In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

J. NUCKOLLS, INC. D/B/A FENTON AUTO SALES, Respondent, v. AMERICA'S AUTO AUCTION ST. LOUIS, INC. ET AL., Appellant.	)	ED113904 Filed: September 22, 2026

Appeal from the Circuit Court of the City of St. Louis
The Honorable Michael W. Noble, Judge

Introduction

America's Auto Auction St. Louis, Inc., XLerate Group,[1] Todd Ritter, and Brian Hockett (collectively, AAA) appeal from the $1,050,000 judgment entered by the trial court upon a jury's verdict in favor of J. Nuckolls, Inc. d/b/a Fenton Auto Sales (Fenton Auto) on Fenton Auto's claims for breach of fiduciary duty, fraudulent misrepresentation, and tortious interference with business opportunity. AAA argues Fenton Auto failed to make a submissible case on two of their three claims, and the trial court erred in refusing

[1] Following a 2022 merger, XLerate Group became the legal successor to AAA.

AAA's instructions on their affirmative defenses, denying AAA's motion to strike/in limine, granting Fenton Auto's motion to quash notice of a deposition, and entering a judgment that allowed damages that violated the merger doctrine. We affirm in part and reverse in part.

Factual and Procedural Background

Fenton Auto is a car dealership and a car wholesale dealer owned by Jon Nuckolls (Nuckolls). Fenton Auto partners with multiple individual wholesalers, who use Fenton Auto's funds to purchase cars from auction houses, such as AAA, on behalf of Fenton Auto for Fenton Auto to then sell for a profit. From August of 2017 through March of 2020, Fenton Auto partnered with wholesaler Alex David (David) of AD Wholesale Company under an agreement that they would split Fenton Auto's profits and losses with 65 percent to AD Wholesale and 35 percent to Fenton Auto.

In 2022, Fenton Auto filed a petition for damages against AAA, AAA general manager Todd Ritter (Ritter), AAA assistant general manager Brian Hockett (Hockett), David, and AD Wholesale, claiming, as relevant to the issues raised on appeal, breach of fiduciary duty, fraudulent misrepresentation, and tortious interference with business opportunity. Fenton Auto sought damages stemming from an agreement between AAA and David that AAA would send David lists of cars to bid on or purchase (bid lists) and refund him a portion of the buyer's fee for any cars he purchased from those bid lists (rebate agreement). Fenton Auto dismissed their claims against David and AD Wholesale before trial pursuant to a settlement agreement.

The following evidence was adduced at trial, viewed in the light most favorable to the jury verdict.[2] AAA primarily makes their money by charging buyer's and seller's fees for each car sold and fees for post-sale vehicle inspections (PSI). AAA is a member of the National Auto Auction Association (NAAA), which has a policy prohibiting auction houses from paying monetary incentives to wholesale buyers to bid on certain cars. AAA and David had a long business relationship, and, even before David partnered with Fenton Auto, AAA had a rebate agreement with David. The rebate agreement changed over time, but its essence was that (1) AAA would send David lists of cars to bid on or purchase and would refund him a portion of the buyer's fee for any car he purchased from those lists or from lanes 7 and 9[3]; and (2) AAA would refund David the PSI fee for each car he purchased.

After David approached Nuckolls about becoming a wholesaler for Fenton Auto, Nuckolls called Ritter, who recommended David. AAA's rebate arrangement with David continued while David was partners with Fenton Auto. Both Ritter and David testified they told Nuckolls about the rebate agreement, but Nuckolls testified he was not aware of either the buy-fee rebate or the PSI rebate. During David's tenure with Fenton Auto, he purchased approximately 1,542 cars from AAA, using approximately $25,163,954 of Fenton Auto's money. Of the cars David purchased, 90 percent were from lane 9, and in total, he purchased approximately 10 percent of the cars identified on AAA's bid lists.

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[2] *Hayes v. Price*, 313 S.W.3d 645, 648 (Mo. banc 2010).

[3] AAA's auto auctions were set up with nine lanes spread from wall to wall. Each lane sold a different quality of cars, from repossessed cars in lane 1, to late-model low-milage cars in lane 9.

David collected approximately $509,000 in rebates from AAA under the rebate agreement, of which he shared $105,535 with Fenton Auto under their profit-sharing agreement.

The cars David purchased from AAA produced a gross profit of $614,161; however, the cars incurred repair costs of approximately $254,348 and other offsets in the amounts of approximately $170,360 and $36,998, which resulted in a net profit of approximately $152,455, or a profit percentage of 0.6 percent. Nuckolls testified that, due to David's reputation as one of the best wholesalers in the St. Louis area, he had expected David to produce a profit percentage of 15 percent. AAA did not offer any rebates to any of Fenton Auto's seven or eight other wholesale buyers, nor did AAA provide bid lists to Fenton Auto's other buyers. Fenton Auto's other wholesalers had profit percentages of 4-9 percent.

Fenton Auto's policy was to purchase a PSI for every car purchased at AAA.[4] Fenton Auto submitted Plaintiff's Exhibit 16, which Hockett identified as AAA's report containing a partial list of cars sold to AD Wholesale, itemizing the buy fee and PSI charge for each VIN number. Fenton Auto also submitted Plaintiff's Exhibit 19,[5] which Hockett identified as a report AAA prepared summarizing each PSI performed on each car purchased by AD Wholesale. 20 cars were highlighted on Exhibit 16, which indicated

[4] There was some evidence that sometime in July of 2019, David stopped getting automatic PSIs and ordered them on a case-by-case basis.

[5] Exhibit 19 is not included in the record on appeal, as required by Rule 81.12(a). We therefore presume the information contained in Exhibit 19 supported the trial court's decision and was not favorable to AAA's position. *See Dickerson v. Dickerson*, 580 S.W.3d 98, 104 n.4 (Mo. App. E.D. 2019).

that they did not also appear on Exhibit 19's PSI report summarizing the results of the PSI. AAA explained the apparent lack of PSIs for those cars as a record-keeping "glitch."

During closing arguments, Fenton Auto argued they expected David to make a profit percentage of 15 percent on their $25,163,954 investment, or $3,774,593, of which Fenton Auto would have been entitled to $1,321,107 under their profit-sharing agreement with David. Fenton Auto then compared the actual net profit they realized from their partnership with David: namely, the $152,455 net profit plus the $105,535 David shared of his rebates from AAA, for a total net profit of $257,990. Fenton Auto then requested a verdict of $1,063,116 in damages for the difference between the profit they could have expected if had David been buying cars based on his own judgment, and the profit they received after AAA's interference.

The jury found in favor of Fenton Auto and against AAA on Fenton Auto's claims of breach of fiduciary duty, fraudulent misrepresentation, and tortious interference with business opportunity. The jury awarded Fenton Auto $350,000 on each count for a total award of $1,050,000. AAA filed motions for judgment notwithstanding the verdict (JNOV), challenging the sufficiency of the evidence on each count; for a new trial, challenging the jury instructions and the trial court's pre-trial rulings on discovery issues; and to amend the judgment under the merger doctrine because Fenton Auto presented only one theory of damages but received three awards. After a hearing, the trial court denied each motion. This appeal follows.

Analysis

AAA raises six points on appeal challenging the trial court's denial of their motions for JNOV, for a new trial, and to amend the judgment on various grounds. We address the points in order.

Point One: There Was No Fiduciary Relationship Between AAA and Fenton Auto

In their first point on appeal, AAA argues the trial court erred in denying AAA's motion for JNOV on Fenton Auto's claim of breach of fiduciary duty because Fenton Auto failed to make a submissible case on that claim, in that there was no fiduciary relationship between the parties. We agree.

We review de novo a trial court's denial of a motion for JNOV. *Brennan v. Harris-Stowe State Univ.*, 722 S.W.3d 396, 404 (Mo. App. E.D. 2025). JNOV is appropriate where the plaintiff fails to make a submissible case. *See Smith v. Brown & William Tobacco Corp.*, 410 S.W.3d 623, 630 (Mo. banc 2013). A plaintiff presents a submissible case when they offer evidence to support every element necessary for liability. *Id.* Whether the plaintiff presented a submissible case is an issue of law that we review de novo, and we view the evidence in the light most favorable to the jury's verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding all conflicting evidence and inferences. *Brennan*, 722 S.W.3d at 404. The existence of a fiduciary duty is a question of law that we review de novo, but whether that duty was breached is a question of fact. *Matter of Wilma G. James Trust*, 487 S.W.3d 37, 41 (Mo. App. S.D. 2016).

To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary relationship between the plaintiff and the defendant, (2) that the

defending party breached their fiduciary duty, and (3) that the breach caused the plaintiff to suffer harm. *See Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 15 (Mo. banc 2012). AAA argues that Fenton Auto failed to establish the existence of a fiduciary relationship because the evidence showed the parties were engaged in arm's length business transactions.

A fiduciary relationship arises as a matter of law due to the parties' relationship, such as an attorney-client relationship, or "as a result of the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former." *Hibbs v. Berger*, 430 S.W.3d 296, 312-13 (Mo. App. E.D. 2014). The essential element of a fiduciary relationship is that the subservient party voluntarily cedes control to and places confidence in the dominant party with the reasonable expectation that the dominant party will act for the benefit of the subservient party. *See Farmer's Ins. Co. v. McCarthy*, 871 S.W.2d 82, 86-87 (Mo. App. E.D. 1994); *Chmielski v. City Prod. Corp.*, 660 S.W.2d 275, 294 (Mo. App. W.D. 1983); *see also* BLACK'S LAW DICTIONARY (12th ed. p. 767).

By contrast, the general rule is that the existence of a business relationship does not create a fiduciary relationship. S*un Aviation, Inc. v. L-3 Comms. Avionics Sys., Inc.*, 533 S.W.3d 720, 728 (Mo. banc 2017). An arm's length transaction is one between parties of equal power and sophistication without a special relationship that would create a heightened expectation of trust. *See Constance v. BBC Development Co.*, 25 S.W.3d 571, 580-81 (Mo. App. W.D. 2000); *see also* BLACK'S LAW DICTIONARY, 12th ed. p. 133 (defining arm's length transaction as "dealings between two parties who are not related or

on close terms and who are presumed to have roughly equal bargaining power"). Parties may deal at arm's length for mutual profit without subjecting themselves to heightened fiduciary duties. S*un Aviation*, 533 S.W.3d at 728.

For an arm's-length business relationship to become a fiduciary relationship, there must be evidence in the record both that the subservient party relinquished control and decision-making to the dominant party, and that the dominant party knowingly undertook this obligation or made specific assurances on which the subservient party relied. *Compare Farmer's Ins.*, 871 S.W.2d at 87 ("fiduciary duty is not created by unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary which is recognized by the law as justifying such reliance"), *with Shervin v. Huntleigh Securities Corp*., 85 S.W.3d 737, 740-41 (Mo. App. E.D. 2002) (after bank made specific representation to wife of client that it would not transfer funds from account she obtained in divorce proceedings, when bank decided to transfer funds, it created a limited fiduciary duty to plaintiff to tell her it was going to transfer funds).

There was no fiduciary relationship between AAA and Fenton Auto here. There is no evidence in the record that Fenton Auto voluntarily placed trust in and ceded control to AAA to act for the benefit of Fenton Auto. *See Hibbs*, 430 S.W.3d at 312-13. Likewise, there was no evidence that AAA in words or conduct led Fenton Auto to believe AAA would act in the interest of or for the benefit of the Fenton Auto. *See Farmers Ins.*, 871 S.W.2d at 87. To the extent that Fenton Auto had a fiduciary relationship with David and AAA interfered in that relationship, this interference does not create a fiduciary relationship between AAA and Fenton Auto under Missouri law.

Without a fiduciary relationship between AAA and Fenton Auto and its heightened duties, the trial court erred in denying AAA's motion for JNOV and entering a judgment on the jury's verdict in favor of Fenton Auto and against AAA.

Point One is granted.

Point Two: Fenton Auto Failed to Make a Submissible Case for Fraudulent Misrepresentation

In their second point on appeal, AAA argues the trial court erred in denying AAA's motion for JNOV on Fenton Auto's claim of fraudulent misrepresentation because Fenton Auto failed to submit a submissible case to the jury that AAA made a fraudulent representation, acted with fraudulent intent, or that Fenton Auto relied on any false representations. We agree.

Again, we review de novo a trial court's denial of a motion for JNOV, considering whether the plaintiff presented a submissible case on every necessary element. *Brennan*, 722 S.W.3d at 404. In our review, we view the evidence in the light most favorable to the jury's verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding all evidence and inferences that conflict with that verdict. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 765 (Mo. banc 2007).

In order to make a submissible case for fraud, a plaintiff must prove nine essential elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the

hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury. *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988). AAA challenges on appeal whether Fenton Auto made a submissible case on the elements of fraudulent representation, acting with fraudulent intent, and reliance on any false representations. We consider first whether AAA made any fraudulent representations.

To state a claim for fraudulent misrepresentation, it is necessary to identify a representation that is a statement of fact, as opposed to a statement of opinion, puffing of wares, or sales propaganda that those in the marketplace should recognize and view with skepticism. *See Clark v. Olson*, 726 S.W.2d 718, 719-20 (Mo. banc 1987). A fraudulent representation can be in the form of words or conduct. *Wion v. Carl I. Brown & Co.*, 808 S.W.2d 950, 955 (Mo. App. W.D. 1991). We consider the meaning of a representation, and its truth or falsity, in the light the plaintiffs would reasonably understand it under the circumstances and in the context it was used. *Haberstick v. Gordon A. Gundaker Real Estate Co.*, 921 S.W.2d 104, 108-09 (Mo. App. E.D. 1996). Representations that are too vague or abstract will not constitute fraud. *See id.* at 109.

Fenton Auto asserted that AAA, Hockett, or Ritter made two false representations upon which liability for fraud could lie: (1) that AAA's auctions were open and fair without improper influence over which cars to purchase, and (2) that AAA would perform any PSIs that were purchased. We consider each alleged representation in turn.

(1) AAA Did Not Make a Representation to Fenton Auto that AAA Would Abide by the Guidelines of the NAAA

Fenton Auto here does not assert that Hockett or Ritter or any other agent of AAA specifically told Fenton Auto that AAA conducted auctions that were open and fair without improper influence over which cars to purchase. Rather, Fenton Auto argues that by having a plaque on their wall stating that they were a member of the NAAA, AAA represented to the public that they had agreed to follow all the guidelines of the NAAA, including NAAA's resolution that prohibited auction houses from paying monetary incentives to representatives of customers to bid on cars.

Under the circumstances here, AAA's conduct in holding themselves out to be a member of the NAAA was not a representation that AAA would conduct open and fair auctions without improper influence over which cars to purchase for purposes of establishing fraud. To incur liability for fraud, representations must clearly communicate a statement of fact. *See Haberstick*, 921 S.W.2d at 109 (vague or abstract statements not sufficient to constitute fraud). AAA's statement that it was a member of the trade association NAAA did not clearly communicate that AAA specifically agreed to comply with all of the NAAA's guidelines.

Perhaps if there had been evidence in the record that membership in the NAAA hinged on an agreement to comply with the NAAA's guidelines, then AAA's statement of membership in the NAAA could be fairly and reasonably be seen as an agreement to follow all of NAAA's policies and resolutions. *See id.* (courts consider meaning of representation through lens of what was reasonable in context and circumstances). However, without such evidence here, AAA's membership in the NAAA was more akin to a marketing device than a statement of intent upon which a reasonable person could

rely. *See Clark*, 726 S.W.2d at 719-20 (sales propaganda is not statement of fact imposing liability for fraud).

(2) The Evidence Was Insufficient to Show AAA Did Not Intend to Perform PSIs

The record here showed that part of AAA's business model was to sell PSIs for the cars it sold. The representation at issue here is AAA's promise that if Fenton Auto purchased a PSI, AAA would perform that PSI. To constitute fraud, the alleged misrepresentation must involve a past or existing facts, and the "mere breach of promise or failure to perform does not constitute a misrepresentation of fact or create a separate claim for fraud." *Trotter's Corp. v. Ringleader Rests., Inc.*, 929 S.W.2d 935, 940 (Mo. App. E.D. 1996); *see also Trimble v. Pracna*, 167 S.W.3d 706, 713 (Mo. banc 2005) (oral promise to pay did not give rise to separate claim for fraud where there was already contractual obligation to pay) (citing *Anglin Eng'g Co. v. J.E. Barry Co., Inc.*, 912 S.W.2d 633, 639 (Mo. App. E.D. 1995)). Rather, a promise to take a future action is only actionable as fraud if the speaker did not intend to perform the future action when the speaker made the promise. *Trotter's Corp.*, 929 S.W.2d at 940.

There is no direct evidence in the record that AAA did not intend to perform the PSIs. Nevertheless, because there is rarely direct evidence of intent, intent can be inferred from the facts and circumstances where the "evidence affords a clear inference of fraud, and amounts to more than a mere suspicion or conjecture." *Konopasek v. Konopasek*, 683 S.W.3d 250, 258 (Mo. banc 2023). Specifically, a pattern of circumstances may warrant an inference of fraud. *See State v. Inscore*, 592 S.W.2d 809, 811 (Mo. banc 1980) (fraudulent intent may be fairly inferred from pattern of failure to perform).

Here, Fenton Auto presented evidence that 20 cars appeared on one list as having paid for a PSI but did not appear on another list with the summary of the PSI results. This discrepancy created a reasonable inference that AAA failed to perform PSIs on these 20 cars. However, David purchased over 1,500 cars from AAA and there was only evidence that AAA failed to perform PSIs on 20 cars. This insignificant number of failures without more is not sufficient to create a pattern from which a jury could infer AAA did not intend to perform the PSIs when it sold the PSIs to Fenton Auto. *See Konopasek*, 683 S.W.3d at 258; *Inscore*, 592 S.W.2d at 811; *Trotter's Corp.*, 929 S.W.2d at 940.

Because the record here did not show either that AAA represented to Fenton Auto that it would not offer incentives to wholesalers to bid on certain cars, or that AAA intended not to perform PSIs when it offered this service for sale, Fenton Auto failed to make submissible case for fraudulent misrepresentation. The trial court therefore erred in denying AAA's motion for JNOV and entering a judgment on the jury's verdict in favor of Fenton Auto and against AAA.

Point Two is granted.

Point Three: AAA's Jury Instructions Number 16 and 17 Were Not Proper

In their third point on appeal, AAA argues the trial court erroneously refused AAA's proposed jury instructions for their affirmative defenses of waiver and estoppel, for which there was no Missouri Approved Instruction (MAI). We disagree.

The parties disagree on the proper standard of review for a trial court's refusal to submit a proffered non-MAI instruction to the jury. Rule 70.02 provides that the trial court "shall" give or refuse instructions "according to the law and the evidence in the

case." Rule 70.02(a); *see also* Rule 70.02(c) (instructions in violation of Rule 70.02 "shall" constitute error). This mandatory language dictates that when a jury instruction is supported by the law and the evidence, the trial court does not have the discretion to refuse the instruction, and thus we review the trial court's rejection of a proposed jury instruction de novo and not for an abuse of discretion. *See Ploch v. Hamai*, 213 S.W.3d 135, 139 (Mo. App. E.D. 2006); *Marion v. Marcus*, 199 S.W.3d 887, 892 (Mo. App. W.D. 2006). While the trial court has discretion over the structure and language of a non-MAI instruction, AAA here does not challenge the trial court's decisions regarding the structure or language of their proposed jury instruction. *See Comty Bank of Raymore v. Patterson Oil Co.*, 463 S.W.3d 381, 390 (Mo. App. W.D. 2015); *see also* Rule 70.02(b) (if there is no applicable MAI, then trial court shall give instruction that is "simple, brief, impartial, free from argument"). Rather, AAA here challenges the trial court's rejection of their proposed instructions, which we review de novo.

AAA argues that they should have been permitted instructions on their affirmative defenses of waiver and estoppel because the instructions were supported by the law and the evidence. *See* Rule 70.02(a) (trial court "shall" shall give or refuse instructions "according to the law and the evidence in the case"). However, there is a third consideration before accepting a proposed jury instruction: whether the proffered instruction was faulty. *See Church v. CNH Indus. Am., LLC*, 671 S.W.3d 829, 837 (Mo. App. W.D. 2023). AAA's proposed instructions failed this third test.

When, as here, there is no applicable MAI, the instruction given shall be "simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of

detailed evidentiary facts." Rule 70.02(b); *Eckerd v. Country Mut. Ins. Co.*, 289 S.W.3d 738, 746 (Mo. App. E.D. 2009). We evaluate non-MAI instructions for "whether an average juror would correctly understand the applicable rule of law, and whether a jury was not or could not be confused or misled, resulting in prejudice to one of the parties." *Church*, 671 S.W.3d at 838 (citation and internal quotation marks omitted).

To be proper, the instruction must not simply present the law in its statutory form; rather, the instruction must submit the ultimate facts to the jury. *Id.*; *Duren v. Union Pacific R. Co.*, 980 S.W.2d 77, 79 (Mo. App. E.D. 1998). Ultimate facts advise the jury on what specific acts or omissions in the evidence would constitute liability or provide a defense. *Id.* If an instruction does not include the ultimate facts, then it improperly grants the jury a roving commission, in that it invites the jury to comb through the evidence and to speculate how a claim or defense might result. *See Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010); *Church*, 671 S.W.3d at 838; *Henderson v. St. Louis Housing Auth.*, 605 S.W.2d 800, 803-04 (Mo. App. E.D. 1979).

Here, AAA proffered two instructions for their affirmative defenses of waiver and estoppel. Neither defense had an appliable MAI. Proposed instruction Number 16 on AAA's affirmative defense of wavier stated:

> The AAA Defendants contend that Plaintiff has waived its claims. Waiver is a defense to certain claims. Waiver is the relinquishment of a known right or privilege. Waiver requires proof of:
>
> 1. An existing right, benefit, or advantage;
> 2. Knowledge, actual or constructive, of its existence; and

3. Actual intent to relinquish the right, which can be inferred from conduct.

Proposed instruction Number 17 on AAA's affirmative defense of estoppel stated:

> Equitable estoppel is a defense to certain claims. Equitable estoppel prevents one party from denying his own expressed or implied admissions which have in good faith and in pursuance of its purpose been accepted and relied upon by another. Equitable estoppel requires proof of three elements:
>
> 1. There was an admission, statement, or act by Plaintiff that is inconsistent with the claim asserted;
>
> 2. Defendant took an action based on that admission, statement, or act; and
>
> 3. Defendant will be injured if Plaintiff is allowed to contradict or repudiate that admission, statement, or act.

Neither of AAA's proposed jury instructions on their affirmative defenses of waiver and estoppel included any facts, much less ultimate facts specifying the conduct that constituted Fenton Auto's alleged fault. The proffered instructions were bare recitations of the definitions of waiver and estoppel, and they invited the jury to comb through the record on its own to find facts that could meet those definitions. Instructions Number 16 and Number 17 were not proper instructions, and the trial court did not err in refusing to submit them to the jury. *See Church*, 671 S.W.3d at 838-39; *Turner v. Norfolk & Western Ry. Co.*, 785 S.W.2d 569, 571, 573 (Mo. App. W.D. 1990) (abstract statements of law that require no findings of fact by jury are not proper jury instructions).

Point three is denied.

Point Four: AAA Waived Their Challenge to Exhibits Produced in the Supplemented Interrogatory Responses and Failed to Preserve Their Challenge to a Late-Disclosed Witness

In their fourth point on appeal, AAA argues the trial court abused its discretion in denying AAA's pre-trial motion both (1) to exclude Fenton Auto's supplemented discovery responses produced past the disclosure deadline that introduced a new theory of damages and (2) to prevent a new witness disclosed after the disclosure deadline from testifying at trial, both of which prejudiced AAA at trial. These issues are not preserved for review on appeal.

The following evidence is relevant to both of AAA's subpoints. Fenton Auto and AAA agreed to discovery deadlines of April 1, 2025 for written discovery and April 28, 2025 for witness and exhibit lists. Trial was set for May 12, 2025. In Fenton Auto's 2022 petition, they sought damages for lost profits on a theory that the rebate agreement caused David to pay a higher price for cars because he bought cars from the bid lists rather than the most profitable cars for Fenton Auto. On April 23, 2025, less than a month before trial, Fenton Auto served AAA with supplemented interrogatory responses, identifying a new theory of damages based on comparing David's profits to Fenton Auto's other individual wholesaler's profits (comparative theory of damages), and identifying a new witness Fenton Auto planned to call at trial.

On April 25, 2025, AAA filed a combined motion to strike Fenton Auto's late supplemented responses and new witness and a motion in limine (motion to strike/in limine[6]), seeking to prevent Fenton Auto from offering testimony and evidence of their

[6] AAA's motion was entitled Joint Motion to Strike/In Limine Regarding Plaintiff's Supplemental Responses to Interrogatories and Exclude Evidence of Previously Undisclosed Damages Theories and Witness.

revised theory of damages at trial. Specifically, AAA argued that the new comparative theory of damages was inconsistent with the prior deposition testimony of Fenton Auto's corporate representative Peggy Wyland (Wyland).

On May 2, 2025, the trial court held a hearing on AAA's motion to strike/in limine. AAA argued that the supplemented disclosures were untimely, in that they were past the parties' discovery deadlines, and that allowing Fenton Auto to change their theory of recovery less than three weeks before trial would cause AAA prejudice. The trial court clarified that the discovery deadlines were informal, not court-ordered. Fenton Auto responded that the change in their theory of damages stemmed from new evidence they learned during defendant Ritter's deposition on April 8, 2025, and that they updated their discovery responses based on this new information less than two weeks later. Moreover, Fenton Auto argued that Wyland's corporate-representative deposition was left open and she could be recalled for further questioning. The trial court denied AAA's motion to strike/in limine.

(1) By Not Requesting a Continuing Objection and Also Stating "No Objection" to the Introduction of Exhibits 22, 23, 24, 26, and 27, AAA Waived Their Right to Appellate Review of Claims Relating to the Introduction of This Evidence

At the beginning of the second day of trial but not directly prior to Wyland's testimony, AAA again challenged Fenton Auto's change in their theory of damages, and AAA specifically challenged exhibits prepared by Wyland under Fenton Auto's new comparative theory of damages that were not produced until May 6, 2025, arguing this late production prejudiced AAA. The trial court ruled AAA could impeach Wyland by comparing the earlier interrogatory answers with the supplemented ones stating a

different theory of damages, but the court reiterated its earlier ruling that any new documents supporting theories resulting from information revealed during discovery were admissible, stating: "I've already ruled on that. … I think you guys can refer to the order [denying AAA's motion to strike/in limine]." AAA did not request a continuing objection.

During Wyland's testimony, Fenton Auto requested admission of Exhibits 22, 23, 24, 26, and 27, which were documents Wyland had prepared comparing David's profitability based on the cars he bought and sold, less repair costs, versus the profitability of Fenton Auto's other wholesalers. When Fenton Auto moved to admit each of these exhibits, AAA affirmatively stated that they had "no objection" to each.

An affirmative announcement of "no objection" when evidence is sought to be admitted waives both appellate review and plain-error review. *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009); *Church*, 671 S.W.3d at 841. While courts can find an exception to this waiver when there a mutual understanding between the parties and the trial court that the objecting party did not intend to waive his or her objection by announcing "no objection," there is no evidence of such a mutual understanding here. *State v. Wilson*, 692 S.W.3d 54, 66 (Mo. App. E.D. 2024). Evidence of a mutual understanding exists when the objecting party has requested and received a continuing objection, and the record evinces a mutual understanding that the statement "no objection" means "no further objection." *Id.*; *see also State v. Loggins*, 445 S.W.3d 105, 110 (Mo. App. E.D. 2014) (mutual-understanding exception is narrow, rare, and based on actions affirmatively demonstrating understanding).

Here, AAA did not request a continuing objection, and the record did not otherwise evince a mutual understanding that AAA wanted their pre-trial objection to be continuing. Thus, by stating "no objection" to the admission of Exhibits 22, 23, 24, 26, and 27, AAA waived both appellate review and plain-error review of the trial court's pre-trial denial of their motion to strike/in limine and the trial court's subsequent admission of these documents at trial. *See Johnson*, 284 S.W.3d at 582; *Church*, 671 S.W.3d at 841.

(2) By Not Objecting to the Introduction of Witness Testimony at Trial, AAA Failed to Preserve Their Claims Relating to that Witness

As for the late-disclosed witness, AAA did not object to this witness testifying at trial. Although AAA filed a motion in limine to prevent Fenton Auto's late-disclosed witness from testifying at trial, pre-trial rulings are interlocutory, and to preserve a pre-trial objection for review on appeal, a party must renew their objection at trial. *See State v. Minor*, 648 S.W.3d 721,729 (Mo. banc 2022). AAA did not renew their objection to this witness testifying at trial, and thus this issue is not preserved for review on appeal and only plain-error review is appropriate. *See* Rule 84.13(c). However, AAA does not request plain-error review on appeal, and thus we do not consider, *sua sponte*, whether manifest injustice resulted. *State v. Shephard*, 662 S.W.3d 761, 772 (Mo. App. E.D 2023); *see also* Rule 84.13(c) (decision to exercise plain-error review is at discretion of appeals court).

Point Four is denied.

Point Five: The Trial Court Did Not Abuse its Discretion in Ordering the Notice of Nuckolls' Corporate-Representative Deposition Quashed

In their fifth point on appeal, AAA argues the trial court abused its discretion in granting Fenton Auto's pre-trial motion to quash the notice of AAA's deposition of Nuckolls, which prejudiced AAA because they were surprised by Nuckolls' trial testimony of Fenton Auto's comparative theory of damages. We disagree.

We review for an abuse of discretion the trial court's ruling on a motion to quash the notice of deposition. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992) (trial court has broad discretion in administering rules of discovery). An abuse of discretion occurs when the ruling is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration. *Vetter Constr. Co. v. Innovated Constr., LLC*, 696 S.W.3d 442, 446 (Mo. App. E.D. 2024).

Discovery rules are designed to prevent concealment of evidence and surprise at trial, and a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in a pending action. *Plank*, 831 S.W.2d at 927; *see also* Rule 56.01(b)(1). The party seeking discovery has the burden of establishing relevancy. Rule 56.01(b)(1). In addition, Rule 57.03(b)(4) provides that if a party seeks to depose a corporation, agency or other organization, that organization shall designate a corporate representative to testify on its behalf to "matters known or reasonably available to the organization." Statements made by the organization's corporate representative "will be admissible against and binding on the corporate party." *State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 551 (Mo. banc 2008).

Here, Nuckolls' corporate-representative deposition was scheduled for April 24, 2025. After Fenton Auto supplemented their discovery responses on April 23, 2025, revealing Fenton Auto's new comparative theory of damages, AAA unilaterally continued Nuckolls' April 24 deposition, stating their intent to challenge Fenton Auto's supplemented discovery responses. Accordingly, AAA filed their motion to strike/in limine, or, in the alternative, requested a continuance of the trial date and an extension of time to conduct discovery on Fenton Auto's new theory of damages. AAA set the motion for a hearing on May 2, 2025. AAA and Fenton Auto rescheduled Nuckolls' corporate-representative deposition for May 5, 2025.

While AAA's motion to strike/in limine was still pending, on April 30, 2025, AAA served Fenton Auto with an amended notice of corporate-representative deposition for Nuckolls, stating their intent to question him on Fenton Auto's initial theory of damages rather than their updated comparative theory of damages. Therefore, on May 1, 2025, Fenton Auto moved to quash the notice of Nuckolls' corporate-representative deposition arguing the deposition was in bad faith, in that AAA sought binding testimony on a theory of damages they knew to be outdated. Fenton Auto set their motion on the existing May 2 hearing date.

At the May 2, 2025 hearing, regarding Fenton Auto's motion to quash, AAA stated it needed the trial court to rule on their motion to strike/in limine so that AAA would know whether to depose Nuckolls on the new or old theory of damages, conceding that if the trial court denied their motion, they would "need to go forward with the deposition [of Nuckolls] on the new responses." The trial court ruled that same day,

denying AAA's motion to strike/in limine and granting Fenton Auto's motion to quash the notice of Nuckolls' deposition on the outdated theory of damages.

The trial court noted, however, that only the Circuit Court's presiding judge[7] had the ability to rule on AAA's motion for continuance. While the trial court explained it could not grant the continuance, it urged the parties to seek the continuance from the presiding judge, stating that there appeared to be grounds for one. AAA did not request a continuance and did not attempt to reschedule Nuckolls' corporate-representative deposition on Fenton Auto's new theory of damages in the remaining week before trial. Moreover, AAA informed the trial court on May 5, 2025 that it did not intend to seek a continuance but planned to go forward with the May 12 trial date.

The trial court's decision here to quash AAA's notice of deposition on an outdated theory of damages was not an abuse of its discretion. The purpose of discovery is to reveal relevant evidence that will be adduced at trial to allow the other party the opportunity to prepare a defense. *See Plank*, 831 S.W.2d at 927; *see also* Rule 56.01(b). The theory of damages that would be relevant at the trial here was the new comparative theory of damages, rather than the old theory. AAA had informed the trial court that if the trial court allowed Fenton Auto to proceed with the new comparative theory of damages, AAA would depose Nuckolls on that new theory. Under these facts, the trial court would

[7] The Honorable Christopher E. McGraugh was the presiding judge for the City of St. Louis Circuit Court, while Michael W. Noble was trial judge assigned to hear this case.

have no reason to expect AAA would not then depose Nuckolls on the new theory, as AAA stated they would.

To the extent that AAA argues the time was too short to reschedule Nuckolls' deposition, AAA did not request a continuance, despite the trial court's urging to do so. AAA knew of Fenton Auto's new damages theory for three weeks before trial and could have conducted discovery during this time. Specifically, AAA had the opportunity to depose Nuckolls on May 5, 2025 on this new theory of damages but instead filed a notice of their intention to depose Nuckolls on the outdated theory of damages. Under these circumstances, we cannot say that it was the fault of the trial court that AAA was unprepared for Nuckolls' testimony at trial.

The trial court did not abuse its discretion in granting Fenton Auto's motion to quash the notice for a deposition seeking binding answers on a theory of damages that would not be presented at trial.

Point Five is denied.

Point Six: AAA's Claim for Violation of the Merger Doctrine is Not Preserved

In their sixth and final point on appeal, AAA argues the trial court abused its discretion in denying their motion to amend the judgment because, while Fenton Auto presented a single claim of damages, the trial court allowed the jury to award damages on three alternate theories of liability, thus awarding triplicate damages, which violated the merger doctrine. This claim is not preserved for review on appeal, and we find no plain error occurred.

Here, AAA claimed damages in the amount of $1,063,116 in lost profits stemming from three alternate theories of liability: breach of fiduciary duty, fraud, and tortious interference in business relationship or expectancy. Fenton Auto submitted proposed jury instructions that included verdict directors for each of their three claims, instructing the jury to award damages separately based on each theory. AAA did not object to Fenton Auto's verdict directors, and the trial court accepted them. The jury found against AAA on all three theories of liability and awarded Fenton Auto $350,000 on each theory.

The merger doctrine prevents a party from recovering twice for the same injury. *Senu-Oke v. Modern Moving Systems, Inc.*, 978 S.W.2d 426, 432 (Mo. App. E.D. 1998). Although a single injury may entitle a plaintiff to proceed on several theories of recovery, the plaintiff is not entitled to receive more than one full recovery for the same harm. *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 197 (Mo. App. E.D. 2007*); see also Senu-Oke*, 978 S.W.2d at 432 (if plaintiff proves only one amount of actual damages, jury cannot award an amount higher than proven damage amount). Accordingly, if the damages for multiple theories of recover arise from the same facts, then the damage awards should be merged into one. *Heckadon v. CFS Enterprises, Inc.*, 400 S.W.3d 372, 381 (Mo. App. W.D. 2013).

AAA argues they preserved this issue for review by raising it in their motion to amend the judgment. However, Rule 70.03 provides that "[n]o party may assign as error the giving or failure to give instructions unless that party objects thereto on the record during the instructions conference, stating distinctly the matter objected to and the grounds of the objection." AAA here did not object to the jury instructions and the

verdict directors during the instruction conference. Without an objection to the jury instructions on the grounds that they submitted multiple claims requesting the damages from the same injury, the merger issue is not preserved for review on appeal. *William v. City of Kansas City*, 641 S.W.3d 302, 331-32 (Mo. App. W.D. 2021) (because Kansas City failed to object during instruction conference that two claims requested recovery for same injury, merger issue was not preserved for appellate review).

This Court has the discretion, however, to review unpreserved issues for plain error. Rule 84.13(c); *Prosser v. Kallas*, --- S.W.3d ---, 2026 WL 1729808, *2 (Mo. App. E.D. June 16, 2026). We may exercise our discretion to review for plain error where the appellant has shown there is error that is evident, obvious, and clear, and where manifest injustice or a miscarriage of justice will result from the failure to correct the error. *State v. Jones*, 725 S.W.3d 577, 582-83 (Mo. banc 2025); *Prosser*, 2026 WL 1729808 at *2. In a civil case, we will only reverse for plain error if the injustice of the error is "so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case." *Prosser*, 2026 WL 1729808 at *2 (citation and internal quotation marks omitted).

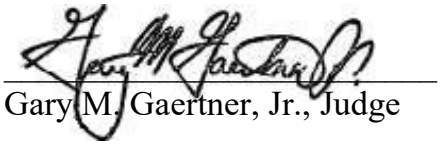
This Court has previously exercised its discretionary plain-error review after finding manifest injustice resulted from jury instructions that allowed the jury to return duplicative damages in excess of the proven amount of actual damages. *See*, *e.g.*, *Senu-Oke*, 978 S.W.2d at 432. However, this is not the situation here. Rather, here Fenton Auto presented evidence of actual damages of $1,063,116 in lost profits, and the jury returned a total verdict for less than that amount. Thus, even if there was error in the jury

instructions, it did not result in manifest injustice here. *See Racket Merchandise Co. v. 718 Grand, LLC*, 713 S.W.3d 672, 683 (Mo. App. W.D. 2025) (declining to grant plain error review of claim that jury instructions permitted double recovery to which defendants failed to object when defendants did not claim total amount of compensatory damages awarded by jury was unsupported by record). Moreover, because we have reversed the judgment in favor of AAA on Fenton Auto's claims of breach of fiduciary duty and fraudulent misrepresentation, AAA is only liable for $350,000. We decline to grant plain-error review.

Point Six is denied.

Conclusion

We reverse the trial court's judgment on the jury's verdicts in favor of Fenton Auto for breach of fiduciary duty and fraudulent misrepresentation and remand for the trial court to enter a judgment in favor AAA on those claims. In all other respects, we affirm the judgment of the trial court.



Gary M. Gaertner, Jr., Judge

Rebeca Navarro-McKelvey, Presiding Judge, and
James M. Dowd, Judge, concur.