

STATE OF MICHIGAN
COURT OF APPEALS

YASMIN VORA,

Plaintiff-Appellee/Cross-Appellant,

V

PRATHER & ASSOCIATES, P.C., f/k/a
PRATHER & FOLEY, P.C., and KENNETH
PRATHER, jointly and severally,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED

December 11, 2001

No. 214558

Oakland Circuit Court

LC No. 95-496498-NM

Before: O’Connell, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendants Prather & Associates, P.C. and Kenneth Prather appeal as of right¹ from a \$167,000 judgment in satisfaction of a jury verdict finding that defendant had committed a fraudulent concealment (“silent fraud”) against plaintiff Yasmin Vora.² Defendant also appeals the trial court’s judgment of \$0 on defendant’s counterclaim for unpaid legal fees. Plaintiff cross-appeals from trial court orders granting summary disposition in favor of defendant on plaintiff’s innocent misrepresentation claim, and granting defendant’s motion for judgment notwithstanding the verdict on plaintiff’s constructive fraud (“actual fraud”) claim. Plaintiff also cross-appeals from the jury verdict of no cause of action on plaintiff’s legal malpractice claim against defendant. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

A. Plaintiff’s Initial Divorce Proceeding and Reconciliation

¹ For ease of reference, because plaintiff’s claim against Defendant Prather & Associates, P.C., derives out of her allegations against defendant Prather, the term “defendant” will be used for the remainder of this opinion.

² Hereafter, Yasmin Vora will be referred to as “plaintiff”.

In June 1989, plaintiff hired defendant to represent her in a divorce action against her husband of twelve years, Ravinda Vora.³ Shortly after hiring him, plaintiff informed defendant that for the sake of their son, she and her husband wished to reconcile. Accordingly, the divorce action was dismissed without prejudice on August 14, 1989.

Before the action was dismissed, the plaintiff and Vora established a reconciliation agreement (“agreement”) controlling the disposition of their assets in the event that the reconciliation failed. Plaintiff testified at trial that this reconciliation was really nothing more than a “business arrangement” that both she and Vora hoped would be best for their son. After negotiating the terms of the agreement with Vora, plaintiff hired defendant to draft the agreement to ensure its legality.

B. The Reconciliation Agreement

The agreement required both plaintiff and Vora to contribute fifty percent of their “take home” pay to a joint marital account, and provided that each party would retain the remaining fifty percent of their income as a separate property. It was also agreed that, in the event of a future divorce, this separate property would be free and clear of any claim from the opposing spouse. According to plaintiff, she informed defendant that she would only agree to reconcile with Vora if defendant could draft an agreement that was “ironclad” and “without any loopholes” and that defendant indicated he could prepare such an agreement and that it was completely legal. In contrast, defendant testified that he specifically indicated to plaintiff that he could draft a “more comprehensive” agreement, addressing all possible issues, but that plaintiff was only interested in a “limited agreement” that required plaintiff and Vora to contribute fifty percent of their take home pay for expenses associated with their home. Defendant then drafted a two page agreement, which read, in pertinent part, as follows:

NOW THEREFORE, IT IS AGREED:

1. That the pending divorce case in the Wayne County Circuit shall be dismissed without prejudice and without costs to either party.

2. Marital Home: That the Wife and Husband shall purchase a marital home and real property under these terms and conditions:

(a) That the down payment on the home and real property shall be taken from jointly owned assets;

(b) That after the purchase of the marital home and real property, the Wife shall contribute fifty (50%) percent of her net income toward payment of the mortgage, utilities, taxes, insurance and upkeep of this home;

(c) That the husband shall contribute fifty (50%) percent of his net income toward the mortgage, utilities, taxes, insurance and upkeep of the marital home;

³ Hereafter, Ravinda Vora will be referred to as “Vora”.

(d) In the event there is any overage from the 50% contribution to be made from the net incomes of each party, the overage shall be invested in jointly owned assets.

3. The remaining 50% of the Wife's net income shall be her property, free and clear of any claim, right, title, or interest of the Husband, in the event of a subsequent divorce.

4. The remaining 50% of the Husband's net income shall be his property, free and clear of any claim, right, title or interest of the Wife, in the event of a subsequent divorce.

C. The Second Divorce Proceedings

In 1993, after about four years of attempted "reconciliation," plaintiff again hired defendant to file a divorce action and to seek enforcement of the agreement he had previously drafted. The divorce action was filed in Oakland Circuit Court, and Vora contested enforcement of the reconciliation agreement on the grounds that he had signed it under duress, and that plaintiff had not complied with the terms of the agreement. In April 1994, the divorce action was assigned to mediation, and the mediators recommended that plaintiff pay Vora \$330,000 to settle the case. Defendant and her accountant recommended settlement, but plaintiff rejected the award and insisted on a trial.

At trial, after hearing plaintiff's testimony, the trial court judge conducted in-chambers settlement discussion with counsel and recommended that plaintiff settle the case for \$350,000. Again, defendant recommended to plaintiff that she settle the case, and plaintiff agreed. On the record, plaintiff stated that she understood she might have obtained a better result had the trial been completed, but that she was waiving the right to trial of her own free will and without coercion.

D. The Instant Action

After settling the divorce action plaintiff filed this action against defendant alleging that defendant's innocent misrepresentation, legal malpractice, actual fraud, and silent fraud in the drafting of the agreement caused her to pay the \$350,000 divorce settlement. Defendant filed a counterclaim for unpaid legal fees.

Defendant subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations) and (C)(10). After a hearing on the motion, the trial court dismissed plaintiff's innocent misrepresentation claim, but found questions of fact on plaintiff's legal malpractice and fraud claims. The trial court also denied defendant's (C)(7) motion, finding that defendant had failed to raise the statute of limitations defense in his affirmative defenses as required under MCR 2.111(F) and MCR 2.116(D)(2).⁴ Defendant then sought leave

⁴ On appeal, defendant does not challenge the trial court's denial of his summary disposition motion with regard to the legal malpractice and fraud claims; thus, they are not before us.

to amend his answers to include this defense but the trial court denied leave to amend, apparently on the basis that the request was untimely.

At trial, defendant moved for directed verdict at the close of plaintiff's proofs and again at the end of all proofs. The trial court took the first motion under advisement, and denied the second motion with respect to the fraud counts. Its ruling on the legal malpractice claim was held in abeyance.

The jury was instructed on three of plaintiff's claims, malpractice, "actual fraud," and "silent fraud", and on defendant's counterclaim for fees. A special verdict form was provided to the jury, listing plaintiff's claims (with a damages line for each count but not as an aggregate) and defendant's counterclaim. The verdict form instructed the jury that the trial court would deduct from the damages award on the counterclaim "any amount that has already been paid".

The jury found that defendant had committed legal malpractice but that this malpractice was not the proximate cause of plaintiff's damages. It also found that defendant had committed both actual and silent fraud, and listed damages of \$167,000 as the award for each of these counts.⁵ On defendant's counterclaim for legal fees, the jury found in favor of defendant and awarded defendant \$33,377.52.

Post-verdict, defendant moved for judgment notwithstanding the verdict on the fraud claims, arguing that because defendant's misrepresentation or failure to disclose, if any, was not fraudulent, the claims were defective as a matter of law, and that any damages plaintiff attributed to the alleged fraud was speculative. The trial court granted defendant's motion, concluding that plaintiff had failed to present sufficient evidence in her case-in-chief to establish that defendant knowingly gave incorrect legal advice or that defendant took affirmative steps to conceal any inaccurate legal advice he may have given plaintiff. Additionally, the trial court ordered that defendant would be awarded \$0 on his counterclaim in accordance with the verdict form instruction that the award would be deducted from the amount of legal fees already paid to defendant.

Plaintiff moved for rehearing, seeking to have the jury verdict reinstated as to both fraud counts. The court ordered the parties to file supplemental briefs specifically addressing (1) what evidence established plaintiff's reliance on defendant's actions, (2) what evidence established that defendant knew his statements to plaintiff were false or recklessly made, and (3) what evidence established that defendant intended plaintiff to rely on his representations. In the same order, the trial court found that because plaintiff was unable to show how defendant intended her to rely on his false impressions, she had failed to establish a prima facie case of silent fraud. Nonetheless, after receiving the parties supplemental briefs, the trial court reinstated the jury verdict on silent fraud but affirmed its earlier decision dismissing the actual fraud count. Ultimately, the trial court entered a judgment in this case awarding plaintiff \$167,000 in damages

⁵ On appeal, plaintiff maintains that this verdict entitled her to \$334,000 in damages, \$167,000 for each count; however, defendant maintains that the jury award only entitled her to \$167,000.

on the silent fraud count, and directing that defendant was entitled to nothing on his counterclaim judgment.

After entry of judgment, defendant again moved for judgment notwithstanding the verdict and also moved for a new trial, challenging the silent fraud verdict. Specifically, defendant argued that since no court had ever ruled on the enforceability of the agreement, it was impossible for defendant to have a duty to inform plaintiff as to the agreement's enforceability. Defendant also alleged that because the jury found that his legal malpractice was not the proximate cause of plaintiff's injury, the jury verdicts were inconsistent. Defendant further argued that the trial court's interpretation of the "note" instruction on the verdict form was erroneous and therefore requested that the trial court order plaintiff to pay \$33,377.52 in satisfaction of the jury verdict on defendant's counterclaim. The trial court denied defendant's motion, finding that plaintiff "presented evidence sufficient to support a finding that defendant knew the [a]greement lacked essential terms and failed to disclose this information." The trial court further ruled that defendant was not entitled to any relief on his counterclaim.

II. Fraud Claims

After reviewing the record, we find that plaintiff failed to establish a prima facie case as to either fraud count; accordingly, we affirm the dismissal of the actual fraud count and reverse the judgment on the silent fraud count.

A. Standard of Review

This Court reviews a trial court's decision regarding either a directed verdict or judgment notwithstanding the verdict de novo. *Morinelli v Provident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000); *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing the trial court's decision, we are to view the evidence presented up to the time the motion was made in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000); see also *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Morinelli, supra*. A directed verdict is appropriately granted only when no factual questions exists on which reasonable jurors could differ. *Meagher, supra* at 708. In addition, in reviewing a motion for judgment notwithstanding the verdict, if the decision reached by the jury is reasonable, then the jury verdict must stand even if that decision is different from the conclusions reached by this Court. *Wickens v Oakwood Healthcare System*, 242 Mich App 385, 389; 619 NW2d 7 (2000); *Morinelli, supra*; *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

B. Actual Fraud

Plaintiff argues that the trial court erred when it dismissed her actual fraud count. We disagree.

Generally, to prove fraud a plaintiff must establish that (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant knew at the time of the representation

that it was false, or that the representation was made recklessly without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998); *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996); *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994); see also SJI2d 128.01.

In the instant case, plaintiff failed to establish that defendant made a false representation of a material fact. Plaintiff argues that defendant's constant assurances to plaintiff that there was no need to worry was in fact a material misrepresentation. Specifically, plaintiff testified that defendant informed her on several occasions that "she would win," "not to worry" and that the "agreement was enforceable." However, the trial court properly instructed the jury with SJI2d 128.10 which states that "[a] material fact cannot be opinion, belief, speculation or prediction. It must relate to something past or present that can be proved or disproved." (Emphasis omitted.) Here, all the statements attributed to defendant by plaintiff were clearly opinions. Thus, because plaintiff failed to establish clear and convincing evidence that defendant's statements were nothing more than opinions, or that those opinions were knowingly false, she failed to establish that defendant made a material misrepresentation.

In support of her argument that defendant's opinions regarding the enforceability of the agreement amounted to actual fraud, plaintiff first relies on *Tomczyk v Thompson Chevrolet*, unpublished opinion per curiam of the Court of Appeals, issued March 31, 1998 (Docket No. 188577), where this Court held that a car salesman's statement that there was "nothing wrong" with a car would permit reasonable minds to conclude that the representation was a statement of fact and not a generalized opinion. *Id.* at 4. *Tomczyk* not only has no precedential value, it is also distinguishable from the case at bar. Here, defendant never told plaintiff there was "nothing wrong" with the agreement; instead, he informed her that it was "enforceable," that they were in "good shape" and that there was "nothing to worry about." Thus, unlike *Tomczyk*, these statements are more akin to "[a] mere honest expression of opinion [that] will not, although proved erroneous, be regarded as fraud." *Graham v Myers*, 333 Mich 111, 114; 52 NW2d 621 (1952). See also *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987) (quoting *Graham*, *supra* with approval) and *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992).⁶

Plaintiff also relies on *Hord v Environmental Research Institute of Michigan*, 228 Mich App 638, 642; 579 NW2d 133 (1998), where this Court held that a fraudulent misrepresentation claim could be brought by a potential new hire when he was shown a 1991 financial statement that the company knew no longer represented the company's financial position. However, that decision was reversed by our Supreme Court. *Hord v Environmental Research Institute of Michigan (Hord II)*, 463 Mich 399; 617 NW2d 543 (2000). In reversing, the Court stated that

⁶ In this regard, it is significant that because plaintiff settled the underlying divorce case, the trial court in that action never actually ruled on whether the agreement, as written, was enforceable. The fact that the divorce trial court encouraged settlement does not establish that it considered the agreement unenforceable.

the plaintiff's belief that the 1991 operating statements shown to him were meant to be an indication of the current financial status of the organization was not reasonable. *Id.* at 411. The Court then went on to state that when determining whether information was fraudulently presented, "[a] plaintiff's subjective misunderstanding of information that is not objectively false or misleading cannot mean that a defendant committed the tort of fraudulent misrepresentation." *Id.*

Similarly, in this case plaintiff testified that she took defendant's statements to mean that there was nothing wrong with the agreement he had drafted and further testified that she took the court's suggestion to settle the case for \$350,000 as proof he was not going to enforce the agreement. This evidence fails to establish that defendant knowingly made a false statement regarding the enforceability of the agreement. *Brownell v Garber*, 199 Mich App 519, 533; 503 NW2d 81 (1993). Thus, we conclude that plaintiff failed to establish a prima facie case of actual fraud, and the trial court properly dismissed this claim. *M&D, Inc, supra*; *Mitchell, supra*; *Arim, supra*.

C. Silent Fraud

We also find that plaintiff failed to establish a prima facie case of silent fraud, and that defendant's motion for judgment notwithstanding the verdict should have been granted by the trial court on this count.

To prove the tort of fraudulent concealment or silent fraud, a plaintiff must establish that (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant knew at the time of the representation that it was false, or that the representation was made recklessly without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. *M&D, supra* at 27; *Mitchell, supra* at 723; *Arim, supra* at 195. In addition, when alleging silent fraud, "[t]he false material representation . . . may be satisfied by the failure to divulge a fact or facts that defendant has a duty to disclose." *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995); see also *Lorenzo v Noel*, 206 Mich App 682, 684-685; 522 NW2d 724 (1994). Mere silence is not enough to sustain a silent fraud cause of action. *Brownell, supra* at 528. Instead, a plaintiff must establish that the defendant "intentionally suppress[ed] material facts [in order] to create a false impression." *M&D, Inc, supra* at 25. Thus, to bring a successful silent fraud claim, a plaintiff must show "that the defendant intended to induce [the plaintiff] to rely on [the defendant's] nondisclosure and that defendant had an affirmative duty to disclose." *Clement-Rowe, supra*, citing *Lowery v Dep't of Corrections*, 146 Mich App 342, 356-360; 380 NW2d 99; see also *M&D, supra* at 29.

Here, even assuming defendant erred in drafting the agreement, his statements assuring plaintiff on several occasions that the agreement was enforceable establish no more than defendant's belief, rightly or wrongly, that the agreement was, in fact, enforceable. This evidence does not establish a prima facie case that defendant intentionally suppressed information from her in an effort to create the false impression that the agreement was enforceable. *M&D, Inc, supra*.

In addition, while defendant had a duty to disclose material facts regarding the enforceability of the reconciliation agreement to plaintiff, see *Brownell, supra* and *Fassihi v Sommers, Schwartz, Silver, Schwartz, & Tyler, PC*, 107 Mich App 509, 515; 309 NW2d 645 (1981), “there is no duty to disclose what is not known.” *Hammond v Matthes*, 109 Mich App 352, 357; 311 NW2d 359 (1981). In this regard, it is significant that in the divorce action plaintiff’s husband did not attack the reconciliation agreement on the grounds that it lacked essential terms. In addition, plaintiff introduced no evidence that other similarly drafted agreements were found to be unenforceable. There is simply no evidence that defendant was aware the agreement was unenforceable and failed to disclose this to plaintiff. *Hammond, supra*.

III. Innocent Misrepresentation

Plaintiff also contends that because defendant received payment from plaintiff for his services and was in a position to attempt to hide his malpractice from plaintiff, she introduced evidence indicating defendant benefited from his misrepresentations to plaintiff. Thus, plaintiff argues that she established a genuine issue of material fact regarding whether defendant committed innocent misrepresentation and therefore the trial court erred by granting defendant summary disposition pursuant to MCR 2.116(C)(10). We disagree.

A. Standard of Review

We review a trial court decision regarding summary disposition de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In addition, a motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial. *Id.* at 337; *Singerman v Municipal Bureau, Inc.*, 455 Mich 135, 138; 565 NW2d 383 (1997). In reviewing a summary disposition motion, this Court will give the nonmoving party the benefit of all reasonable inferences when determining whether summary disposition is appropriate. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 615; 537 NW2d 185 (1995).

B. Discussion

After reviewing the applicable law and the record evidence in this case, it is apparent to us that the trial court properly dismissed plaintiff’s innocent representation claim. In *M&D, Inc., supra*, this Court distinguished between innocent misrepresentation and fraud as follows:

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure[d] to the benefit of the party making

the representation. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. [*Id.* at 27-28 (internal citations and emphasis omitted).]

See also *Forge*, *supra* at 211-212; *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999); SJI 128.04.

Plaintiff makes the novel argument, without citation to authority, that defendant's receipt of legal fees while failing to disclose his commission of malpractice, constitutes a benefit to defendant inuring as a result of his innocent misrepresentation. This argument fails. In *Riddle v Lacey & Jones*, 135 Mich App 241; 351 NW2d 916 (1984), this court affirmed the trial court's dismissal of the plaintiff's claim, stating:

Here, plaintiff has failed to allege any benefit which would inure to defendant as a result of her injury. . . . The injury suffered by plaintiff was either the loss of her claim against US Truck or the loss of the \$15,000 insurance benefit caused by the Teamster's Health and Welfare Fund's refusal to reinstate the life insurance policy. *In either event, the loss did not inure to the benefit of defendant, who received a fee for his services regardless of whether plaintiff was ever paid.* [*Id.* at 246 (emphasis added).]

Likewise, plaintiff would have been responsible for defendant's legal fees in the divorce action regardless of the trial court's ultimate ruling on the enforceability of the settlement agreement. Thus, plaintiff's only injury was the \$350,000 settlement payment, which did not inure to the benefit of defendant. Accordingly, we conclude that the trial court properly dismissed plaintiff's innocent misrepresentation claim.

IV. Defendant's Legal Fees

The jury awarded defendant \$33,377.52 in legal fees on his counterclaim, and the trial court reduced the amount to \$0. Defendant argues that the trial court erred when it made this determination, and we agree.

A. Standard of Review

Whether the trial court properly interpreted the jury verdict is a question of law that we review de novo. See *Oakland County Prosecutor v Beckwith*, 242 Mich App 579, 581; 619 NW2d 172 (2000). In addition, we review the factual findings of a trial court under a clearly erroneous standard. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000).

B. Discussion

At trial, the trial court instructed the jury on defendant's counterclaim as follows:

As to Defendant's counter-claim, he has the burden of proof on each of the following propositions:

That the Plaintiff agreed to pay Defendant for attorney's fees and costs reasonably incurred in the prosecution of her Complaint for Divorce;

That Defendant performed legal services and incurred costs in prosecuting Plaintiff's Complaint for Divorce;

That Defendant's legal services and incurred costs were reasonable and necessary;

That Plaintiff has not paid the fees and costs.

* * *

The Plaintiff has admitted that she agreed to Defendant's attorney's fees and costs and she has also admitted that some of the services Defendant performed have gone unpaid. You are to decide only whether the services performed by Defendant for Plaintiff were reasonable and the amount, if any, to be awarded to Defendant for the services.

Based on these instructions, the verdict form, read, in pertinent part:

DEFENDANTS' COUNTERCLAIM

ATTORNEY FEES AND COSTS (SJI2D 230.01)

Question No. 11: On Defendants' Counterclaim, do you find in favor of Kenneth Prather and Prather & Associates, P.C.?

Answer: yes (yes or no)

* * *

Question No. 12: What is the amount of Defendants' damages?*

Answer: \$33,377.52 (set forth the total dollar amount)

Please note that the Court will deduct from your verdict any amount that has already been paid.

Here, the jury found that defendant was owed \$33,377.52 in legal fees for the services he performed on behalf of plaintiff. There was no evidence that this amount had already been paid and in fact the evidence was to the contrary since plaintiff admitted that she owed fees to defendant. The trial court clearly erred when it reduced the jury's verdict, thus we reverse the judgment on defendant's counterclaim and remand for an entry of judgment of \$33,377.52, plus appropriate interest.

V. Jury Instructions

Plaintiff also contends that the trial court improperly instructed the jury on the proximate cause element in her legal malpractice claim. We disagree.

A. Standard of Review

The determination whether an instruction is accurate and applicable to a particular case rests within the sound discretion of the trial court, *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997), and it is error to instruct a jury about an issue unsustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). On review, we look at the jury instructions in their entirety, *Stoddard v Manufacturers National Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999), to see, if on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock*, *supra*. Thus, even if there was error in the instructions, if the parties theories and adequate law were adequately and fairly presented, no reversal is required. *Id.*

B. Discussion

Plaintiff contends that the trial court erred by not instructing the jury in accordance with SJI2d 15.05⁷. However, the trial court determined that based on the evidence, SJI2d 15.05 was not applicable. After reviewing the record, we conclude that the trial court correctly exercised its discretion in finding that SJI2d 15.05 did not apply. Despite plaintiff's claims to the contrary, defendant never argued that third parties were responsible for plaintiff's damages; instead, defendant maintained that plaintiff's own actions created Vora's possible challenge to the agreement, because the evidence showed that plaintiff invaded the marital account to pay for expenses unrelated to the marital home. Thus, defendant contended that to the extent the agreement was unenforceable, plaintiff herself, not a third party, was the proximate cause of such injury. Defendant's theory did not indicate that third parties were the proximate cause of plaintiff's injury; thus, SJI2d 15.05 did not apply.

VI. Evidentiary Issues

Both parties also appeal several evidentiary decisions of the trial court. A trial court's decision regarding the admissibility or exclusion of evidence is reviewed by this Court for an abuse of discretion. *Tobin v Providence Hospital*, 244 Mich App 626, 638; 624 NW2d 548 (2001). "An abuse of discretion exists only when the result so violates fact and logic that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias." *Model*

⁷ SJI2d 15.5 provides, in part:

If you decide that [the defendant] [was] negligent and that such negligence was a proximate cause of the occurrence, it is not a defense that the conduct of [a third party] to this suit also may have been a cause of this occurrence.

* (However, if you decide that the only proximate cause of the occurrence was the conduct of [the third party] to this suit, then your verdict should be for the [defendant].)

Laundries & Dry Cleaners, v Amoco Corp, 216 Mich App 1, 4; 548 NW2d 242 (1996), quoting *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990).

Plaintiff contends that the trial court erred when it failed to allow her to introduce defendant's teaching materials into evidence or allow her to cross-examine defendant with regard to his secretly recording meetings with plaintiff, thus violating his duty of loyalty. In addition, plaintiff alleges that the trial court improperly permitted defendant's expert witness to speculate regarding the enforceability of the agreement defendant drafted. Because plaintiff has failed to provide any supporting authority for these evidentiary issues, she has abandoned appellate review of these issues. *Wilson v Taylor*, 457 232, 243; 577 NW2d 100 (1998); *Opland v Kiesgan*, 234 Mich App 352, 360 n 4; 594 NW2d 505 (1999).

Nonetheless, it is clear from the record that the trial court did not abuse its discretion. Admission of defendant's teaching materials, even if relevant, would have merely been cumulative evidence and therefore it was within the discretion of the trial court to exclude the evidence. *Phinney v Perlmutter*, 222 Mich App 513, 529; 564 NW2d 544 (1997). See also *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995) and MRE 403. Similarly, because defendant never denied taping plaintiff, the trial court again was within its discretion to limit cross-examination on this issue. *Phinney, supra*; *Bahoda, supra*; MRE 403. Further, because defendant's expert merely stated an opinion, based on her previous experience, regarding the enforceability of the agreement defendant drafted, defendant's expert did not improperly speculate.

Defendant's claims of evidentiary error are moot in view of the disposition of the other claims before us.

VII. Conclusion

We affirm the trial court's rulings dismissing plaintiff's innocent misrepresentation and actual fraud claims. We reverse the trial court's entry of judgment in favor of plaintiff on the silent fraud claim. We also reverse the judgment awarding \$0 legal fees to defendant, and remand for entry of judgment consistent with the jury verdict of \$33,377.52. Further, we find that plaintiff's claims of evidentiary and instructional error do not warrant reversal or retrial on plaintiff's legal malpractice claim. In view of our disposition of these issues, we need not address the remaining issues raised by the parties.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder