence and the damage award is reasonable, the courts will conclude that the jury was not prejudiced by a remark concerning the subject of insurance."). The trial court did not abuse its discretion in permitting the two exhibits to be sent to the jury. See *Gallina v. Watson*, 354 Ill. App. 3d 515, 522 (2004) (noting that decision of which exhibits go the jury is within the court's discretion and will not be reversed absent an abuse of that discretion that prejudices the complaining party).

¶ 53 d. *Jury Instructions*

¶ 54 Survey Tech next argues that the trial court should have ordered a new trial because it improperly instructed the jury on the applicable law. Survey Tech argues that (1) the court improperly gave Rose's jury instruction No. 5, which was IPI Civil (2011) No. 30.07, the tort measure of damages for loss of past and future earnings or profits; (2) Rose's jury instruction No. 9, IPI Civil (2011) No. 700.01, was improper because it referred to a single contract and suggested that Survey Tech and Singley would be jointly liable if the contract were breached; and (3) Rose's damages verdict form based on IPI Civil No. 700.13V was improper because it did not give the jury the option of determining separate damages awards.

¶ 55 A trial court has discretion to determine which instructions to give to the jury. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002). "The standard for

deciding whether a trial court abused its discretion is whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Schultz*, 201 Ill. 2d at 273-74. "A reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant." *Schultz*, 201 Ill. 2d at 274. To preserve for appeal the issue of an allegedly improper jury instruction or verdict form, a party must make a specific objection during the jury instruction conference or when the instruction is read to the jury, and must submit a remedial instruction or verdict form to the trial court. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 869 (2004); see also Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994) ("No party may raise on appeal the failure to give an instruction unless the party shall have tendered it.").

¶ 56 Regarding Rose's jury instruction No. 5, IPI Civil (2011) No. 30.07, we agree with Survey Tech that it was error to give this instruction. The instruction stated, "The value of time, earnings, profits and benefits lost and the present cash value of the time, earnings, profits and benefits reasonably certain to be lost in the future." It describes an element of damages that is recoverable in an action for damages for injury to person or property. See Notes on Use, IPI Civil (2011) No. 30.01 (stating that the "Measure of Damages" instruction in an action for injury to person or property should list the applicable elements of damages from among IPI 30.04 to 30.20). The instruction has no applicability to a breach of contract action. The jury instructions for damages in a breach of contract action are found in IPI Civil (2011) Nos. 700.13 through 700.16. See Notes on Use, IPI Civil (2011) No. 700.13 ("This general damages instruction should be given in all contract cases where none of the specific damages instructions, numbered 700.14 through 700.16, are applicable.").

¶ 57 Nevertheless, the error is not reversible, because there is no indication in the record that the instruction misled the jury or resulted in prejudice to Survey Tech. The only evidence of damages Rose presented at trial was the cost of repairing the entrance, which was the appropriate measure of damages. See *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1158 (2009) ("The measure of damages for the breach of a contract when a contractor has provided defective performance is generally the cost of correcting the defective condition."). Moreover, the jury received IPI Civil (2011) No. 700.13 and an instruction on mitigation of damages. At trial, Rose presented evidence that it incurred expenses of $95,622 to repair the Route 251 entrance. Survey Tech presented testimony from Bunge that, in his opinion, Rose removed too much of the entrance and used approximately one-third more materials than necessary. The jury awarded Rose damages of $67,814.50, which was approximately 70% of the damages Rose sought and fell within the range supported by the evidence. In sum, there is no indication that the trial court's giving of IPI Civil (2011) No. 30.07 misled the jury or resulted in prejudice to Survey Tech.

¶ 58 Regarding Rose's jury instruction No. 8, IPI Civil (2011) No. 700.01, which Survey Tech also contends was improper, Survey Tech has not preserved this issue for appeal. Although Survey Tech objected to the instruction during the instructions conference, it objected on the basis that the instruction was inconsistent with Rose's pleadings. On appeal, by contrast, Survey Tech argues that the instruction improperly suggested that Survey Tech and Singley would be jointly liable if the contract were breached. Not only did Survey Tech not raise this specific objection during the instructions conference, it did not offer a remedial version of IPI Civil (2011) No. 700.01. Survey Tech points out that its instruction No. 11, based on IPI Civil (2011) No. 700.11, referred to two contracts and separately discussed Survey Tech's and Singley's liabilities. However, IPI Civil

(2011) No. 700.11 concerns the fourth element of a breach of contract claim—that the defendant's breach caused damage to the plaintiff (Notes on Use, IPI Civil (2011) No. 700.11)—and is not an alternative to IPI Civil No. 700.01, which is an introductory instruction. See Notes on Use, IPI Civil (2011) No. 700.01 ("This instruction is an introduction to the contract dispute in question.").

¶ 59 Survey Tech's argument with respect to Rose's damages verdict form, based on IPI Civil (2011) No. 700.13V, suffers a similar fate. On appeal, Survey Tech argues that the verdict form was improper because it did not give the jury the option of determining separate damages awards. However, during the jury instruction conference, Survey Tech objected to the verdict form solely on the basis that Rose had not offered any verdict forms with regard to liability before reaching the question of damages. Survey Tech cannot now argue a different theory on appeal. See *People v. Stewart*, 161 Ill. App. 3d 99, 110 (1987) (noting that a specific objection is required to preserve a jury instruction issue for review).

¶ 60 2. Judgment Notwithstanding the Verdict

¶ 61 Survey Tech also argues that the trial court should have entered a judgment notwithstanding the verdict. A judgment notwithstanding the verdict is appropriate where all of the evidence, viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on the evidence could stand. *Stackhouse v. Royce Realty & Management Corp.*, 2012 IL App (2d) 11062, ¶ 19. Our standard of review is *de novo*. *Lawlor*, 2012 IL 112530, ¶ 37. Because we already have determined that the jury's verdict was not against the manifest weight of the evidence, it necessarily follows that the trial court did not err in denying Survey Tech's request for a judgment notwithstanding the verdict.

¶ 62 3. Remittitur

¶ 63 Survey Tech's final contention is that the trial court abused its discretion by failing to order a remittitur. Survey Tech argues that the evidence was uncontested that Rose failed to mitigate its damages, failed to afford Survey Tech an opportunity to correct the defective entrance, and failed to prove that Survey Tech caused any of the damages awarded by the jury. "A remittitur is an agreement by the plaintiff to relinquish, or remit, to the defendant that portion of the jury's verdict which constitutes excessive damages and to accept the sum which has been judicially determined to be properly recoverable damages." *Tri–G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 253 (2006). It is appropriate where, after examining the evidence, the court determines that the jury's verdict was excessive. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 412-13 (1997).

¶ 64 We have already determined that the jury's verdict was not against the manifest weight of the evidence and that its damages award fell within the range supported by the evidence. Although Survey Tech argues that the evidence was "uncontested" that Rose failed to mitigate its damages, the only evidence in support of mitigation at trial was Bunge's testimony that Rose tore out more of the entrance than it needed to and used approximately one-third more material than necessary. Again, the jury's damages award fell within the range supported by the evidence and was not excessive. Survey Tech also argues that a remittitur is warranted because Rose failed to prove what portion of the damages Survey Tech caused and what portion Singley caused. Because Survey Tech did not object to Rose's damages verdict form on the basis that it did not provide for separate damages awards, we conclude that Survey Tech cannot now challenge the damages award on appeal on the basis that it was not separated. See *Stein v. Scott*, 252 Ill. App. 3d 611, 617 (1993) ("It is well-recognized that a party who has induced the trial court to make an error or acquiesced in its making cannot assign that same matter as error on appeal.").

¶ 65 B. Singley's Appeal

¶ 66 1. Hayes' Instructions to Jeff Singley

¶ 67 Singley argues that the trial court abused its discretion in refusing to allow Jeff Singley to testify to instructions he received from Jack Hayes. Singley further argues that the court abused its discretion in striking Jeff's testimony regarding his actions after speaking with Hayes. Singley contends that the court improperly excluded the testimony as hearsay. Again, we review the trial court's evidentiary rulings for an abuse of discretion. *Timothy Whelan Law Associates, Ltd.*, 409 Ill. App. 3d at 365.

¶ 68 During Singley's case-in-chief, Singley's attorney asked Jeff about a meeting on June 30, 2008, among Jeff, Hayes, and the excavation subcontractor. Jeff testified that the purpose of the meeting was to discuss the work that was to be done at the Route 251 entrance. The following exchange occurred:

"Q. What did Jack Hayes direct you to do at that time?

A. He told us —

MR. DWYER [Rose's attorney]: Objection, Your Honor, calls for hearsay.

THE COURT: Approach."

Following a sidebar, which was not transcribed, the court directed Singley's attorney to restate his question. The following exchange then occurred:

"Q. Without saying what Jack Hayes told you, what did you do immediately after the conversation with the Rose Construction superintendent?

A. We matched the curb and gutter and the asphalt down to the entranceway. The asphalt was, like I said, poured out through our curbs.

MR. DWYER: Objection.

THE WITNESS: We matched that down to the entranceway, no inlet.

MR. DWYER: Judge, please, may we approach?"

Following the sidebar, which again was not transcribed, the court informed the jury that it had sustained Rose's objection to the last question and directed the jury to disregard Jeff's answer.

¶ 69 Singley has not provided a sufficient record on appeal to support its claims of error. Regarding the first question ("What did Jack Hayes direct you to do at that time?"), Rose's counsel objected to the question on the basis that it called for hearsay. However, the sidebar was not transcribed, and, following the sidebar, the court directed Singley's attorney to restate his question. Based on the record before us, we do not know whether the trial court sustained Rose's objection or whether Singley's attorney agreed to reword his question. We would be speculating were we to conclude that there was an evidentiary ruling subject to appellate review. See *Foutch*, 99 Ill. 2d at 391-92 (holding that, where an appellant has not met its burden of providing a sufficiently complete record on appeal, any doubts occasioned by the incompleteness of the record will be resolved against the appellant).

¶ 70 Turning to the second question ("[W]hat did you do immediately after the conversation with the Rose Construction superintendent?"), the basis for Rose's objection was not stated on the record, and the sidebar was not transcribed. As Singley acknowledges in its brief, "it is unclear from the record why the court sustained the objection and directed the jury to ignore the answer." Although Singley argues that the answer was not hearsay, it would be speculation to say that the trial court struck the answer on that basis. Without being able to review the trial court's reasoning, or even the basis for Rose's objection, we cannot determine whether the court abused its discretion in excluding

the testimony. See *Cannon*, 341 Ill. App. 3d at 685 ("Without the transcript, we are unable to discern the trial court's reasoning and whether it abused its discretion."); see also *York*, 353 Ill. App. 3d at 17-18 (noting that objections must have a specified basis and that mere objections are not enough to preserve errors for review).[2]

¶ 71 2. Separate Verdict Forms

¶ 72 Singley next argues that the trial court erred in denying the portion of its posttrial motion that requested the court to direct the jury to return separate damages awards against Survey Tech and Singley. Singley cites section 2-1201(c) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1201(c) (West 2010)), which provides, "If there are several counts in a complaint *** upon which separate recoveries might be had, the court shall, on the motion of any party, direct the jury to find a separate verdict upon each claim."

¶ 73 Singley's argument suffers from two fatal flaws. First, in Singley's motion, which was filed on July 16, 2012, it asked the court to "enter an order directing the jury to find a separate verdict upon each claim pursuant to 735 ILCS 5/2-1201." Singley's request was much too late, as the trial had concluded and the jury had been dismissed on June 15, 2012. Second, Singley did not preserve this issue for appeal. As we stated above, to preserve for appeal the issue of an allegedly improper verdict form, a party must make a specific objection during the jury instruction conference and must submit a remedial verdict form to the trial court. *Compton*, 353 Ill. App. 3d at 869. Here, Singley

[2]Moreover, Singley failed to make an offer of proof, which ordinarily is required to preserve for appeal the issue of a ruling that excludes evidence. Ill. R. Evid. 103(a)(2) (eff. Jan. 1, 2011) (the party offering the evidence must make the substance of the evidence "known to the court by offer" unless the substance "was apparent from the context within which the questions were asked").

objected to Rose's general verdict form, and the trial court directed Rose to provide separate general verdict forms for Survey Tech and Singley, which it did. However, Singley did not object to Rose's damages verdict form, which did not provide for separate damages awards against Survey Tech and Singley. Because Singley did not object to the damages verdict form, it cannot now challenge it on appeal.

¶ 74 3. Motion for New Trial

¶ 75 Singley argues that the trial court erred in failing to order a new trial on the basis that Rose's jury instructions Nos. 8 and 9 misled the jury. Rose's jury instruction No. 8 was IPI Civil (2011) No. 700.01, which is an introductory instruction to a contract dispute that may be given in any case in which there is no factual dispute as to the formation of a contract and no dispute as to its material terms. Notes on Use, IPI Civil (2011) No. 700.01. Rose's Jury instruction No. 9 was IPI Civil (2011) No. 700.06, which provides, "A written contract may consist of more than one document." According to Singley, the instructions misled the jury because they suggested that the IDOT-approved plans for the Route 251 entrance were part of the contract. Singley further argues that Rose's instruction No. 8 was confusing because it suggested to the jury that Singley's liability was intertwined with Survey Tech's liability.

¶ 76 Singley failed to preserve for appeal its objections to Rose's jury instruction No. 8. As we discussed above, Survey Tech objected to the instruction on the basis that it was inconsistent with Rose's pleadings. During the jury instruction conference, Singley simply stated, "same objection, same basis." On appeal, Singley cannot now object on different bases. See *Stewart*, 161 Ill. App. 3d at 110 (noting that a specific objection is necessary to preserve a jury instruction issue for review). Moreover, Singley did not offer a remedial instruction. See Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1,

1994) ("No party may raise on appeal the failure to give an instruction unless the party shall have tendered it.").

¶ 77 Regarding Rose's jury instruction No. 9, Singley did object to it during the jury instruction conference on the same basis that it argues on appeal—that the instruction suggested to the jury that the IDOT-approved plans were part of Singley's contract. However, as the trial court reasoned, nothing in Rose's jury instruction No. 9 referred to the IDOT-approved plans or suggested that they were part of the contract. Therefore, we cannot say that the court abused its discretion in giving the instruction. Moreover, Singley's own witness, Carla Singley, testified on cross examination that Singley received the IDOT-approved plans and was required to form its curbs and gutters in accordance with those plans. Even if it had been error to give the instruction, in light of Carla's testimony, it could not have prejudiced Singley.

¶ 78 4. Remittitur

¶ 79 As Survey Tech argued, Singley argues that the trial court erred in denying its request for a remittitur. Singley contends that the jury failed to determine which portion of the damages Singley caused and which portion Survey Tech caused. Singley asserts that it was a "logical impossibility" that both parties were equally liable for the $67,814.50.

¶ 80 We resolve Singley's argument the same way we resolved Survey Tech's argument. Because Singley did not object to Rose's damages verdict form, which did not provide for separate damages awards against Survey Tech and Singley, we conclude that Singley cannot now challenge the damages award on appeal on the basis that it was not separated. See *Stein*, 252 Ill. App. 3d at 617 ("It is well-recognized that a party who has induced the trial court to make an error or acquiesced in its making cannot assign that same matter as error on appeal.").

¶ 81 Singley also argues that a remittitur is warranted because the evidence at trial established that Rose controlled the sequence of work and that "Singley had no choice" but to match the curbs to the existing asphalt. This argument does not pertain to the appropriate amount of damages, but to Singley's liability for breach of contract. Because Singley has not argued on appeal that the jury's verdict on the issue of liability was against the manifest weight of the evidence, we decline to address this argument in the context of Singley's request for a remittitur. A remittitur is a judicial device used to address an excessive damages award, not to reverse a trial court's verdict on the issue of liability. See *Best*, 179 Ill. 2d at 412 (a remittitur is used to correct excessive damages awards).

¶ 82 Finally with respect to damages, Singley maintains that the evidence established that Rose failed to mitigate its damages. Specifically, although Singley acknowledges that the jury may have awarded only $67,0814.50 because of Rose's failure to mitigate damages, it argues that this is "pure speculation," because "[t]he jury made no specific finding as to whether they considered Rose's failure to mitigate or indicated that they were reducing the damages accordingly." Singley's argument is without merit, because no party offered a special interrogatory on the issue of mitigation of damages. Again, the jury was instructed on the issue of mitigation of damages, and its damages award was within the range supported by the evidence. The award was not excessive, and a remittitur is not warranted.

¶ 83 5. Petition for Attorney Fees

¶ 84 Singley's final argument is that, because it was the "prevailing party" in this litigation, it was entitled under the contract to have its attorney fees paid by Rose. Singley contends that it was the "prevailing party" because Rose sought $95,622 in damages but was awarded only $67,814.50. According to Singley, Rose will only be able to recover from Singley one-third of the damages it

sought, or half of the $67,814.50 damages award. To borrow Judge Posner's words, "a certain air of the ridiculous hangs" over Singley's argument. *Bart v. Telford*, 677 F.2d 622, 625 (1982). "A 'prevailing party' is '[a] party in whose favor a judgment is rendered' or 'successful party.' " *Larson v. Wexford Health Sources, Inc.*, 2012 IL App (1st) 112065, ¶ 25 (quoting Black's Law Dictionary 1206, 1145 (7th ed. 1999)). " 'A successful litigant is still considered the prevailing party under a fee-shifting provision even if the judgment amount is below the amount claimed.' " *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 29 (quoting *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001)). Here, it is elementary that Rose was the prevailing party.

¶ 85 In the final paragraph of its brief, Singley asserts that, because the trial court determined that Rose could not recover attorney fees against it because Rose had failed to provide the notice required under the contract, "the case against Singley should be dismissed in the same manner and for the same reason that Rose's request for fees was denied." Singley did not raise this argument in the trial court, and it cannot raise it for the first time on appeal. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85 ("[I]ssues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal.").

¶ 86 C. Rose's Cross-Appeal

¶ 87 Rose cross-appeals the trial court's September 20, 2012, order awarding it $10,000 in attorney fees against Survey Tech but denying the remainder of its petition, which sought $87,955.93 in fees and costs against Survey Tech and Singley.[3] Rose argues that the trial court abused its

[3]Singley argues that Rose cannot challenge the order because it did not cross-appeal; however, the record reveals that Rose timely filed a notice of appeal from the September 20, 2012, order.

discretion by arbitrarily determining that a reasonable attorney fee award was $30,000; that Survey Tech was liable for only one-third of the fees; and that Singley was not liable for any of the fees because Rose failed to provide Singley notice of its claim as the contract required. A trial court has broad discretion in awarding attorney fees, and a reviewing court will not reverse an attorney fees award unless the court abused its discretion. *Timan*, 2012 IL App (2d) 100834, ¶ 29.

¶ 88 Rose has failed to provide a sufficient record on appeal to permit this court to review the attorney fees award. As we have already twice stated, where an appellant has not met its burden of providing a sufficiently complete record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92. Rose has not provided either a transcript or a bystander's report from the September 20, 2012, hearing on its fee petition. See Ill. S.Ct. R. 323(c) (eff. Dec.13, 2005) (authorizing the use of bystanders' reports in lieu of reports of proceedings when the latter are unavailable). Because we are unable to review the evidence and argument on which the trial court based its decision, we must presume that the court's order was in conformity with the law and had a sufficient factual basis.

¶ 89 III. CONCLUSION

¶ 90 For the reasons stated, we affirm the judgment of the circuit court of De Kalb County.

¶ 91 Affirmed.