2018 IL App (1st) 172046-U
No. 1-17-2046

SECOND DIVISION
June 26, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAYMOND & RAYMOND, LTD., as successor in interest to RAYMOND & ASSOCIATES, Plaintiff-Appellee, v. LAW OFFICES OF KENNETH C. CHESSICK, M.D., LTD., LAW OFFICE(S) OF KENNETH C. CHESSICK, M.D., and KENNETH C. CHESSICK, M.D., Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 14 L 9855 The Honorable Raymond W. Mitchell, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Jury's award in favor of plaintiff affirmed where the jury could have found that its principal attorney referred the underlying medical malpractice case to defendants, plaintiff complied with the terms of the referral agreement, and plaintiff did not improperly solicit the clients; defendants were not prejudiced by the admission of plaintiff's expert's testimony; and the trial court did not err in awarding plaintiff prejudgment interest.

¶ 2 Following a jury trial, the jury awarded plaintiff, Raymond & Raymond, Ltd., $888,888.11 pursuant to a referral agreement between plaintiff and defendants, Law Offices of

Kenneth C. Chessick, M.D., Ltd., Law Offices of Kenneth C. Chessick, M.D., and Kenneth C. Chessick, M.D. During posttrial proceedings, the trial court awarded plaintiff prejudgment interest of $382,333.42, and defendants appealed. On appeal, defendants contend that (1) the evidence at trial did not support a finding that Clark Raymond, one of plaintiff's principals, referred the clients to defendant, (2) the trial court erred in permitting plaintiff's expert to testify regarding legal conclusions, (3) plaintiff is not entitled to a referral fee because the contingency fee agreement with the clients did not comply with Illinois Rule of Professional Conduct 1.5 ("Rule 1.5") (Ill. R. Prof'l Conduct R. 1.5 (eff. Aug. 1, 1990)) and because plaintiff did not meet the requirements to earn the fee under the contingency fee agreement, (4) plaintiff is not entitled to a referral fee because Clark violated Illinois Rule of Professional Conduct 7.3 ("Rule 7.3") by improperly soliciting the clients, and (5) plaintiff was not entitled to prejudgment interest. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 This case arises from a dispute between the parties regarding whether defendants owe plaintiff a portion of the attorney's fees realized as a result of a large settlement obtained in a medical malpractice case in which the parties represented Corey, Shelley, and Cassidy Bischke for permanent injuries sustained by Cassidy during birth. Plaintiff claimed that Clark referred the case to defendants and that it is entitled to one-third of the total attorney's fees resulting from the medical malpractice case. Defendants, on the other hand, denied that Clark referred the medical malpractice case to them and claimed that even if Clark did refer the case to them, plaintiff was not entitled to any fees on the settlement, because Clark violated multiple rules of professional conduct and because Clark did not perform enough work on the case to earn the fees plaintiff sought. After extensive pretrial practice, the matter was tried to a jury on multiple

counts of plaintiff's complaint, including claims of breach of contract, breach of fiduciary duty, imposition of a constructive trust, and unjust enrichment. The jury also heard evidence related to defendants' counterclaim of fraud.

¶ 5 Trial

¶ 6 Clark Raymond testified at trial as follows. He was an attorney by profession, and in 2001, he was operating a solo practice that primarily handled medical malpractice cases. At the end of 2000, he handled a personal injury case for the daughter of Gloria and Robert Gambit. In August 2001, he received a phone call from Gloria. Immediately after Clark hung up with Gloria, and knowing that Corey Bischke was waiting for his call, Clark placed a phone call to Corey. During that call, Clark told Corey that he understood that Corey wanted to talk to him about a potential medical malpractice case. Clark and Corey then proceeded to discuss the facts of the case. Corey had copies of the relevant medical records, and Clark made arrangements to obtain those records from Corey.

¶ 7 Clark testified that he did not believe that his phone call to Corey qualified as an improper solicitation of a client under Rule 7.3, because he did not cold call Corey. Rather, he called Corey based on his understanding that Corey wanted him to call, and he would have confirmed that fact with Corey during the call.

¶ 8 After obtaining the medical records from Corey, Clark reviewed them individually and then with his wife, Patricia Raymond, who was both an attorney and a registered nurse. In addition, while meeting with his nurse expert, June Thomas, on another case, Clark showed her the fetal monitor strips from Cassidy's birth, in what Clark termed a "curbside consult."

¶ 9 Recognizing that he had a good case with catastrophic injuries, Clark contacted Kenneth Chessick to refer the case to defendants, as Chessick was a medical doctor and lawyer, and had

greater experience than Clark in handling such large medical malpractice cases. Clark did consider referring the case to other attorneys, but Patricia worked for defendants at the time, and she enjoyed working on birth injury cases. Although he did not remember the specific conversation, Clark's standard practice would have been to speak with Corey about the decision to refer the case to defendants. Clark also lacked a specific recollection of a conversation with Chessick about giving him the referral.

¶ 10 In November 2001, Clark met with Chessick, Corey, and Shelly in Chessick's office. Clark testified that he thought that Patricia was also present during the meeting. During that meeting, one of defendants' staff members brought in a copy of a contingency fee agreement, which had been drafted by defendants and was on defendants' letterhead. Chessick reviewed the agreement paragraph by paragraph with the Bischkes. Clark could not remember whether the Bischkes signed the agreement at the meeting. Although he initially testified in his deposition that the Bischkes signed the agreement at the meeting, he now thought that the Bischkes might have brought the agreement home and signed it later, based on the fact that their signatures were dated November 24, 2001, which was the Saturday after Thanksgiving. He did not believe that the meeting would have been held on a Saturday. He also believed that the reason he did not have a copy of the signed agreement in his file was because the Bischkes signed the agreement after the meeting and sent it back to defendants' office. Ultimately, the agreement was signed by the Bischkes and Chessick. Clark did not sign the agreement.

¶ 11 Typically, when he had referred cases to other firms in the past, Clark did not perform any work on the cases, other than to provide the referral. Likewise, when cases were referred to him, the referring attorney usually did not do any work on the case. It was his opinion that under Rule 1.5 and based on the custom and practice of attorneys in Illinois, referring attorneys were

entitled to a share of the attorney's fees in a case based only on their service of referring the case. Nevertheless, even in those situations where no work was required of him as the referring attorney, Clark was willing to perform work on the case if the receiving attorney wanted him to. With respect to the Bischke case in particular, paragraph 9 of the agreement provided as follows:

> "The Law Office of KENNETH C. CHESSICK, M.D. and CLARK RAYMOND will work on your case jointly and will divide the legal fees earned, if any, in the following proportion: 2/3 to the Law Office of KENNETH C. CHESSICK, M.D. and 1/3 to the Law Office of CLARK RAYMOND, respectively. This division of legal fees will not obligate the plaintiffs to pay any additional fees whatsoever."

Clark was of the opinion that this provision identified him as the referring attorney and made him legally responsible for the Bischke case should there be any legal malpractice. He did not believe, however, that he was required to perform any additional work on the case other than referring the case.

¶ 12 Despite his belief that he was not obligated to perform any additional work on the Bischke case, Clark did, in fact, perform additional work on the case: he answered written discovery, communicated updates to the clients, attended the deposition of Corey and Shelley with Patricia, took thirteen depositions as the lead lawyer, and attended the other major depositions in the case. At no point did he ever refuse to perform any work on the case or attend any court appearances when requested to do so by Chessick's office. On one or two occasions, however, Chessick's office asked him at the last minute to cover a deposition in Wisconsin and he was unable to do so because he was already scheduled with other cases at those times.

¶ 13 Three settlements were reached in the Bischke case. The first two settlements were reached in 2005 and totaled $3.1 million. Clark was paid $344,444.00 as his share of attorney's

fees from those settlements. After the first two settlements, Clark continued to work on the Bischke matter primarily by updating the clients as to the happenings in the case. In addition, when defendants disclosed their chosen medical experts in the spring of 2007, Clark and Patricia (who had left defendants' employment and joined Clark's firm in 2005) reviewed the disclosures. Clark and Patricia had concerns about the disclosed medical experts and relayed those concerns to defendants and even offered to help find suitable replacements. Defendants declined the offer and expressed their intent to proceed with the disclosed experts. Throughout the time between the initial settlements and the final settlement, Clark continued to monitor the progress of the case and would contact defendants to obtain updated information on its status. He was sometimes met with cooperation from defendants, and at other times, he was not. Also during this time, an associate attorney with defendants, Magdalena Dworak Matthews, came to Clark's office to review Clark's file on the Bischke case and discuss the matter with him, because defendants' file was missing some of the medical records. In addition, Clark believed that his work prior to the initial settlements contributed to the final settlement of the case, as the medical experts would have reviewed and relied on the discovery and depositions conducted by Clark in forming their opinions.

¶ 14 In June 2008, Clark learned that the last part of the Bischke matter had settled for $8 million. Prior to Clark learning of the settlement, defendants had filed and presented a petition to have the settlement approved by the probate court.[1] Clark did not receive notice of that petition, despite being an attorney of record in the matter. On May 1, 2008, the probate court considered the petition and approved the settlement. In addition, the probate court considered and approved defendants' request for enhanced attorney's fees over and above the statutory cap in medical

[1] Because Cassidy was a minor, any settlement on her behalf had to be approved by the probate court.

malpractice cases. As a result, defendants were permitted to collect as attorney's fees one-third of the $8 million settlement, an amount that was consistent with the contingency fee agreement, but that exceeded the statutory cap on attorney's fees in medical malpractice cases.

¶ 15 On June 11, 2008, Clark met with Chessick at defendants' office regarding the final settlement. Clark did not receive his portion of the attorney's fees on the final settlement at that meeting, which would have been $888,888.11. It was only after that meeting that Clark learned that defendants had been awarded enhanced fees by the probate court. Wanting to verify the extraordinary work that was required for an award of enhanced fees, Clark requested access to defendants' Bischke file. Defendants refused Clark access to the file. In response, Clark filed an emergency motion to reconsider with the probate court, asking that the probate court reconsider its award of enhanced attorney's fees. The probate court denied his motion. Had the probate court granted his motion and reduced the attorney's fees to the statutory maximum, it would have resulted in a larger portion of the settlement going to the Bischkes.

¶ 16 In June 2008, Clark received a letter from the Bischkes, discharging plaintiff as a representative of them. Shortly thereafter, Clark received a letter from Chessick, which directed that Clark was not to have any more contact with the Bischkes.

¶ 17 Following the denial of his emergency motion to reconsider, Clark instituted the present lawsuit. To date, he has not been paid his claimed share of the attorney's fees resulting from the final settlement in the Bischke case.

¶ 18 On cross-examination, Clark admitted that his file on the Bischke case did not contain any letters, notes, or other documentation evidencing his initial phone call with Corey, his meeting with Corey to obtain the medical records, his pre-referral analysis of the medical

records, or June Thomas' consult. He also admitted that his file did not contain a copy of the contingency fee agreement.

¶ 19 Patricia Raymond testified next and gave the following testimony. She was a practicing lawyer and a nurse. In 2001, she worked for defendants. In August 2001, Clark received a phone call at their home from Gloria, who was a cousin of Patricia's, but not one to whom she was close or with whom she had kept in regular contact. After speaking with Gloria, Clark told Patricia about the conversation. Clark then called Corey or Corey called Clark—Patricia could not recall which. While Clark was on the phone with Corey, Patricia slipped him notes with questions to ask Corey. Eventually she got on the phone and asked Corey some additional questions. Corey then passed the phone to Shelly, and Patricia also asked her some questions. After that phone call, Clark obtained the medical records, Patricia reviewed them, and she urged Clark to consult with June Thomas about the case. During that time, Clark was considering lawyers to whom he could refer the case, as he was too busy with other matters to handle it himself. Patricia urged him to refer the matter to defendants, because she was employed with them at the time and she wanted to work on the case. Although she did not have a specific recollection of doing so, she testified that she was sure she spoke to Chessick about the case and told him what a great case it was.

¶ 20 In November 2001, she, Clark, Chessick, and the Bischkes met in Chessick's office. Either Clark brought the medical records to Chessick that day or she brought them to Chessick at some point prior to the meeting. At the meeting, Chessick reviewed the contingency fee agreement—which Patricia believed Chessick had drafted—with the Bischkes. She did not recall the Bischkes signing the Agreement at the meeting.

¶ 21 With respect to paragraph 9 of the agreement, Patricia testified that the language that Clark would work jointly with defendants had never before been interpreted by defendants as a requirement that the referring attorney participate in the prosecution of the case. Other lawyers who had referred cases to defendants and had signed the same agreement had never been expected to work on the cases in the manner that Clark did on the Bischke case. Even in a case that Clark had referred to defendants prior to the Bischke case and in which he had signed an agreement with the same language, Clark had not performed any work other than providing the referral and there had been no issue.

¶ 22 After the November 2001 meeting but before Patricia left defendants' employment in 2004, Clark came into defendants' office often to work on the matter, including creating the discovery plan, working with paralegals to answer written discovery, and assisting Patricia in preparing and presenting the Bischkes for their depositions. In addition, by the time Patricia left defendants' employment, all of the "primary" depositions had been completed—the doctor who delivered Cassiday and all of the nursery nurses who cared for her after birth. Patricia testified that Clark performed the majority of the work associated with those depositions. She estimated that Clark attended somewhere between 13 and 15 depositions in the case. After that, defendants took only 3 to 5 additional depositions of medical treaters and presented their medical experts for deposition by the opposing parties.

¶ 23 After Patricia left defendants' employment and until the final settlement, Clark contacted defendants monthly to get updates on the status of the case and ask what he could do to help. When defendants issued their expert disclosures in the matter, he and Patricia reviewed them and identified some concerns they had with the disclosed experts. Patricia called attorney John Fisk at defendants' office, relayed those concerns to him, offered him suggestions on suitable

replacements, and offered that she and Clark take the experts' depositions. Fisk declined the offers.

¶ 24 Shortly before the approval of the final settlement in May 2008, a pretrial conference was held in the Bischke matter, where the judge informally attempted to help resolve the matter. Clark and Patricia were aware of it, and Patricia phoned Fisk to ask if anything meaningful would be taking place at that pretrial conference, if they should attend, and whether the clients would be there. Fisk answered no. As a result, Clark and Patricia did not attend.

¶ 25 Like Clark, Patricia testified that plaintiff received its share of attorney's fees following the initial two settlements in the Bischke case but did not receive its share of the attorney's fees on the final settlement.

¶ 26 Although Patricia testified that Clark was notified in April 2008 that a final settlement had been reached, her testimony regarding the lack of notice on the petition to have the settlement approved and enhanced attorney's fees awarded, Clark's attempts to obtain a copy of defendants' file on the Bischke case, and their emergency motion to reconsider was substantially the same as Clark's testimony. With respect to defendants' request for enhanced attorney's fees, however, Patricia testified that most of the work identified in defendants' supporting affidavits was work that Clark had performed.

¶ 27 David Pritchard, a practicing attorney since 1977 in the field of medical malpractice, testified as an expert on behalf of plaintiff. Upon reviewing the contingency fee agreement in the Bischke case, it was his opinion that Clark was the referring attorney and that the agreement complied with the three requirements of Rule 1.5: (1) be a referring attorney, (2) disclose the referral to the client, and (3) take legal responsibility for the case should there be legal malpractice. Neither Rule 1.5 nor the contingency fee agreement required Clark to perform

additional work on the case, which was consistent with Pritchard's experience practicing law. He had been referred many cases over the years where the referring attorney did not perform any work aside from providing the initial referral.

¶ 28 Despite his opinion that Clark was not obligated to perform work on the Bischke case outside of providing the referral, his review of the file revealed that Clark did, in fact, perform additional work on the Bischke case. Clark answered some written discovery, assisted in the preparation of Corey and Shelly for their depositions, and took between 10 and 15 depositions in the case. In addition, Clark never refused to perform any work on the Bischke case. Pritchard acknowledged that the majority of work performed by Clark was performed prior to the initial two settlements, but he opined that the timing of the work was irrelevant because Clark was not obligated to do any work on the case. Moreover, it did not matter if the contingency fee agreement referenced working jointly, because Clark needed only to comply with the requirements of Rule 1.5, which he did. In any case, the work performed by Clark in the early stages of the case contributed to the ultimate final settlement, because all of the work performed on a case contributes to its resolution.

¶ 29 With respect to Rule 7.3, Pritchard opined that Clark did not violate its prohibition on solicitation, because Clark called Corey in response to information from a third-party that Corey wanted Clark to call him. Clark did not cold call Corey. Pritchard testified that it was common practice among practicing Illinois attorneys to contact potential clients in response to a third-party's statement that the person was looking to speak with an attorney.

¶ 30 On cross-examination, Pritchard testified that parties to a referral agreement are free to agree upon whatever division of labor that they see fit. As for the language in the Bischke contingency fee agreement that Clark and defendants would work jointly on the case, Pritchard

testified that the language informed the Bischkes that Clark would be working on the case too, but such language was not required by Rule 1.5.

¶ 31 On redirect examination, the following colloquy occurred between Pritchard and plaintiff's counsel:

"THE WITNESS: Patty, you know, I wish you would ask me why they have this referral rule [Rule 1.5].

BY MS. ARGENTATI [plaintiff's counsel]:

Q. Okay, Mr. Pritchard, why do they have this referral situation?

A. I'm glad you asked that question.

***

Q. Okay. Let me rephrase the question. And if you could let me ask the question.

Why is it that a lawyer gets to, based solely on a referral, without being required to do any work, why is the lawyer entitled to get a fee in the State of Illinois?

A. I get that question. I get that question. And I am glad that I asked you to ask it.

Q. Yeah, okay.

A. Because the reason they allow that exception is because these medical malpractice cases, they are very complicated. This is a smart guy over here. (Indicating.) He is very talented to handle these cases. And they're expensive. It's not odd to have to put out 200, $300,000 to prosecute these cases. And if you don't win, you don't get your money back.

And so they have this exception to the solicitation [*sic*] rule that you can get a referral fee simply by sending a case, even though you do nothing else, because they want to make sure that that family gets the best possible lawyer.

> I was a defense attorney for 22 years. And I'm actually ashamed to say that I won cases I shouldn't have won because I was a better lawyer than somebody that kept the case for the family that should not have kept the case.
>
> So we put this exception in. It's the law of Illinois. It's been there as long as I've been around. And it's a good law, because it funnels the case to the proper people. To Dr. Chessick. To Pat Salvi. To Phil Corboy. To Bob Clifford. The people that know what they're doing. And that's why they have the rule in there." (Emphasis added.)

Defendants did not object to this testimony.

¶ 32 Shelly Dycus, formerly Shelly Bischke, gave the following testimony at trial. Her daughter, Cassidy, was born on December 12, 2000, with significant disabilities. After consulting with a doctor unassociated with Cassidy's birth, Shelly made the decision to investigate the potential of making a legal claim for Cassidy's injuries. In preparation of meeting with lawyers, Shelly obtained copies of the medical records from Cassidy's birth. Shelly consulted with a number of lawyers, including a family friend, who all turned down the case. Aside from the family friend, Shelly found the lawyers on the internet. Eventually, Shelly found Chessick on the internet.

¶ 33 Prior to locating Chessick's name on the internet, Shelly had never met or spoken to Clark or even heard his name. The first time that Shelly met Clark was at her and Corey's depositions in the medical malpractice case. Shelly also did not have any conversations with Patricia prior to retaining Chessick. Clark did not introduce her to Chessick or do anything to influence her to choose Chessick as her attorney. Prior to retaining Chessick, the medical records she had obtained stayed in a desk drawer in the Bischke home. She did not recall giving

the records to Corey to give to anyone else at any point, and she did not believe that Corey would take them without informing her.

¶ 34 After locating Chessick's information online, she set up an appointment to meet with him at a time that would work with Corey's work schedule. Because of the Bischkes' tight financial situation, they could not afford for Corey to miss work, so it made sense that the initial meeting with Chessick was scheduled for a Saturday. Prior to the meeting, Shelly worked with an assistant of Chessick's to allow defendants to obtain the necessary medical records. Other than her, Corey, Cassidy, and Chessick, Shelly did not recall whether anyone else was present for the meeting. During that meeting, they went over the contingency fee agreement. She acknowledged the reference to Clark in paragraph 9 of the agreement and that she knew that he would be working on the case, but testified that she did not know whether he was an employee of defendants or what the precise relationship was. No one explained to her what paragraph 9 of the contingency fee agreement meant. She was not concerned about the division of fees between Chessick and Clark, because it did not have any effect on her or her family. The Bischkes signed the agreement on the day of the meeting.

¶ 35 During the first part of the litigation in the medical malpractice case, Shelly understood Clark's role to be that he would be conducting depositions and answering any questions that she or Corey might have about the case. Prior to the initial two settlements, Shelly had frequent contact with Clark about the progress of the case but infrequent contact with Chessick. After the initial settlements, however, Clark's and Chessick's roles seemed to switch. She received no communication from Clark and instead dealt directly with Chessick or Fisk. During the negotiations for the final settlement, Chessick was the one who would contact her and discuss the offers and he was the one that attended the settlement conference with the court. In addition, it

was defendants that helped her set up and manage the trust and annuities for the settlement funds. Clark played no role in any of the final settlement negotiations or financial planning.

¶ 36 After the final settlement, defendants were paid one-third of the settlement in attorney's fees, and she and Corey agreed to that amount in the contingency fee agreement. Sometime thereafter, Clark contacted her and informed her that he was going to the court to ask that defendants' fees be reduced. She then contacted Chessick, who prepared an affidavit for her signature, which stated that she did not authorize Clark to file the emergency motion to reconsider the enhanced fees, she agreed to the fees awarded to defendants, and that she was aware that the fees awarded to defendants were greater than the statutory maximum. Although Shelly testified that she did not care how the attorney's fees were divided between plaintiff and defendants, she also testified that she appreciated what Chessick had done for her in the final settlement and that she did not appreciate Clark using her name to go after Chessick in the motion to reconsider.

¶ 37 When Clark continued to contact her about the fee dispute, she began to feel uncomfortable and did not want to be involved, so she contacted Chessick and asked him how she could make Clark stop. In response, Chessick drafted the letter terminating Clark's representation of the Bischkes.

¶ 38 On cross-examination, Shelly identified correspondence she received from Clark after the first settlements but before the final settlement regarding the progress of the case. Also on cross-examination, Shelly denied that she would have taken any additional money that might have been allocated to Cassidy if Clark's emergency motion to reconsider the enhanced attorney's fees had been granted. She testified that accepting such additional money would have gone

against the contract she entered into with Chessick and that she would not go against the contract.

¶ 39 John Fisk gave the following testimony at trial. During the relevant time period, he was employed by defendants as a managing supervising attorney, who oversaw the associates in the firm. During the time that Patricia was employed with defendants, she was a valued employee, as her nursing background was helpful and she was skilled in taking depositions and conducting discovery. Fisk and Patricia had a close relationship and even socialized outside of work on occasion. Patricia left the employment of defendants in approximately November 2004 and began working with Clark in 2005. When she left, Fisk was very upset and angry and felt betrayed by her.

¶ 40 Fisk could not recall whether he attended the initial meeting with the Bischkes in November 2001. He was, however, involved in the case from the time it was filed until the time it was resolved, making court appearances, handling depositions, and participating in the firm's weekly meetings on the status of the case.

¶ 41 The language in the Bischke contingency fee agreement that Clark and defendants would work jointly on the case was language that appeared in some of the other contracts used by defendants. According to Fisk, the language required that the referring attorney perform work on the case from beginning to end in order to earn his or her portion of the collected attorney's fees. Chessick would assign the referring attorney tasks to be performed. The terms of the agreement in this respect were important, because it gave the clients an understanding of who would be performing what work on the case. In the other referred cases that defendants had handled, the referring attorneys worked on the case and, as a result, would be paid their share of the fees.

¶ 42 In the Bischke case, Clark did perform work on the case for a period of time by participating in the depositions of fact witnesses and the treating medical professionals. In January 2006, after the initial two settlements, however, Clark stopped working on the case. By that time, only about 20% of the work on the case had been completed and, of that amount, Clark had performed only approximately 10%. Clark had not attended any court calls or participated much in discovery or pretrial motion practice. The selection and disclosure of the medical experts remained to be done, and that was the most important work in the case. In addition, the court appearances and trial preparation continued. In 2006, on two occasions, Fisk called Clark to ask him to cover the deposition of a witness in Wisconsin. On both occasions, Clark told Fisk that he could not do it because he had other commitments at the time, but was apologetic about being unable to attend. In addition, Fisk asked Clark to attend two or three court appearances on the case, but Clark did not agree to do so. Other than Patricia expressing some concerns about the medical experts chosen by defendants, Clark did not perform any work on the Bischke case after January 2006. Fisk did not hear from Clark again until the emergency motion to reconsider the enhanced fees was filed in June 2008. In Fisk's opinion, Clark did not comply with the requirement in the contingency fee agreement that he work jointly with defendants on the Bischke case, because he did not do any work after January 2006.

¶ 43 On cross-examination, Fisk admitted that no one with defendants called Clark and asked for his assistance in selecting medical experts and presenting them for depositions. He also acknowledged that in preparing the expert witnesses, he gave them the transcripts of some of the depositions Clark had taken to read. Fisk had no recollection of a phone call with Patricia in which Patricia asked about attending a pretrial conference in the spring of 2008.

¶ 44 Fisk also acknowledged on cross-examination that he did, in fact, have contact with Clark prior to the filing of the emergency motion to reconsider the enhanced fees. In June 2008, Clark came into defendants' offices to meet with Chessick. Fisk was present for that meeting, but he did not tell Clark that Clark was not owed a fee on the case. About a week later, Clark called Fisk and asked to review the Bischke file. Fisk consulted with Chessick, who stated that Clark could not have access to the file, because he was no longer employed by the Bischkes.

¶ 45 Ed Underhill, a practicing attorney since 1984, who had represented attorneys accused of violating the Illinois Rules of Professional Conduct, testified as an expert on behalf of defendants and gave the following testimony. With respect to referral agreements, attorneys are permitted to reach whatever arrangement they like in terms of the amount of fees and the amount of work to be performed, so long as the client agrees in writing, the work is divided proportionately, and the attorneys agree on the fee split. Underhill testified that within this framework, there are two scenarios that might occur when attorneys split fees: either (1) the referring attorney works on the case with the receiving attorney and receives a share of the attorney's fees as a result of his or her work, or (2) the referring attorney does not perform any work on the case and simply receives a share of the fees just for his or her service of providing the referral. In either situation, disclosure to the client of whether the referring attorney will be performing work on the case and the amount of fees the referring attorney will receive is necessary under Rule 1.5. The purpose of Rule 1.5 is to prevent confusion on the part of the client regarding the roles of the referring and receiving attorneys.

¶ 46 In the Bischke case, Underhill did not see any evidence that Clark took any action that resulted in the Bishckes' retaining defendants, and it was Underhill's opinion that Clark was not the referring attorney. If Clark falsely asserted that he was the referring attorney, that would be a

lie and plaintiff would not be entitled to any fees on the Bischke case. Even if Clark did refer the Bischke case to defendants, the contingency fee agreement was required under Rule 1.5 to disclose that fact, and it did not. Underhill opined that the contingency fee agreement in the Bischke case was not a referral agreement but was, instead, a "joint venture" agreement that required Clark to work on the case with defendants from beginning until end. Underhill testified that Clark did not perform any work on the case after January 2006.

¶ 47 As for Rule 7.3's prohibition on solicitation, Underhill explained that the purpose of the rule was to protect clients in sensitive circumstances from attorneys who might try to take advantage of those sensitive circumstances to sign a client. In Underhill's opinion, Clark's phone call to Corey violated Rule 7.3 because Corey did not call him and because Clark did not have any prior relationship with the Bischkes. Even if Corey wanted Clark to call him, Clark's phone call to Corey still would qualify as a violation of Rule 7.3. In any case, in his review of the matter, Underhill did not see any evidence that Corey wanted Clark to call him.

¶ 48 On cross-examination, Underhill acknowledged that the contingency fee agreement identified plaintiff and defendants, described the fee split between them, and was signed by the Bischkes, which were the requirements of Rule 1.5. In addition, Underhill was impeached by his deposition testimony in several respects. First, despite opining at trial that Clark did nothing to connect the Bischkes to defendants, he acknowledged that in response to a question at his deposition about whether it was his understanding that the Bischkes got in touch with defendants through plaintiff, he answered, "It's unclear, but, yes, probably." Second, Underhill acknowledged his deposition testimony that if Corey had spoken with Robert Gambit, Clark's former client, Robert told Corey about the lawyer that helped with his daughter's case, Corey

indicated that he wanted the lawyer to call him, and Clark then called him, then it would not have been a violation of Rule 7.3 for Clark to call Corey.

¶ 49 On redirect examination, Underhill clarified that additional factors learned since his depositions made him conclude that Clark was not the referring attorney, such as the fact that Clark claimed to have spoken to Corey in August 2001 but the contingency fee agreement was not signed until November 2001, Clark was not present at the initial November 2001 meeting with the Bischkes, and Clark failed to document any of his work or communications with the client leading up to November 2001. Normally, if an attorney were to refer a case out, he or she would keep documentation of their work and their communications with the client and would work fast to get the case signed by the receiving attorney, so that another attorney did not take the case first. He also clarified that Corey did not ask that Clark call him, but that instead Clark got a hold of Corey's number and took it upon himself to call Corey.

¶ 50 The record indicates that trial testimony was also given by Magdalena Dworak, an associate of defendants, who worked on the Bischke case. Although the parties stipulated to the inclusion of a transcript of that testimony in the record on appeal, no such transcript was actually included. Therefore, the substance of Dworak's testimony is unknown.

¶ 51 Like with Dworak, we are unable to review the entirety of Chessick's trial testimony. Although the direct examination and part of the cross-examination of Chessick are in the record on appeal, his remaining testimony is not. Accordingly, we recite here only those portions that were provided to us.

¶ 52 Chessick testified that he was a board certified general surgeon and attorney who has operated the Law Office of Ken Chessick, M.D., a medical malpractice firm, since the time he graduated law school in 1984. Chessick first learned of the Bischke case when Patricia, who was

working for him at the time, came to him and told him that Clark had a case that he wanted to refer. Until Chessick read the transcript of Shelly's deposition testimony in this case, he wrongly believed that Clark was the referring attorney of the Bischke case. Chessick was of the opinion that Clark was not the referring attorney as contemplated under Rule 1.5 based on Shelly's testimony that she had not had any contact with Clark prior to signing with Chessick, Corey's testimony that he did not recall speaking with Clark, Clark's failure to attend the initial meeting, and Clark's failure to sign the Bischkes for three months. Chessick did not believe that Clark had ever called Corey and, even if he did, Chessick was of the opinion that such a call was a violation of Rule 7.3. Even if Corey did ask Clark's former client if he knew an attorney, it was not an excuse for Clark to call Corey. Clark should have asked that his number be given to Corey so that Corey could call him.

¶ 53 Typically, when a person would call defendants with a potential case, the person answering the phone would use a pre-printed form created by Chessick to gather information about the caller and the case. The form included questions about the caller's contact information, demographics, doctors involved, date of injury, etc. It also included a question of who referred the caller to defendants. Chessick testified that defendants were unable to locate any such form regarding the Bischke case and that he had never seen one for the Bischke case.

¶ 54 The initial meeting with the Bischkes took place on November 24, 2001. Present were Chessick, Corey, Shelly, and Cassidy. Clark and Patricia were not present. Chessick specifically remembered that Clark was not present because, believing that Clark had a preexisting relationship with the Bischkes, he thought that the Bischkes would trust Clark that Chessick was the best attorney for the case. For that reason, Chessick had asked Clark to attend the meeting and was irritated when he did not.

¶ 55 Over the years, Chessick had taken numerous cases on referral and his agreement regarding the amount of fees that the referring attorney would receive and the amount of work the referring attorney would perform would vary between cases. In situations where the case was in an outlying county, he would often have the referring attorney work on the case, because it was difficult to have his firm's attorneys attending hearings and other matters all over the state. With the additional work of the referring attorney, defendants were more easily able to handle cases all over the state. The Bischke case was in McHenry County and, as a result, the contingency fee agreement required that Clark work jointly with defendants on the case.

¶ 56 Clark did work on the Bischke case with defendants, but stopped after the initial two settlements. Chessick testified that he asked Clark to participate in the March 2008 pretrial conference. Again believing that, as the referring attorney, Clark had a preexisting relationship with the Bischkes, Chessick asked Clark to attend in order to help convince Shelly to settle the last part of the case. Clark would not commit to attending the pretrial conference and, in the end, he did not attend. Ultimately, Clark was of no assistance in reaching the final settlement. In Chessick's opinion, plaintiff violated Rule 1.5 by failing to comply with the contingency fee agreement's requirement of working jointly on the case and by failing to disclose to the Bischkes that he would receive a fee for not performing any work on the case.

¶ 57 The testimony of Robert Gambit, Gloria Gambit, and Corey Bischke was presented at trial by way of videotaped evidence depositions. Robert Gambit testified that he knew Corey when they both worked for a concrete company in Harvard, Illinois. At some point in time, Corey approached Robert, stating that some of the other men at work had told him that Robert might be able to help him find an attorney. Robert responded by giving Corey his home telephone number and telling him that he should talk to his wife, Gloria, who could probably

help him. Robert gave him Gloria's information because she had the contact information for the attorney who had helped with their daughter's case. Robert did not have the attorney's information to give to Corey, and Corey would not have gotten Clark's or Patricia's information from him. Robert later learned from Gloria that she had, in fact, spoken to Corey. A day or two after Robert had spoken with Corey, Corey came to him and told him that he had spoken with Gloria and thanked Robert for the information. Corey never told Robert that he had spoken with an attorney after talking to Gloria, nor did he say that he had plans to meet with an attorney after talking to Gloria.

¶ 58 Gloria testified that she and Patricia were cousins, but that she had not seen Patricia in person in decades and had spoken with her infrequently on the phone. Patricia's husband, Clark, had represented Gloria's daughter, Marnie, in an automobile accident lawsuit in the late 1990s. Between her and Robert, Gloria was the only one who had interacted with Clark with respect to Marnie's case, and Robert did not have Clark's contact information. At some point in time, Robert gave Gloria Corey's name and phone number as someone who was looking for an attorney for a case involving birth injuries to his daughter. Gloria called Clark, explained what she knew about Corey's case—that it was a "bad baby" case, and asked if Clark was interested. Clark said that he was and that he would call Corey, so Gloria gave him Corey's phone number. After that phone call with Clark, Gloria did not have any further involvement in the Bischke case. At no point did Gloria ever have any contact with Corey or Shelly.

¶ 59 Corey testified that his daughter, Cassidy, was born with injuries and that he and his then-wife, Shelly, began to look for an attorney to assist them in pursuing a claim related to those injuries. Although Corey was involved in trying to locate an attorney, he never personally contacted any attorneys and he did not remember conducting any internet searches for an

attorney. He also was not sure whether Shelly had conducted any internet searches for an attorney. He did, however, personally purchase copies of Cassidy's medical records three or four weeks after her birth. Once he purchased those records and brought them home, they remained in his possession and he did not have any recollection of giving the records to an attorney.

¶ 60 During this time, Corey worked at a concrete company with Robert. Corey heard through coworkers that Robert had had an issue with a personal injury and that he might know an attorney. Corey approached Robert to discuss Cassidy's potential claim, and Robert told Corey that he would give him the phone number of an attorney. Robert did, at some point, give Corey a phone number for an attorney, but Corey was unable to recall the name of that attorney. Corey could not recall having contact with the attorney whose number Robert gave him. He also could not recall whether the conversation that he had with Robert resulted in the Bischkes hiring an attorney.

¶ 61 Corey testified that he could recall having multiple meetings at Chessick's office. At one of those meetings, Chessick was present, but Corey could not recall who else was present. He also could not recall what was discussed at that meeting or whether it was the first meeting that he had in Chessick's office. Corey testified that he also recalled signing an agreement with Chessick and that Chessick's fees were explained to him. He was not aware of any splitting of fees between plaintiff and defendants, as he was more concerned about the total amount of fees that would be taken out of any recovery.

¶ 62 At some point, all aspects of Cassidy's case settled. Corey recalled that plaintiff filed a motion challenging the amount of attorney's fees taken out of the settlement, and he understood that if that motion had been granted, Cassidy would have received more money.

¶ 63 Although he recalled seeing Clark during the course of Cassidy's case and knew that Clark and Patricia were part of the team working on the case, he did not know Clark prior to Cassidy's case. Corey could not recall having any phone conversations with Clark, much less any phone conversations where Clark said that he would be referring Cassidy's case to Chessick. He also had no memory of Clark doing anything to recommend Chessick or refer Corey to Chessick. Corey clarified that when he testified that he could not remember something, it meant that, due to the passage of time, he could not say one way or the other whether the incident had occurred.

¶ 64 Following closing arguments, the case was submitted to the jury. The jury returned a verdict in favor of plaintiff in the amount of $888,888.11. In doing so, the jury answered several relevant special interrogatories, finding that Clark provided a service to the Bischkes by referring them to Chessick, the Bischkes were informed of the basis upon which the division of fees would be made, Clark did not solicit the Bischkes' representation, Clark performed his obligations under the contingency fee agreement, Clark worked jointly on the Bischke case, and Chessick breached the agreement by failing to pay plaintiff 1/3 of the total attorney's fees earned.

¶ 65 Posttrial Proceedings

¶ 66 Defendants filed a posttrial motion for judgment notwithstanding the verdict or a new trial. In it, defendants alleged that the evidence presented at trial demonstrated that Clark was not the referring attorney, the contingency fee agreement violated Rule 1.5, Clark violated Rule 7.3, and Pritchard's testimony lacked foundation and gave the impression that he wrote the Rules of Professional Conduct. At the same time, plaintiff filed a motion asking the trial court to reconsider its pretrial ruling that plaintiff was not entitled to prejudgment interest. The trial court denied defendants' motion, but granted plaintiff's. Defendants then filed a motion asking the

trial court to reconsider its award of prejudgment interest or to at least clarify the time period during which the interest accrued. The trial court denied that motion, but clarified that prejudgment interest accrued from May 1, 2008, when the final settlement was approved, through December 8, 2016, when the jury returned its verdict. Defendants subsequently requested that the trial court enter judgment on the award of prejudgment interest and, in response, the trial court entered an order *nunc pro tunc* amending its previous order to reflect that the amount of prejudgment interest due plaintiff was $382,333.42. Defendants appealed.

¶ 67 ANALYSIS

¶ 68 On appeal, defendants contend that (1) the evidence at trial did not support a finding that Clark referred the Bischkes to defendant, (2) the trial court erred in permitting plaintiff's expert to testify regarding legal conclusions, (3) plaintiff is not entitled to a referral fee because the contingency fee agreement with the Bischkes did not comply with Rule 1.5 and because plaintiff did not meet the requirements to earn the fee under the contingency fee agreement, (4) plaintiff is not entitled to a referral fee because Clark violated Rule 7.3 by improperly soliciting Corey, and (5) plaintiff was not entitled to prejudgment interest. We conclude that none of these contentions warrant reversal.

¶ 69 Judgment *n.o.v.*/New Trial

¶ 70 Defendants first contend that they were entitled to judgment notwithstanding the verdict or a new trial, because the evidence presented at trial overwhelmingly favored a conclusion that Clark did not refer the Bischkes to defendants. Our supreme court has made clear the standards for reviewing a trial court's determinations on motions for judgment *n.o.v.* and new trial:

> "A judgment *n.o.v.* should be granted only when all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no

> contrary verdict based on that evidence could ever stand. [Citation.] In other words, a motion for judgment *n.o.v.* presents a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case. [Citation.] Because the standard for entry of judgment *n.o.v.* is a high one [citation], judgment *n.o.v.* is inappropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. [Citation.] A court of review should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way [citations]. [Citation.] We review *de novo* the circuit court's decision denying defendant[s'] motion for judgment *n.o.v.* [Citation.]
>
> A new trial should be granted only when the verdict is contrary to the manifest weight of the evidence. [Citation.] A verdict is contrary to the manifest weight of the evidence when the opposite conclusion is clearly evident or when the jury's findings prove to be unreasonable, arbitrary and not based upon any of the evidence. [Citation.] A reviewing court will not reverse a circuit court's decision with respect to a motion for a new trial unless it finds that the circuit court abused its discretion. [Citation.] We are mindful that credibility determinations and the resolution of inconsistencies and conflicts in testimony are for the jury. [Citation.]"

York v. Rush-Presbyterian-St. Luke's Medical Center, 222 Ill. 2d 147, 178-79 (2006) (internal quotation marks omitted). We conclude that the trial court did not err in denying defendants' motions under either of these standards.

¶ 71 The jury specifically found that Clark referred the Bischkes to defendants, and the testimony of Clark, Patricia, Robert, and Gloria all support that finding. Clark testified that Gloria called him, informed him that Corey was looking for an attorney, and gave him Corey's contact information with the request that he call Corey. He called Corey, spoke with him about the case, obtained medical records from him, and would have informed Corey of the decision to refer the case to defendants. Patricia testified that she was present when the call from Gloria came in and when Clark called Corey. She spoke with both Corey and Shelly about the case during that phone call, and even conducted a review of the medical records. Later, after she had convinced Clark to refer the case to defendants, she told Chessick about the case and that Clark wanted to refer it to him. Robert's testimony confirmed that Corey had approached him seeking information about a lawyer and that he told Corey to contact Gloria. Gloria supported Clark's testimony that she called him about the case and gave Corey's contact information to him. Both Clark and Patricia testified that they were present at the initial meeting with the Bischkes at Chessick's office and that the Bischkes were presented with the contingency fee agreement at that meeting.

¶ 72 The contingency fee agreement stated that Clark would be working on the case and that plaintiff would be sharing in the recovered attorney's fees. In fact, Chessick paid plaintiff $344,444.00 from the initial two settlements. From this—the testimony of four witnesses, the Raymonds' presence at the initial meeting, the inclusion of plaintiff in the contingency fee agreement, and Chessick's splitting of the attorney's fees from the initial settlements—a jury most certainly could find that Clark referred the Bischkes to defendants. At the very least, it is impossible for us to conclude that there was a "total failure or lack of evidence to prove" this

issue, the opposite conclusion is clearly evident, or that the jury's findings were unreasonable, arbitrary, or not based upon any evidence.

¶ 73 Defendants' contentions that they were entitled to judgment *n.o.v.* or a new trial boil down to nothing more than claims that the jury improperly weighed the evidence or made incorrect credibility findings. Specifically, defendants argue that the testimony of Clark and Patricia was inconsistent, self-serving, and unsubstantiated, and that the Bischkes denied Clark's and Patricia's account of events. Defendants also argue that it is incredible that Clark would wait three months to sign the Bischke case and that he would not mention June Thomas's favorable review of the medical records to anyone. According to defendants, the testimony of Corey and Shelly was more believable and trumped the testimony of the other, contrary witnesses. Defendants presented and argued all of these alleged evidentiary shortcomings to the jury, yet the jury still found in favor of plaintiff. From that, it is apparent that the jury disagreed with defendants' assessment of the evidence and found the testimony and evidence presented by plaintiff to be more credible than defendants'. The fact that defendants disagree does not warrant an award of judgment *n.o.v.* or a new trial, as credibility determinations, factual inconsistencies, and conflicts of testimony are for the jury, and we may not usurp the jury's role in that respect. *Id.*

¶ 74 Pritchard's Testimony

¶ 75 Defendants next argue that the trial court erred in permitting Pritchard to testify to his opinion of whether the contingency fee agreement required Clark to perform work on the Bischke case other than providing the referral to defendants. A trial court's rulings on motions *in limine* and its admission of expert testimony will not be disturbed absent an abuse of discretion. *Maggi v. RAS Development, Inc.*, 2011 IL App (1st) 091955, ¶ 67.

¶ 76 According to defendants, the trial court abused its discretion because Pritchard's testimony interpreting the requirements of the contingency fee agreement constituted an impermissible legal conclusion under *Todd W. Musberger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (2009) (stating that experts cannot offer testimony regarding legal conclusions that will determine the outcome of the case). Plaintiff responds that expert testimony on the meaning of contractual language is permitted where the language in the contract is used in a technical sense or is otherwise unusually complex and, in this case, referral agreements and the practice of attorneys in the context of referral agreements were outside the understanding of an average layperson. See *American College of Surgeons v. Lumbermens Mutual Casualty Co.*, 142 Ill. App. 3d 680, 701-02 (1986).

¶ 77 We need not decide whether expert testimony was warranted on the issue of what work, if any, the contingency fee agreement required Clark to perform, as defendants have failed to establish any prejudice resulting from Pritchard's testimony in this respect. Even assuming error in the admission of evidence, to be entitled to reversal, an appellant must establish that it was prejudiced by the error. *Crawford County State Bank v. Grady*, 161 Ill. App. 3d 332, 342-43 (1987). Here, even if we were to assume that the trial court's admission of Pritchard's testimony in this respect was error, defendants' only argument regarding prejudice is that "[t]he trial court's rulings on this point were wrong and highly prejudicial." This does not suffice to establish that defendants were prejudiced; defendants' stating they were prejudiced does not necessarily make it so. See *id.* ("Lakeview has totally failed to present any issue, point, meaningful argument, or authority to show or establish prejudice."). Moreover, it is impossible to ignore the fact that defendants solicited similar testimony from their expert, Underhill, Fisk, and Chessick. Defendants cannot be said to have been significantly prejudiced by Pritchard's testimony on the

meaning of the contingency fee agreement when they questioned their own expert (and other witnesses) on the same topic. See *Maggi*, 2011 IL App (1st) 091955, ¶ 71 (defendant was not prejudiced by plaintiff's expert testifying on the interpretation of contractual provisions where defendant questioned its own expert in the same respect).

¶ 78 Defendants also contend that Pritchard should not have been allowed to "lecture" the jury about the purpose of Rule 1.5. Specifically, defendants argue that the colloquy between Pritchard and plaintiff's counsel, after Pritchard directed plaintiff's counsel to ask him about the purpose of Rule 1.5, was "highly prejudicial" because "[i]t made Pritchard seem as if he had authored the Rule himself or participated in the committee that wrote it. He was judicial, professorial, commanding, and all-knowing. His testimony gave the jury the clear sense that they were in the presence of a great authority instead of a paid expert witness." Defendants did not object to this testimony at trial, but they urge us to overlook their forfeiture of the claim because the error in the admission of this testimony was so prejudicial that "the parties litigant cannot receive a fair trial and the judicial process cannot stand without deterioration." See *City of Quincy v. V.E. Best Plumbing & Heating Supply Co.*, 17 Ill. 2d 570, 577 (1959). We disagree.

¶ 79 Other than defendants' contention that Pritchard's testimony on the purpose of Rule 1.5 gave the impression that he authored the rule or participated in the committee on it, their other complaints relate only to Pritchard's demeanor as a witness. In essence, they complain that Pritchard appeared *too* credible on this topic. The practical limitations on our review of such claims are glaringly apparent. First, we find it difficult to believe that defendants actually want the appellate court to start down the path of regulating whether trial experts appear too knowledgeable, too informed, or too authoritative. Aside from the absurdity of the notion, it would be impossible to determine where to draw the line for such measurements. Moreover,

drawing the line anywhere would only serve to punish parties who were able to locate and recruit experts at the top of their fields. Second, even if some sort of line could be drawn, we, as the reviewing court, could not accurately determine whether such line had been crossed by any given witness. The determination of whether someone was too knowledgeable, too authoritative, too commanding, etc. would depend entirely on viewing that witness's body language and demeanor and hearing the tone of their voice. These are things we are unable to do based on the cold record on appeal. For the same reasons that reviewing courts have long left the question of whether a witness was credible at all to the jury, we would also have to defer to the jury on the question—if it were to ever actually be a question—of whether a witness was *too* credible.

¶ 80 As for defendants' claim that Pritchard's testimony gave the jury the impression that he authored Rule 1.5 or was a member of the committee on Rule 1.5, we do not see any basis for that conclusion. Although at one point in his response, Pritchard said, "So we put this exception in," the rest of his response makes clear that his use of "we" in that sentence was not intended to include him as one of the authors, but was instead used in the general, collective sense. The rest of his response repeatedly referred to the authors of Rule 1.5 as "they" and "them." He explicitly stated that Rule 1.5 had been around as long as he had, thus making it impossible for him to have participated in its drafting. Moreover, Pritchard made no express claim of having participated in the drafting of Rule 1.5.

¶ 81 Because we see no error in these respects, we do not agree that defendants were deprived of a fair trial or that the judicial process was deteriorated in any way, such that defendants' forfeiture of this issue should be overlooked. Moreover, to the extent that defendants intend to imply that it was improper for Pritchard to testify at all regarding the purpose of the Rules of Professional Conduct, we again conclude that defendants could not have been prejudiced

because their own expert also testified regarding the purpose of the Rules. *Maggi*, 2011 IL App (1st) 091955, ¶ 71.

¶ 82 Defendants' final contention regarding Pritchard consists of two sentences: "Pritchard had no foundation for telling the jury how Rule 1.5 came into being. This testimony was obnoxious." Despite their claim that this testimony was "obnoxious," defendants are apparently unable to articulate what, exactly, was so obnoxious about it (other than that Pritchard was apparently such a credible witness that his testimony was detrimental to defendants' case). Defendants make no attempt to explain what foundation was necessary for Pritchard's testimony regarding the purpose of Rule 1.5 or what elements of that foundation he lacked. Nor do defendants cite to any authority or portions of the record in support of their position. Accordingly, defendants have waived this claim on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (providing that an appellant's brief must contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18 ("The failure to provide an argument and to cite to facts and authority, in violation of Rule 341, results in the party forfeiting consideration of the issue.").

¶ 83 Rule 1.5

¶ 84 In their opening brief on appeal, defendants frame their next argument in two parts: (1) the contingency fee agreement did not comply with the requirements of Rule 1.5, and (2) plaintiff was not entitled to any attorney's fees because it did not comply with the requirements of the agreement. Although not entirely clear, based on the substance of defendants' opening brief and reply brief, defendants' contention with respect to the agreement's compliance with Rule 1.5 appears to be as follows: if plaintiff believed, as Pritchard testified, that the agreement

did not require Clark to perform any work on the Bischke case over and above providing the referral to Chessick, then plaintiff had an obligation under Rule 1.5 to disclose that fact to the Bischkes, and the agreement's language that Clark would work jointly with defendants on the case did not do that. We need not decide this issue, however, because regardless of plaintiff's belief about what the contingency fee agreement required, defendants admit that Clark did perform work on the Bischke case over and above providing a referral to defendants. Thus, the only real question is not whether the contingency fee agreement complied with the requirements of Rule 1.5, but whether Clark performed enough work such that plaintiff complied with the requirements of the contingency fee agreement.

¶ 85 Defendants argue that plaintiff did not comply with the contingency fee agreement's requirement that Clark work jointly on the Bischke case with defendants. Defendants argue that plaintiff did not comply with that requirement, because after the initial two settlements, the only work Clark performed was to express concerns about the medical experts selected by defendant. Based on this, defendant argues that the jury's finding that plaintiff was entitled to $888,888.11 for his share of the final settlement was against the manifest weight of the evidence. See *Claro v. DeLong*, 2016 IL App (5th) 150557, ¶ 21 (reviewing court will not set aside a jury's verdict unless it is against the manifest weight of the evidence).

¶ 86 The primary shortcoming with defendants' contention is, of course, that paragraph 9 of the contingency fee agreement provided only that defendant and Clark would "work on [the Bischke] case jointly." It did not detail how the work would be divided between plaintiff and defendants, set a base amount of hours or tasks that had to be performed by Clark, or specify that Clark's work must be spread out over the entire duration of the case. Plaintiff presented evidence at trial that Clark took numerous depositions, worked on answering written discovery,

and maintained regular contact with the Bischkes prior to the initial settlements. None of the evidence presented by defendants substantially disputed this. Although plaintiff acknowledges that Clark's work decreased after the initial settlements, there was evidence that he still had some contact with the Bischkes and that he reviewed the medical experts selected by defendants. Clark acknowledged that defendants asked that he attend a deposition in Wisconsin, but explained that he was called at the last minute and that he already had commitments scheduled for the same time. Clark and Patricia both testified that Clark never refused to perform any other work on the Bischke matter and that he called defendants' office regularly to check on the status of the case. In addition, Pritchard testified that because all work performed on a case contributes to its ultimate resolution, the fact that the bulk of Clark's work was performed during the early stages of the litigation did not mean that he did not contribute to the final settlement. From this evidence and because the language of the contingency fee agreement did not impose any specific requirements on the amount of work to be performed by Clark, the jury's conclusion that Clark performed his obligations under the agreement and worked jointly on the Bischke case was not against the manifest weight of the evidence.

¶ 87 Rule 7.3

¶ 88 Defendants' penultimate contention on appeal is that plaintiff is barred from recovering any attorney's fees because Clark violated Rule 7.3 by improperly soliciting the Bischkes. The jury specifically found that Clark did not solicit the Bischkes' representation. As previously stated, we will not disturb a jury's verdict unless it is against the manifest weight of the evidence. *Id.* The jury's verdict was not against the manifest weight of the evidence in this respect.

¶ 89 In 2001, Rule 7.3 provided that "a lawyer shall not, directly or through a representative, solicit professional employment when a significant motive for doing so is the lawyer's pecuniary

gain. The term 'solicit' means contact with a person other than a lawyer in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient." Ill. R. Prof'l Conduct R. 7.3. The comments to Rule 7.3 explained that a solicitation did not include contact made in response to a request for information. Ill. R. Prof's Conduct R. 7.3, Committee Comments. The only exceptions to this rule were where the potential client was also a lawyer or where there existed a familial, close personal, or prior professional relationship with the lawyer. Ill. R. Prof'l Conduct R. 7.3.

¶ 90 According to defendants, even if one believes Clark's testimony about his initial contact with Corey, an improper solicitation occurred because there was no evidence that Corey wanted Clark to call him. Although it is true that none of the witnesses testified that Corey specifically told anyone, "I would like Clark Raymond to call me," there was evidence that Corey approached Robert to request assistance in locating an attorney to help with Cassidy's case. Robert indicated that Gloria would be better suited to provide that information. Whether from Robert or Corey (Robert testified that he gave Corey Gloria's contact information, while Gloria testified that Robert gave her Corey's contact information), Gloria obtained Corey's contact information with the understanding that Corey was looking to hire an attorney and had specifically asked Robert for help. Certainly, that Corey's contact information ended up in the hands of Gloria, after Corey approached Robert for information about an attorney, suggests that Corey was looking to be contacted. Gloria then relayed this information to Clark, asked if he was interested in the case, and provided him with Corey's contact information. Based on this evidence, we cannot say that it was against the manifest weight of the evidence for the jury to infer that Clark believed that Corey wanted him to call him and that he was responding to that request for information.

¶ 91 As in previous arguments, defendants make only a cursory contention that Pritchard's testimony on the topic of whether Clark violated Rule 7.3 should not have been admitted because it was "highly prejudicial." Not only does this argument fail because defendants cannot be said to have been prejudiced by Pritchard's testimony in this respect where their own expert testified on the same topic (*Maggi*, 2011 IL App (1st) 091955, ¶ 71), but the argument is also waived for failure to properly develop it or to cite any authority in support. See Ill. S. Ct. R. 341(h)(7) (providing that an appellant's brief must contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *CE Design, Ltd.*, 2015 IL App (1st) 132572, ¶ 18 ("The failure to provide an argument and to cite to facts and authority, in violation of Rule 341, results in the party forfeiting consideration of the issue.").

¶ 92 Prejudgment Interest

¶ 93 Defendants' final argument on appeal is that the trial court erred in awarding plaintiff prejudgment interest. Section 2 of the Interest Act provides that "[c]reditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing." 815 ILCS 205/2 (West 2000). To form the basis of an award of prejudgment interest, a written instrument must establish a debtor-creditor relationship and must contain a specific due date. *Adams v. American International Group, Inc.*, 339 Ill. App. 3d 669, 674 (2003). In addition, the amount due on the written instrument must be liquidated or easily computed. *Krantz v. Chessick*, 282 Ill. App. 3d 322, 327 (1996).

¶ 94 Awards of prejudgment interest are typically reviewed for an abuse of discretion. *Milligan v. Gorman*, 348 Ill. App. 3d 411, 415 (2004). Citing to *Grate v. Grzetich*, 373 Ill. App.

3d 228, 231 (2007), however, defendants argue that a *de novo* standard of review should be applied. Although *Grate* involved an award of attorney's fees, not prejudgment interest, we nevertheless observe that a number of cases have applied the *de novo* standard of review in situations where the trial court has denied an award of prejudgment interest under the Interest Act. See, *e.g.*, *Chandra v. Chandra*, 2016 IL App (1st) 143858, ¶ 46; *Milligan*, 348 Ill. App. 3d at 416. Whether the *de novo* standard of review should be applied here is a question we need not answer, as we conclude that the trial court did not err, regardless of the standard of review applied.

¶ 95 Defendants' first point of contention with respect to the trial court's award of prejudgment interest is that there was no "instrument in writing" between plaintiff and defendants or between plaintiff and the Bischkes, as required by section 2 of the Interest Act. Defendants argue that the contingency fee agreement does not constitute an instrument of writing, because Clark was not a party to that agreement. Instead, Clark was only mentioned in the agreement as a Rule 1.5 disclosure to the Bischkes of the oral agreement between plaintiff and defendants to split fees. Accordingly, defendants argue that the contingency fee agreement should not be deemed a contract between plaintiff and defendants.

¶ 96 Prior to trial, defendants moved for summary judgment on the issue of prejudgment interest. In that motion, they argued that the only agreement that existed between plaintiff and defendants was an oral agreement under which plaintiff agreed to work jointly on the Bischke case in exchange for splitting fees. No argument was made by defendants that the contingency fee agreement imposed any obligations on plaintiff. At trial, however, defendants apparently abandoned this position, because they did not present any evidence of an oral agreement between plaintiff and defendants and, instead, relied exclusively on the written contingency fee agreement

to support their position that Clark was required to work jointly on the Bischke case in order for plaintiff to recover its share of the attorney's fees. Defendants then resurrected the contention that an oral agreement governed the relationship between plaintiff and defendants only when asking the trial court to reconsider its award of prejudgment interest. Throughout the majority of this appeal, defendants have maintained the same position that they took at trial—Clark was obligated under the written contingency fee agreement to work jointly on the Bischke case, and his failure to do so precludes any recovery by plaintiff—with the exception, of course, that they take their alternative position when it comes to the issue of prejudgment interest.

¶ 97 Defendants' argument that the contingency fee agreement does not constitute an instrument of writing for purposes of prejudgment interest is defendants' attempt at having their cake and eating it too. They want the contingency fee to be an agreement to the extent that the jury would find it to bind Clark to work on the Bischke case, but not to the extent that it could serve as a basis for an award of prejudgment interest. Defendants cannot do that without some sort of explanation or authority for the proposition that the same document can, at one time, both be and not be a contract that binds plaintiff. See *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) ("Thus, here, judgment for defendant must be affirmed if plaintiff's position during the trial of her case, which was adopted by the trial court, is inconsistent with the one she has argued on appeal.").

¶ 98 We further note that there is no evidence in the record to support the existence of a separate, oral agreement between plaintiff and defendants; in fact, defendants do not even attempt to cite to anything in the record in support of such a position. Accordingly, it is unclear how the trial court was supposed to find in favor of defendants on this issue without a factual basis, much less how we are supposed to find that the trial court erred in failing to do so. To the

extent that there was any evidence of the existence or non-existence of a separate, oral agreement presented at the hearings on the parties' motions for summary judgment or posttrial motions or in the missing testimony of Dworak and Chessick, we must assume that it favored plaintiff, as defendants failed to include such transcripts in the record on appeal. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) ("[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. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.").

¶ 99 Defendants also argue that even if the contingency fee agreement is considered an instrument of writing for purposes of prejudgment interest, it does not meet the other requirements for an award of prejudgment interest. Although defendants state that the contingency fee agreement does not establish a debtor-creditor relationship, they once again fail to offer any explanation or to cite any authority in support of this proposition, and it is therefore forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (providing that an appellant's brief must contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *CE Design, Ltd.*, 2015 IL App (1st) 132572, ¶ 18 ("The failure to provide an argument and to cite to facts and authority, in violation of Rule 341, results in the party forfeiting consideration of the issue."). Indeed, any such contention would be difficult for defendants to maintain, given that the contingency fee agreement explicitly stated that plaintiff and defendants "will divide" any legal fees earned, thereby obligating both parties to ensure the other received their agreed-upon share,

and given that defendants took the position at trial and on appeal that the same provision of the contingency fee agreement bound Clark to work jointly on the Bischke case.

¶ 100 Defendants' contention that the contingency fee agreement did not contain a specific due date is equally misplaced. Although it is true that the contingency fee agreement did not provide a specific month, day, and year on which defendants were to make payment to plaintiff, prejudgment interest may be awarded where the written instrument contains an inherent due date. See *Reserve Insurance Co. v. General Insurance Company of America*, 77 Ill. App. 3d 272, 283 (1979). Here, the contingency-fee agreement stated that plaintiff and defendants would divide any legal fees earned on the Bischke case. We hold that this implies that upon earning any legal fees, the plaintiff and defendants were each immediately entitled to their portion of the fees.

¶ 101 Defendants rely on *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181 (2007), for the proposition that no money was due to plaintiff until after the trial court entered judgment against defendants and in favor of plaintiff in the present case. In *Lowrey*, the minor plaintiff brought suit against her former attorney, alleging that the attorney committed legal malpractice when he failed to advise her that the defendants in the underlying medical malpractice case had made a $1,000,000.00 pretrial settlement offer. *Id.* at 185. After judgment in her favor in the legal malpractice case, plaintiff argued that she was entitled to prejudgment interest under the Interest Act, based on the contingency fee agreement between her and the attorney in the underlying medical malpractice case. *Id.* at 215. This court disagreed, noting that the plaintiff had denied the existence of a written contingency fee agreement and failed to present any evidence of one and that, even if such an agreement existed, there was no evidence that it obligated the attorney to pay money to the plaintiff. *Id.* Relevant here is the court's

determination that the plaintiff was not due the $1,000,000.00 from the attorney until after the trial court entered judgment in her favor in the legal malpractice case. *Id.*

¶ 102 The distinction between the present case and *Lowrey* is readily apparent. Here, plaintiff and defendants entered into an express agreement under which defendants would pay plaintiff one-third of any legal fees earned. Thus, defendants' self-imposed obligation to pay plaintiff its share of the legal fees arose once legal fees were earned in the Bischke matter, which occurred long before judgment was entered in the present case. In contrast, in *Lowrey*, there was no pre-existing agreement between the plaintiff and her attorney that the attorney would pay plaintiff $1,000,000.00 upon the occurrence of some event. Rather, the $1,000,000.00 was a court-imposed obligation that came into existence only after it was determined that the attorney had committed legal malpractice and that the plaintiff was damaged to the tune of $1,000,000.00, *i.e.*, at judgment.

¶ 103 Defendants also contend that the amount due to plaintiff is not easily computed because after the final settlement of the Bischke matter was approved by the probate court and defendants were awarded enhanced attorney's fees, plaintiff filed an emergency motion to reconsider the enhanced attorney's fees. In that motion, plaintiff asked that the probate court apply the statutory cap on attorney's fees to the fees in the Bischke case. Plaintiff also asked that if the probate court were to lower the fees, that defendants be directed to pay it $533,333.33, or its third of the reduced fees. The probate court denied that motion and, since that time, plaintiff has maintained in the present litigation that it is entitled to $888,888.11, one-third of the enhanced fees collected by defendants on the final Bishcke settlement. Defendants argue that because plaintiff asked that it be awarded only $533,333.33 in the emergency motion, but then asked for $888,888.11 in the present case, the amount in dispute is uncertain. We disagree.

¶ 104 Plaintiff's position has consistently been that it is entitled to one-third of the total attorney's fees collected by defendants on the Bischke matter. This is consistent with the agreement that the parties would split any earned legal fees, one-third to plaintiff and two-thirds to defendants. The emergency motion in the probate court was directed not to the amount owed plaintiff, but to the amount of attorney's fees defendants should have been allowed to recover. Once the probate court finally determined the amount of fees defendants would be allowed to recover on the final Bischke settlement, the calculation of the amount due plaintiff was simple and straightforward: 33.33% of the fees recovered by defendants on the final $8,000,000.00 settlement. Neither side disputes that the result of this calculation is $888,888.11. Accordingly, we see nothing difficult or complicated about the calculation of the amount owed to plaintiff. In any case, to the extent that defendants required the court's determination of the amount owed plaintiff, "interest can be awarded on money payable even when the claimed right and the amount due require legal ascertainment." *Krantz*, 282 Ill. App. 3d at 327.

¶ 105 Finally, defendants argue that even if plaintiff is entitled to prejudgment interest, it should not be awarded interest for the one-year period during which plaintiff had voluntarily dismissed its suit against defendants and there was no dispute pending. According to defendants, plaintiff was unjustly enriched by delaying proceedings, presumably because this allowed prejudgment interest to accumulate for an additional year. This argument it completely without merit.

¶ 106 The purpose of the Interest Act is to "fully compensate the injured party for the monetary loss suffered." *Milligan*, 348 Ill. App. 3d at 416.

> "A refusal to pay a debt when due, even when based on a good faith dispute, means that the debtor has the use of the disputed funds until a court rules against him. If a creditor is

> denied payment of a sum rightfully his, he loses not only that sum but the right to use it. In our society the use of money is worth money. Use carries with it the opportunity to deposit or lend it at interest or, in the alternative, the ability to avoid the borrowing of other funds and paying of interest. It would be unjust as well as contrary to the language of the statute for us to ignore this economic fact of life."

Haas v. Cravatta, 71 Ill. App. 3d 325, 331-32 (1979). To fully compensate plaintiff, interest must be awarded from the time defendants were obligated to split the fees on the final settlement, *i.e.*, May 1, 2008, the date the probate court approved the final settlement and enhanced fees. The fact that plaintiff voluntarily dismissed its legal action against defendants for a year is irrelevant, because there is no language in the Interest Act stating that interest only accrues while litigation is pending to recover the owed amounts. Moreover, it seems somewhat outrageous to require the plaintiff, who had already been wrongfully denied its money by defendants, to persistently chase after defendants to recover the wrongfully withheld funds or risk losing its right to prejudgment interest. As stated above, prejudgment interest is awarded to compensate the injured party for the loss of use of wrongfully withheld funds. Regardless of whether plaintiff's suit was pending or not, defendants continued to withhold funds owed and thereby continued to deprive plaintiff of the use of those funds.

¶ 107 We note that defendants spend a fair amount of time discussing the alternative argument of whether plaintiff qualified as a third-party beneficiary under the contingency-fee agreement. Because we conclude, however, that the contingency fee agreement qualified as an instrument of writing under the Interest Act, we need not to address those contentions.

¶ 108 CONCLUSION

¶ 109 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 110 Affirmed.