STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Counter Defendant-Appellee/Cross-Appellant,

v

TIMOTHY BROE, ELEANOR BROE, and BROE REHABILITATION SERVICES, INC.,

Defendants-Counter Plaintiffs-Appellants/Cross-Appellees.

UNPUBLISHED
August 21, 2008

No. 274809
Oakland Circuit Court
LC No. 2004-063179-CK

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendants, Timothy Broe, Eleanor Broe, and Broe Rehabilitation Services, Inc.,[1] appeal as of right from a judgment, in accordance with a jury's verdict, awarding plaintiff, Allstate Insurance Company, $3,000,000 on its claims of payment by mistake of fact, insurance fraud, breach of contract, and unjust enrichment. The trial court also awarded Allstate costs in the amount of $12,129.29, and judgment interest in the amount of $245,057.39. The judgment also reflected the jury's findings of no cause of action on Allstate's no-fault claim and defendants' no-fault counterclaim. We affirm.

Allstate filed a complaint for declaratory relief in December 2004 against defendants Timothy and Eleanor[2] and Broe, an entity that provides rehabilitation services primarily to persons who have suffered closed head injuries.[3] Allstate provided no-fault automobile insurance coverage to several Broe patients. Allstate alleged in its complaint that defendants are not properly licensed and improperly billed for services. Allstate sought to recover approximately $3.5 million from defendants. It raised claims for payment by mistake of fact,

[1] Hereinafter Timothy, Eleanor, and Broe, respectively.

[2] Timothy and Eleanor are officers, directors, and shareholders of Broe.

[3] The use of the term "Defendants" will encompass all three defendants for the sake of clarity. The individual defendants will be identified by name where necessary.

fraud, insurance fraud, breach of contract, unjust enrichment, and violation of the Michigan no-fault act. It also sought certain declaratory relief.

Defendants filed a counterclaim on February 15, 2005. Defendants alleged that Allstate knowingly, willingly, and voluntarily paid Broe for several years for its customary and reasonable charges in the treatment of Allstate's insureds, but that in January 2005 Allstate "unilaterally ceased all reimbursement to Broe for the customary and reasonable charges submitted to Allstate, constituting arbitrary, capricious, and unlawful actions." Defendants further alleged that Broe "has provided, or is providing, reasonably necessary products, services, and accommodations to Allstate's insured for purposes of their care, recovery, or rehabilitation, and all such treatment or rehabilitative occupational training was related to the auto accidents of Allstate's insured." Defendants also alleged that Broe submitted reasonable and customary charges to Allstate relating to the treatment or rehabilitative occupational training of Allstate's insureds and that Broe provided reasonable proof to Allstate as to the fact of each loss sustained and the amount of each loss sustained. Defendants raised claims of breach of contract as to third party beneficiary, tortious interference with contracts, tortious interference with business relationships, and defamation. Defendants also sought declaratory relief, seeking a judgment "requiring Allstate to pay all of Broe Rehabilitation's future reasonable and customary charges incurred for the treatment or rehabilitative occupational training of Allstate's insured, and that Allstate may not interfere in its insureds' choice of Broe Rehabilitation as their provider."

Defendants moved for summary disposition, presenting general arguments that Allstate did not have standing to pursue claims based on alleged licensing violations and that the individual defendants could not be held liable to Allstate. They also challenged Allstate's individual claims, asserting with regard to each either that Allstate failed to plead a cause of action or that Allstate failed to present sufficient evidence to support the claim. On July 28, 2005, the trial court entered an order denying defendants' motion for summary disposition.[4]

According to Allstate, it paid approximately $3.5 million over a six-year period to Broe. After an investigation, however, it made a decision to stop paying Broe and to evaluate the patients and move them to facilities more suitable for their needs. This was after the investigation revealed that Allstate "was deceived into believing that there was a program at Broe Rehabilitation that was capable of taking care of the persons who were there and that there were licensed personnel on staff who were able to administer those therapies and those types of things that Allstate was being told." Allstate asserted that defendants acted fraudulently in billing for services not performed and billing for services it could not legally render and therefore not legally bill. Allstate also asserted that defendants put an illegal mark-up on bills, and profited from services it could not legally perform. Even if the services were legally

[4] Defendants filed a delayed application for leave to appeal on November 9, 2005, challenging the trial court's denial of their motion for summary disposition and asserting with respect to each specific claim that Allstate had failed to plead a valid claim and/or that no genuine issue of material fact existed. This Court denied defendants' application for leave to appeal for failure to persuade the Court of the need for immediate appellate review.

rendered, Allstate believed that the duration and quantity of treatments was excessive. Allstate further asserted that Broe did not have the appropriate staffing to run a brain injury program. Allstate also portrayed defendants as having violated the standard ethics of its profession by giving improper loans to clients with head injuries, creating improper relationships with those clients, in some cases resulting in dependency and the failure of the program.

Defendants asserted that the services provided at Broe were appropriate and reasonably necessary. Defendants claimed that even though the professionals needed for the treatment of patients with brain injuries were not on staff at Broe, Broe worked with numerous outside professionals. Defendants asserted that they did not act unethically and were compliant with the ethical standards of the profession. Defendants further asserted that they did not bill for or perform any services Broe could not legally render, and that the additional fee on assigned bills was not a mark-up but a valid charge for overhead expenses.

Trial Testimony

Allstate presented the testimony of several witnesses in support of their theories. Dr. Theodore Ruza, a psychiatrist who had examined and treated Brian Hillen, an Allstate insured and patient at Broe, originally treated Hillen from August of 1992 until May of 1994. He discontinued treating Hillen due to Hillen's substance abuse and noncompliance with medications and recommendations. In 1994 he recommended inpatient substance abuse treatment for Hillen. Hillen's treating physician requested that Dr. Ruza perform a competency evaluation on Hillen in February of 2004. Dr. Ruza noted that Hillen was drinking on a regular basis and using marijuana while at Broe. Hillen told him that he obtained the alcohol at the corner store, and obtained the marijuana from his roommate at Broe and other people in the Broe program. Dr. Ruza testified that he was not surprised that Hillen attempted to gain access to alcohol and marijuana, but was concerned that Hillen continually had success. Dr. Ruza also stated that if someone were continually not being treated due to noncompliance while in a structured program, he would question whether the program was proper for that person.

Eleanor is the co-founder and secretary/treasurer of Broe, and is a part owner of TECMA Corporation, which owns the properties used by Broe in their rehabilitation program. She acknowledged that Broe leant money to clients from time to time as needed. Eleanor acknowledged that there are no licensed healthcare professionals on staff at Broe, but that some professionals come to Broe to provide services. Eleanor further testified that Broe can only bill for psychological services as a favor to someone else because Broe does not have staff licensed to provide such services.

Certified Medical Audit Specialist Donna Bauby reviews medical files for insurance companies and was assigned files to review by Allstate. Bauby testified that it is her job to identify inconsistencies in the medical records and bills. She was asked to look at the files for Michael Hall, an Allstate insured and patient at Broe. She noted that the injury reported for Hall by Broe was not consistent with the police report regarding Hall's accident and subsequent behavior. Specifically, she observed that the files indicated that after Hall's accident he followed the semi-truck that had hit his vehicle. She indicated that this behavior is not typical of someone with a closed head injury. Bauby was concerned that Hall's treatment exceeded what was necessary and appropriate in light of his preexisting injuries and disability. Bauby also found inconsistencies in the Broe bills. Allstate was billed for group therapy at $95 per hour from 9:00

am – 2:00 pm. However, the records were clear that the sessions did not start until 9:30 a.m., that there was a fifteen-minute bathroom break and a one-hour lunch period, with no break in the billing. Bauby also testified that Broe billed even if a patient did not attend a session. No documentation of a staff member being present during the sessions, of the therapy being provided, or its effectiveness was provided. Bauby noted that the general rule is that an insurance company will not pay a claim if documentation is not provided to support the claim.

Bauby further testified that Broe billed $125 for psychological counseling sessions provided by Len McCulloch, a Master's level limited license psychologist, but no documentation of the sessions was provided. Medical management services were also quoted and billed at $110 per hour and billed in fifteen-minute increments. The standard practice for billing this service is six-minute increments. Broe also billed for rehabilitation counseling, but did not identify the therapist or provide documentation.

Pamela Fienberg-Rivkin, a Certified Case Manager, testified as an expert witness with regard to the management of people with brain injuries. Allstate requested that Rivkin look into alternate facilities for its insureds being treated at Broe. Rivkin set up physician's appointments for three individuals, Hillen, Wing Lee, and Michael Gray, and requested that recommendations on facilities and treatments be made. Hillen had drug and alcohol problems and was transferred from Broe to Rainbow Rehabilitation on November 15, 2005, because of his marijuana use at Broe. Rivkin testified that she believed Hillen's condition deteriorated while at Broe because there were no consequences for his poor behavior.

Rivkin noted that Lee participated in the vocational program at Broe by working in the Broe office sixteen hours per week, but there was no indication that he participated any other programs. Rivkin pointed out that although Lee was at Broe for a lengthy period of time, few records existed regarding his treatment. Lee's brother requested and was provided with a facility comparison by Rivkin. Rivkin looked at three other facilities and compared them to Broe in light of treatment recommendations provided by Dr. Perlman, a physical medicine and rehabilitation doctor who evaluated Lee at Rivkin's request. All three other facilities had nursing staffs, but Broe did not. Lee also needed physical, occupational, and speech therapists to monitor his program. Unlike Broe, all three other facilities had such therapists on staff. Two of the other programs have individual group therapies and activities in the community, whereas Broe's program is all on site.

Gray was on a number of medications, yet Rivkin did not know of anyone at Broe licensed to administer the medications. Gray had been at Broe since March of 1993, but had experienced no improvement in his condition. Broe managed his finances, collected his mail, and paid his bills all while he was a patient at Broe. Rivkin testified that Gray lived in a house owned by Broe. Allstate paid $450 or $500 per day for Gray to live in the house, but the records did not reflect anything "special" about the house to justify the charge.

Rivkin made the conclusion that all three Allstate insureds whose records she reviewed needed services that Broe was not providing. Rivkin testified that a psychologist should be on staff to manage the staff and educate them to manage the clients due to the intensity of the clients' needs. She also noted that someone is needed to set up and oversee the program appropriately.

Dr. Charles Seigerman, a licensed psychologist specializing as a neuropsychologist, reviewed the medical records of Gary Taylor and Michael and Susan Kalnasy, and performed a neuropsychological evaluation on Taylor. Dr. Seigerman diagnosed Taylor with malingering, or faking. Dr. Seigerman testified that he believed that, at the worst, Taylor had only a mild brain injury. Dr. Seigerman also believed that Taylor was overmedicated, and that the program at Broe was "overkill" for a person with Taylor's deficits. Dr. Seigerman did not find sufficient evidence to diagnose a traumatic brain injury. Dr. Seigerman believed that the treatment program at Broe was reinforcing Taylor's disability, meaning that by treating for a brain injury, Taylor started believing he had a brain injury and that his problems were related to that injury.

In questioning Dr. Seigerman, Allstate presented a document from Broe containing psychological diagnoses. The diagnoses appeared to have been made by Timothy. Dr. Seigerman testified that a psychiatrist, psychologist, or possibly a licensed social worker must make such diagnoses. Dr. Seigerman explained that it made no sense for Timothy to try to determine issues for treatment before neuropsychological evaluations were complete. Timothy's report also contained a recommendation for a neurocognitive evaluation, but Dr. Seigerman did not know of anyone on staff at Broe licensed to perform such an evaluation. Dr. Seigerman recommended that Taylor find some place to live outside the Broe system because Taylor did not have a traumatic brain injury. He further testified that a psychologist is required to run a traumatic brain injury program and a licensed counselor's training is not sufficient to run such a program.

In his record review of Michael and Susan Kalnasy's records, Dr. Seigerman noted that the police report indicated that neither party suffered an injury in the accident. He opined that this would indicate any injuries were rather mild, not catastrophic. Dr. Seigerman opined that Michael Kalnasy had a neck injury at the worst. Dr. Seigerman recommended that Michael Kalnasy not continue at Broe because he had either no injury or only minimal injury as a result of the accident and nothing in the record justified inpatient treatment.

Dr. Seigerman noted that diagnoses contained in Timothy's report on Susan were largely the same as for Michael Kalnasy, and since the accident was not severe, there should have been, at worst, only soft tissue damage. Again Dr. Seigerman did not believe further treatment at Broe was necessary.

Charles Mirisciotti, a private vocational consultant, limited license psychologist, and certified rehabilitation consultant, reviewed Broe's files to examine the appropriateness of the vocational activities, duration of treatment, whether there were clear goals, and whether the activity itself was appropriate. Mirisciotti testified that he did not have success finding vocational goals listed in the files that he reviewed for the Allstate insureds treated at Broe. He also felt that four of the insured's whose files he reviewed -- Jessie Huey, Wing Lee, Michael Gray, and Brian Hillen -- were not good candidates for vocational consulting or vocational rehabilitation because they had uncontrolled psychological or behavioral problems, including, in Hillen's case, drug use. Mirisciotti also looked at the file of Richard Olepa and noted that Olepa was at Broe for five or six years and demonstrated no progress toward becoming independent. He also testified that Olepa seemed to have a strong dependency problem that was keeping him from improving, and that this was a problem because a primary goal of vocational rehabilitation is independence. Mirisciotti specifically pointed out that he observed no goals set for Olepa, no progress toward a goal, or that any goals were even being pursued.

Mirisciotti also reviewed the files of Dan Alder and noted that he was in the sheltered workshop at Broe, known as the WIN Program. However, the files did not contain a breakdown of Alder's activities, the amount of supervision he received, or what tasks he was succeeding at or having problems with. He also noted that the files indicated that Alder had vocational rehabilitation sessions three times per week, but the files did not indicate what rehabilitation was being performed or where it was taking place. Mirisciotti also indicated that he generally did not see a patient three times per week for vocational counseling, and that such visitation was more in line with services provided by a psychologist.

Thomas Remski, an Allstate employee on the special investigation unit investigating personal injury protection claims, was responsible for reviewing the Broe bills that were randomly selected by the claims department for review due to concerns by the claims department. Remski noted that bills from providers are typically taken at face value and paid due to the high volume of bills received and the limited resources available to evaluate every bill. However, in the special investigation unit, each bill is looked at and scrutinized in detail. Remski opined that Allstate paid Broe for services that were not lawfully rendered. He pointed out that Broe billed for psychological services provided by Len McCulloch, and an investigation revealed that McCulloch did not have any supervision, as his licensing required. Broe had no nurses on staff to administer medication. Remski also noted that vision therapy was provided by Dr. Ingersoll and billed at either $135 per visit or $125 per visit. However, Allstate learned that Dr. Ingersoll only charged $75 per visit. The difference was the result of an illegal mark-up or fee-split. Because of inconsistencies in Broe bills, Allstate made the decision not to honor Broe claims.

Remski believed that Allstate paid Broe for services for Hillen that Broe did not provide. Allstate was charged a $475 per diem charge per day, but the bills did not specify the services provided. Hillen was to receive 24-hour supervision, but did not, and even was permitted to walk unsupervised to the corner store to purchase alcohol. Remski pointed out that Hillen had problems with drugs and alcohol and that Broe documents identified another Broe patient as the person believed to be supplying the drugs.

Remski noted an incident involving Alder where Alder had a seizure in 2002 and ended up comatose for six days as a result. Alder was given a combination of Phenobarbital, Valium, and Dilantin, according to a Broe report. However, one month prior to the incident, Dr. Nisar, Alder's treating neurologist, indicated that Alder was to continue to take Diastat for seizures. A closure report from Timothy on March 31, 2003, indicated that no Diastat was administered per prescription from treating neurologist, Dr. Verma. However, the records indicated that Dr. Nisar, and not Dr. Verma, was the treating neurologist.

Remski also reviewed the Broe records for Michael and Susan Kalnasy. He noted that the two were in a Corvette at the time of their accident, that the car sustained minor damage for a Corvette, and that Susan Kalnasy left the hospital without being treated and did not go back to the emergency room for two days. Remski testified that Timothy diagnosed the traumatic brain injury. He also testified that Broe billed Allstate for services for July 26, 2002, the date of the car accident.

Remski also observed that Broe submitted bills for Richard Olepa for services not rendered. Broe billed Allstate $575 per day from March 1-6, 2003, yet Olepa walked away from

the facility three days earlier. The bill was paid after it was adjusted. Broe also billed Allstate for services for Olepa for the full month of October 2001, at $450 for the first 23 days and $550 for the last 8 days, for a total of $14,750. However, Allstate was also billed by Sinai-Grace Hospital for Olepa's inpatient hospitalization from October 12-24, 2001. Remski also testified that Broe again billed Allstate at $550 per day for July 2002, for a total of $17,050, despite Olepa's hospitalization for three days at St. Mary Mercy Hospital. He also stated that Broe reports showed that Olepa participated in the remodeling of the home he lived in. Broe placed Olepa in the home, which is owned by TECMA. Broe billed Allstate $90 per hour for vocational rehabilitation services for services that Olepa performed at the home -- many days up to $720 per day.

Catia Monfortin-Ferris, a special investigation unit analyst for Allstate, established the damages in the case. Ferris identified open and closed files and testified regarding the amounts paid by Allstate to Broe. She gathered information on amounts paid from 1099 statements of payments issued to contractors at the end of each year as identified by the tax identification number given to each facility. Ferris calculated that Allstate had paid Broe a total of $3,558,665.56 for the six-year period in question for all of its insureds at Broe. Ferris testified that Allstate was asking for the return of all the money paid back because it could not determine what services were actually performed. Allstate could not rely on bills presented by Broe because of irregularities in the bills and lack of specificity in the bills. Ferris pointed out that if Broe would have provided sufficient information, Allstate might have been able to determine which services were being billed.

Dr. Manfred Greiffenstein, a psychologist specializing in neuropsychology and sleep disorders medicine, performed a record review on Michael and Susan Kalnasy. Dr. Greiffenstein observed that Timothy Broe made diagnoses that he was neither trained nor licensed to make, and that the reports prepared by Timothy looked as if a psychologist was giving and interpreting tests and doing a poor job. Timothy administered a series of tests that are usually only given and interpreted by psychologists, and his interpretations of the data provided in his report were erroneous. Dr. Greiffenstein observed that the Kalnasys were seriously misdiagnosed. He pointed out that the diagnoses Timothy gave for the Kalnasys are usually reserved for people with very serious brain injuries, which the Kalnasys did not have. He also noted that even a psychologist couldn't diagnose seizure disorder, as Timothy did; rather, only a medical doctor can make such a diagnosis. Dr. Greiffenstein noted that he saw no evidence of any impairment in cognitive function and no evidence that Michael Kalnasy suffered even a minor brain injury. Regarding a symptom checklist filled out by Susan Kalnasy, Dr. Greiffenstein noted that she reported 49 of 90 symptoms on the checklist to a moderate to severe degree. He pointed out that there is no diagnosis defined by 49 symptoms and this seemed to be excessive symptom reporting, more consistent with exaggeration than any known form of emotional disorder. Dr. Greiffenstein observed that Timothy did not report exaggeration and accepted as true everything Susan Kalnasy said.

Dr. Robin Hanks, the chief of rehabilitation, psychology, and neuropsychology at the Rehabilitation Institute of Michigan at the Detroit Medical Center, testified that Olepa was unhappy with the Broe program and felt that everyone was "making money off of him" and that he was not being treated with the care and respect he deserved. Olepa was also concerned that Broe reported that he could not do a number of things that he was capable of doing for himself.

Olepa also felt he was overmedicated and therefore had weaned himself off medications. Dr. Hanks testified that Olepa came to her on his own for an examination to prove he could take care of himself. Dr. Hanks found that Olepa functioned within normal limits, that he had a good recovery from a brain injury, and that his cognitive skills were within the normal limits. She did not believe that Olepa needed cognitive remediation.

Dr. Hanks also stated that loaning money to a patient or helping build a case for a patient on which to file suit would be considered unethical because it would constitute a dual relationship between the provider and patient. Such a relationship with a person with a closed head injury is dangerous because it could create dependency or suggest emotional attachment. Dr. Hanks believed that Broe may have reinforced disabilities and led Olepa to believe they had a greater disability than they actually had. Dr. Hanks noticed that most Broe patients received the same treatment and she was concerned that treatments were not individualized. Dr. Hanks also was concerned about the lengthy duration of treatments at Broe. She did not believe Broe had the facilities to provide the care prescribed.

Following the trial court's denial of defendants' motion for directed verdict, defendants called Ann Manning, the vice-president of community relations at Broe. Manning testified that Broe billed services at a per diem rate because the insurance industry requested per diems to make it easier to process billing. She disagreed with Remski that the services in the per diem rate were not specified. Manning described a "partnership"[5] between Dr. Ingersoll and Timothy Broe, where Dr. Ingersoll provided vision therapy and Broe provided a place for services to be rendered as well as billing. Manning stated that when a patient is absent from Broe, or when a patient is hospitalized, that patient should only be billed $200 for a bed hold, and the billing department may not know of these absences because they are usually not present at team meetings.

In discussing a fee schedule authored by Manning and approved by Timothy, Manning agreed that a person looking at the fee schedule could believe that Broe will actually provide the services listed. She admitted that by including "psychological counseling" Broe indicated that it had psychologists who performed psychological counseling. The fee schedule did not identify the psychologists as "independent contractors." She acknowledged that Len McCulloch had signed reports indicating that he was the director of psychological services at Broe and that using that title is misleading. Manning also admitted that the fee schedule was misleading by including "neuropsychological testing and psycho-vocational testing," because Broe did not have anyone on staff licensed to provide such testing.

Manning confirmed that Broe loaned money to clients. She elaborated that Broe will help build cases for clients for Medicare or Medicaid, and if it thinks the client will prevail, it will loan money against the case. Manning also testified that Broe gives stipends or allotments of spending money that clients do not have to repay. Broe has also given clients money to purchase cars, but she did not know if the clients have to repay the money.

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[5] Manning admitted that she never saw any paperwork reflecting a partnership and was using the term loosely.

Timothy testified that he and Eleanor started Broe in 1987. He pointed out that Broe is CARF certified, which is the highest form of accreditation. Timothy Broe also testified that the adult foster care facilities are licensed through the state. He described the training of Broe employees as being "through the county, private curriculum set up at Broe Rehabilitation, and provided by private agencies that do training and sell materials."

Timothy explained that clients worked on Broe homes as part of vocational therapy. He testified that Broe gave Olepa a loan to buy a truck in order to meet the vocational goals of getting him driving and selling scrap at a flea market. He stated that the transaction was well documented and did not impair his independent and professional judgment with respect to Olepa's vocational care. Timothy Broe also stated that Broe has loaned money to clients to purchase psychotropic medications.

Timothy denied acting as a psychologist or neuropsychologist. He testified that he provided a working diagnosis as a guide for all providers to see and did not intend it to be a permanent diagnosis. He did not know if he was permitted to profit from psychological services because he is not a psychologist, but acknowledged that he charged more to Allstate than he paid McCulloch and Dr. Ingersoll. He stated that the mark-up was justified because Broe provided the administration, billing, room, clerical services, and certain other commodities and services. He also asserted that McCulloch's services were included in the per diem charge. However, Allstate presented Hillen's bill that showed that Allstate was charged both the per diem rate and for psychological services. Dr. Broe also testified that bills do not represent that services were being performed by Broe staff, but do represent that services were provided.

Timothy testified that the $550 per day that Broe billed for Gray to live in a Broe home without 24-hour care was not just for the home, but also for Gray's comprehensive treatment plan. He disagreed with Dr. Perlman's assessment that Gray was dependent on Timothy. Timothy also denied managing Gray's finances.

Dr. Gerald Shiener, a medical doctor with a specialty in psychiatry that treats traumatic brain injury patients as part of his practice, testified that he had seen and treated Broe clients, that he had referred patients to Broe, and that he had experienced good communication and documentation in his dealings with Broe.

Dr. Shiener found Hillen to have cognitive impairments. He recommended continued rehabilitation services and believed that cognitive remediation was reasonably necessary and that Hillen would benefit from job coaching or vocational rehabilitation. He stated that Broe would be the type of facility he would refer Hillen to. He diagnosed Lee with personality change and psychotic disorder caused by a closed head injury stemming from the accident. Dr. Shiener believed that Broe provided the care he prescribed. Dr. Shiener did not believe that the treatments he prescribed needed to be administered by registered occupational therapists or licensed physical therapists for either Hillen or Lee.

Dr. Shiener also reviewed the files of Gray and the Kalnasys. He testified that various doctors recommended the types of care provided by Broe for Gray and agreed that he should be in structured and supportive residential living and that he should be involved with cognitive therapy. Regarding the Kalnasys, Dr. Shiener stated that it is not unusual for a husband and wife involved in the same accident to suffer similar injuries.

Dr. Shiener further testified that he did not believe that cognitive remediation is discipline-specific and that speech therapists, teachers with degrees through the college of education, and professional counselors with supervision can provide cognitive remediation. Dr. Shiener believed that Timothy supervised the cognitive remediation program at Broe, but he did not know Timothy's licensure. Dr. Shiener testified that he would not loan money to patients, and considers such a practice to be unethical because people with brain injuries have an inability to recognize and care for themselves.

Dr. Owen Perlman, a medical doctor specializing in physical medicine and rehabilitation and traumatic brain injuries, performed Independent Medical Exams (IMEs) on behalf of Allstate for Lee, Hillen, and Gray. Dr. Perlman noted that Hillen was difficult to treat due to his problems and needed residential care, cognitive remediation, medical and case management, and sheltered workshop. Dr. Perlman did not believe that there was any indication that Timothy Broe was acting as or treating as a psychologist for Lee. He also noted that Gray had a history of traumatic brain injury and a poor educational background, adding that Broe was in a de facto conservatorship with Gray managing funds on his behalf. Dr. Perlman believed that Gray needed a psychologist or psychiatrist to do certain things and this did not occur at Broe. Gray's only contact with Broe was driving to the center for medications daily.

Regarding the Broe program, Dr. Perlman believed that Timothy was qualified to do cognitive remediate and cognitive behavioral work training. He noted that a patient's ability to obtain illegal drugs while in the facility might indicate that the care in the facility is substandard. Dr. Perlman did not believe it was fee splitting to have a doctor come in as a subcontractor and bill the doctor's charge and administrative expenses on top and that the bill only needed to reflect the psychological services. He did not believe, however, that it was a good practice to get into lending money to clients and that a guardian should be appointed if the client had no money and should work through the appropriate resources to get medications or money. Dr. Perlman further explained that lending or gifting money could result in dependency. Dr. Perlman also testified that Broe employees have called clients who left Broe to try to get them back into the program.

Steve Sipporin, an attorney acting as guardian for some Allstate insureds, including Hillen, thought Broe compared favorably well to other programs. However, Sipporin had not assessed the program and is not in a position to evaluate programs and licenses of staff. Sipporin also testified that stipend programs for spending money are not common, and that clients usually do chores and get stipends for groceries or cigarettes for their work.

Dr. Bradley Sewick, a licensed psychologist with a specialty in neuropsychology. who treats patients with traumatic brain injuries, testified that cognitive remediation did not need to be implemented by a psychologist and can be provided by speech and language pathologists. He believed Timothy was qualified to run a cognitive remediation program. Dr. Sewick testified that it might be permissible for Broe to pay for medications if there is a medical emergency, and that if loans are given the provider must avoid exploitation and dual relationships. Dr. Sewick pointed out that financial relationships could create dependency. He also saw no problem with billing over the hourly rate for services of subcontractors or independent contractors and saw this to be a common practice.

I

Defendants first argue that the trial court erred by denying defendants' request for a directed verdict because Allstate failed to present sufficient proofs with regard to the issue of damages. They contend that Allstate is seeking to recover the sum total of the bills paid by Allstate to Broe for all of the Allstate insureds who were treated at Broe, without establishing the amount of damages applicable to each insured. Thus, they assert that the request for damages was speculative.

This Court reviews de novo a trial court's decision on a motion for a directed verdict, reviewing the evidence in the light most favorable to the nonmoving party. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006). A motion for a directed verdict should be granted only if the evidence fails to establish a claim as a matter of law. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Thus, a directed verdict is only appropriate where there is no factual dispute on which reasonable jurors could disagree. *Smith v Foerster-Bolser Construction, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006).

Viewed in a light most favorable to Allstate, the evidence showed that Broe was engaged in a pattern of inappropriate or fraudulent billing. Defendants billed Allstate for services it either did not or could not legally provide to Allstate's insureds. Allstate also presented evidence to show that it could not give a precise account of any services billed that may have been appropriate because no proper documentation was provided by defendants to establish what services billed were actually legally provided. Remski testified that Allstate was charged a $475 per diem charge per day for Brian Hillen but the bill never specified what services the charge was for. Ferris also pointed out that Allstate could not rely on Broe bills because of irregularities and lack of specificity in the billings. Ferris added that if Broe would have provided sufficient information, Allstate might have been able to determine which codes were billed and for which services. For example, Timothy Broe testified that the $550 per day that Allstate paid for Gray to live in a Broe Home without 24-hour care was not just for the home, but also for Gray's comprehensive treatment plan. Defendants, however, failed to elaborate as to what that treatment plan entailed. Additionally, Allstate presented evidence that, for some Allstate insureds, no services rendered by Broe would be appropriate and necessary due to minor injuries sustained and lack of traumatic brain injury.[6] Since Broe specializes in traumatic brain injury treatment, it would not be reasonable and necessary for Allstate insureds without traumatic brain injury to be treated at such a facility.

Defendants cite to *Dolomite Limestone Products Co v Kennedy-Van Saun Mfg & Engineering Corp*, 241 Mich 279, 282; 217 NW 26 (1928), for the proposition that if the damages are capable of being proven, it is Allstate's burden to do so. However, defendants ignore the Supreme Court's acknowledgment that "[a] wrongdoer may not escape liability

[6] In fact, Allstate raises the argument in its brief on appeal that the jury, in denying Broe Rehabilitation's counter-claim for no-fault benefits, agreed that no services rendered by Broe Rehabilitation were reasonable and necessary.

because of the impossibility to ascertain the extent of his wrong." *(Id.)*. Here, Allstate presented evidence that "it was difficult to discern what was what service [.]" This difficulty was in part due to inconsistencies in billing codes used, where an incorrect or misleading code was used. Also, Allstate's witnesses repeatedly testified that it was difficult to find documentation verifying what services were performed or who performed them. Allstate presented evidence to show the impossibility of ascertaining the true extent of the improper billing.

The Michigan Supreme Court has stated,

> [W]here injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have. We do not, 'in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable.' Particularly is this true where it is defendant's own act or neglect that has caused the imprecision. *Purcell v Keegan*, 359 Mich 571, 576; 103 NW2d 494 (1960).

Allstate presented evidence that it was, in fact, damaged due to improper billings for services either not provided by Broe or services not properly provided by Broe, and that it was difficult to discern which billings were proper and which were not. Eleanor Broe and Ann Manning both admitted that there were no nurses on staff while Allstate repeatedly presented testimony of the necessity of nurses at a residential care facility. Allstate also presented evidence that Broe billed for psychological services provided by Len McCulloch, and an investigation revealed that he did not have anyone supervising him as his licensing, as a Limited License Psychologist, required. Even more, Allstate presented testimony by Dr. Greiffenstein that Timothy Broe made diagnoses that he was neither trained nor licensed to make. In addition, Allstate presented evidence on more than one occasion of Broe billing for services not rendered such as 24-hour care, where such care was not provided, or residential care, where the client was not at the facility due to an absence or hospital stay. "The damages are therefore neither remote nor contingent and the degree of imprecision is that with which juries routinely must contend." *Ensink v Mecosta County General Hospital*, 262 Mich App 518, 526; 687 NW2d 143 (2004).

While evidence of damages "shall not be so meager or uncertain as to afford no reasonable basis for inference leaving the damages to be determined by sympathy and feelings alone,"[7] there was evidence presented tending to show that Allstate incurred damages within a certain range, thereby allowing the jury to draw reasonable inferences on the issue of damages from the testimony presented and not "sympathy and feelings alone." "Although damages based on speculation or conjecture are not recoverable, [ ], damages are not speculative merely because they cannot be ascertained with mathematical precision [ ]." *Ensink*, supra at 525, citing *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966), and *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368; 137 NW2d 151 (1965). Allstate proved that it had paid Broe $3,558,665.56 over the six year period at issue in this case. Since Allstate had shown that it could not ascertain what amount of those payments would be valid or invalid due to the inconsistent billings by Broe

[7] *Fera v Village Plaza, Inc*, 396 Mich 639, 644; 242 NW2d 372 (1976).

Rehabilitation, there were sufficient issues of fact for the trial court to deny defendants' motion for directed verdict.

II

Defendants argue that the trial court erred by denying defendant's motion for summary disposition of Allstate's breach of contract claim because Allstate's response to the motion did not address defendants' argument that no contract existed between the parties. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer,* 471 Mich 109, 129; 683 NW2d 611 (2004).

In their amended motion for summary disposition, defendants relied solely on the deposition testimony of Remski, who indicated that he was not aware of any contracts between Allstate and Broe, but that "there may have been some agreements." He indicated that he did not know the terms of the agreements, and that he was not aware of any facts to support a claim that Broe Rehabilitation breached any contract or agreement with Allstate.

In its response to defendants' motion for summary disposition, Allstate noted that it was

> burdened by Defendants' failure to adhere to the Michigan Court Rules. Specifically, MCR 2.113(E)(1): All allegations must be made in numbered paragraphs, and the paragraphs of a responsive pleading must be numbered to correspond to the numbers of the paragraphs being answered.
>
> 2. Without numbered allegations set forth in Defendants' motion, Allstate is unable to respond to the individual allegations Defendants would put forth had they complied with the Michigan Court Rules, and therefore must rely upon its argument set forth in its attached Brief in Support.

Allstate's brief in support did not specifically address defendants' argument regarding the breach of contract claim.

A hearing was held on the motion on July 27, 2005. With respect to the breach of contract claim, Allstate argued with respect to defendants' assertion that Remski's deposition testimony failed to support Allstate's breach of contract claim that:

> The last thing is the deposition of the representative. At the time we appeared in front of your Honor we produced the representative that was available. I explained to counsel that Catia Monforton, and the person who had been handling the file, was ill and under doctor's orders that day. She is still, she will be available after September. She's still undergoing her medical treatments. She would be an additional person that I would present to the Court.
>
> I'm asking the court to deny the disposition summary. Certainly its premature and certainly because there's a question of fact.

The court therefore entered an order on July 28, 2005, denying defendants' motion, finding that "Plaintiff has standing to bring this action, has stated valid claims and there are genuine issues of material fact."

Under the circumstances, the trial court properly denied defendants' motion for summary disposition with regard to the breach of contract claim. Discovery was not yet completed, and Allstate explained that the primary person who handled this case was ill and therefore had not yet been deposed. The answers given by Remski in response to defendants' questioning regarding his knowledge of a contract or agreement did not deny the existence of a contract or agreement but, rather, revealed that he simply was unaware of whether a contract or agreement existed because he was not the primary person in charge of the case.

III

Defendants contend that the trial court erred by denying their motion for summary disposition on the counts of fraudulent concealment[8] and statutory insurance fraud. We disagree.

A review of defendants' brief in support of their amended motion for summary disposition reveals that defendants' primary argument with respect to the fraud claims was that Allstate had ample opportunity to discover the alleged fraud. They essentially argue that because Allstate had employees who reviewed the claim forms supplied by Broe in support of its billings, the employees should have been able to discover the fraud. In support of such an argument, defendants cited cases such as *Nieves v Bell Industries,* 204 Mich App 459; 517 NW2d 235 (2004), wherein this Court held that no fraud occurred where the plaintiff was given a contract with the true term of employment and it was contrary to the oral representations of the defendant's hiring manager. Such cases are inapposite, however, because in the present case Allstate had no reason to know that the claims forms defendants submitted to Allstate were fraudulent. Nothing on the face of the claim forms revealed any irregularity. Allstate's failure to learn of the fraudulent activity does not excuse defendants' allegedly fraudulent activity. See, e.g., *Rood v Midwest Matrix Mart*, 350 Mich 559, 570; 87 NW2d 186 (1957). Because Allstate presented evidence of fraud, the trial court properly denied defendants' motion for summary disposition.

IV

Defendants assert that the trial court erred by denying defendants' motion for summary disposition on Allstate's claim of payment by mistake of fact. We disagree.

In their motion for summary disposition, defendants argued that Allstate's claim of payment by mistake of fact must be dismissed because Allstate voluntarily made payments to defendants and because there was no mutual mistake of fact. Allstate responded that its

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[8] The fraudulent concealment count in the complaint was put forth to go beyond the statutory six-year limitations period. Allstate dismissed any and all claims past the six-year period on the first day of trial, and a claim for fraudulent concealment was never presented to the jury.

payments were not voluntarily made because "fraud and deception on the part of defendants in acquiring payment from Allstate is overwhelmingly evident in this matter." It also noted that "it is well-settled that a payment, although voluntarily made, if made under a mistake of a material fact, may be recovered, even if the mistake is due to lack of investigation," and that "the general rule is that money paid under a mistake of fact may be recovered whether or not the mistake is mutual." It alleged that defendants clearly accepted payment from Allstate with knowledge of the mistake/fraud and therefore Allstate may maintain an action for recovery of those payments.

Pursuant to the voluntary payment doctrine, a "voluntary payment," i.e., "one made with a full knowledge of all the circumstances upon which it is demanded, and without artifice, fraud or deception on the part of the payer, or duress of the person, or goods of the person making the payment" may not be recovered by the payor. *Pingree v Mut Gas Co*, 107 Mich 156, 157; 65 NW 6 (1895). However, "[i]t is well-settled law that a payment, although voluntarily made, if made under a mistake of a material fact, may be recovered, even if the mistake be due to a lack of investigation." *Couper v Metro Life Ins Co*, 250 Mich 540, 544; 230 NW 929 (1930); see also *Wilson v Newman*, 463 Mich 435, 441-442; 617 NW2d 318 (2000) (holding that a payor may recover a payment made under a mistake of fact if the payee has not relied to his or her detriment on the payment). Yet, "where money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying." *Montgomery Ward & Co v Williams*, 330 Mich 275, 285; 47 NW2d 607 (1951), quoting 53 ALR 949. Because Allstate presented evidence that it made payments to defendants under a mistake of fact induced by fraud, the trial court properly denied defendants' motion for summary disposition.

V

Defendants argue that the trial court erred by denying defendants' motion for summary disposition with regard to Allstate's claim that Broe and its staff was not properly licensed. We disagree.

Defendants argued below that Allstate did not have standing to pursue claims based on alleged licensing violations because Allstate failed to respond to defendants' motion by failing to set forth any facts to support the assertion that defendants provided services for which they were not properly licensed. Allstate maintained that it did present sufficient facts. Allstate argued below that:

> a reasonable person would expect that if you received a bill for psychiatric services, that the bill for psychiatric services would reflect, number one, that the services were actually performed and that they were performed by a psychiatrist from the agency that did the billing. That would be a reasonable expectation, that's what Allstate expected and in fact that's what Broe Rehabilitation billed Allstate for, psychiatric services. . . . A reasonable person would expect that if you receive a bill for psychological services that those services were performed by a licensed psychologist and Allstate assumed that and Allstate paid those bills and . . . Broe Rehabilitation submitted bills for psychological services.
>
> You would also expect that if a report is generated in support of a claim and the report comments and offers opinions as to psychiatric and emotional

> stability and provides clinical working diagnosis including organic mood disorder and cognitive disorder and traumatic brain injury, that all of those things would have been authored by a licensed competent individual who is rendering this opinion, that should be relied upon. Allstate did that. . . . the Court will also notice that in that report Broe Rehabilitation indicated that they're monitoring medications, doing cognitive remediation, and providing a variety of other service that certainly sounds like medical and psychiatric and psychological services. That's the problem. . . .
>
> Mr. Broe is not licensed to do any of those things. His wife is not licensed to do any of those things, and he has no one on staff who is licensed to do any of those things. That's fraud.
>
> When you tell someone we're providing psychiatric and psychological services and you can't do it, that's fraud.
>
> And counsel is dead wrong when he says there is no case authority for attacking a provider of services. We've cited the *Cherry* case in which the Court of Appeals authorized insurers to go after unlicensed, unauthorized, unlawful practices in the no-fault act. It's very clear. *Cherry* couldn't be more clear. That's our obligation and that's why we're here.

Defendants argue on appeal that "Allstate did not respond to this aspect of the defendants' motion with either legal arguments or facts establishing that defendants lacked the appropriate licenses to provide the services that they did." Importantly, Allstate did not bring a "claim" for alleged licensing violations. Rather, the allegation that the providers were not properly licensed was a fact set forth by Allstate in support of its clams; e.g., that defendants engaged in fraudulent activity, etc. Contrary to defendants' assertion, Allstate did respond to defendants' motion with sufficient argument and evidence to present an issue of fact. Defendants' argument is without merit.

VI

Defendants maintain that they were denied a fair trial by various evidentiary rulings and by inappropriate comments made by the judge during the trial. This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Thompson v Thompson*, 261 Mich App 353, 355; 683 NW2d 250 (2004). Comments made by a trial court are reviewed for partiality and detrimental influence on the jury. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

Defendants do not specifically advance a legal argument pertaining to this issue. The argument sections of their briefs seem to operate together, with one brief briefly mentioning the issue and stating that it was prevented from going into the issue in detail due to page constraints; the other explored the issue in detail but at the most merely presented a list of alleged errors. Defendants also included a list of alleged errors and inappropriate comments by the trial court as an attachment to their briefs. These lists, along with the listing of alleged errors in the body of the text, do not constitute a sufficient legal argument on appeal. Defendants fail to provide this Court with any analysis or the context of the alleged errors. "It is not sufficient for a party

'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Defendants' briefs simply assert that there was error on the part of the trial court without providing any legal authority or rationalization for their claims. For this reason, we decline to address this issue.[9] *Wilson, supra* at 243.

VII

Defendants maintain that the trial court abused its discretion by failing to grant a new trial on the ground that the jury's verdicts are incompatible. This Court reviews the trial court's decision on a motion for a new trial for an abuse of discretion. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc.*, 267 Mich App 625, 644; 705 NW2d 549 (2005). A judgment containing inconsistent verdicts is an issue of law that this Court reviews de novo. See *Lagalo v Allied Corp*, 457 Mich 278; 577 NW2d 462 (1998).

Defendants first argue that the jury erred in finding in favor of Allstate on both the breach of contract claim and the claim for unjust enrichment. A breach of contract claim and a claim for unjust enrichment are inconsistent claims as a contract will be implied under a theory of unjust enrichment only if there is no express contract covering the same subject matter. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). It was error for the jury to find in favor of Allstate on both the breach of contract and unjust enrichment claims. However, because the jury did not assess any specific damages on the unjust enrichment claim, the issue is moot.

Defendants also argue that it is inconsistent for the jury to award Allstate damages "under either (1) payment by mistake; (2) insurance fraud; (3) breach of contract, or (4) unjust enrichment, but then find against Allstate on its claim that defendants violated the no-fault act in charging Allstate for the services provided to its insureds."

A review of the transcript reveals that, with regard to Allstate's claims against defendants, the trial court did not instruct the jury on the elements of a claim of violation of the Michigan no-fault act. When the jury sent the court a question asking "When we mark off the proven claims on the jury verdict form do we mark with a yes or no or simply with a check mark?" the jury was instructed that it could indicate each claim "by a yes or no or a check mark or both." After the jury reached a verdict, the following colloquy occurred on the record:

> JUROR DONNEGAN: We the jury find that Allstate have proven the following claim by the necessary standards of proof: payment by mistake of fact; insurance fraud; breach of contract; unjust enrichment.

[9] We note, however, that defendants' assertions of error fail to recognize the rulings and comments of the trial court within the context of the trial.

THE COURT: And have you reached an amount for damages to Allstate?

MR. HEWSON: Your Honor, there's another question the jury has to answer before that.

THE COURT: The violation of the Michigan No-Fault?

* * *

JUROR DONNEGAN: We assess damages in Allstate's favor and against the following Defendants: Broe Rehabilitation Services, Inc., Dr. Timothy Broe, Eleanor Broe. Damages to Allstate, three million dollars.

* * *

THE COURT: Okay. And you – the claim of violation of the Michigan No-Fault Act, you have no finding on that? Right?

JUROR DONNEGAN: Correct.

THE COURT: And as to page two of the verdict?

JUROR DONNEGAN: We the jury find against Broe Rehabilitation Services, Inc. on its claim and we assess now [sic, no] allowable expenses to Broe Rehabilitation for the care, recovery, or rehabilitation of Allstate's insureds.

Under these circumstances, there is no indication that the jury reached a verdict on Allstate's claim of violation of the Michigan no-fault act and, therefore, there is not an inconsistent verdict. Further, assuming that the jury did reach a verdict and rule against Allstate on its claim of violation of the no-fault act, defendants' argument that such a verdict is inconsistent because such a verdict means that the jury found defendants' services reasonable, necessary, and lawfully rendered is not supported by the evidence. Rather, the jury verdict form is void of any findings or language that the jury found the care reasonable, necessary, and lawfully rendered. It is improper to speculate as to why the jury rendered such a verdict. Nonetheless, the jury's verdict on that count does not have any effect on the jury's finding of fraud, payment by mistake of fact, breach of contract, and unjust enrichment. A jury's verdict will be upheld, even if it is arguably inconsistent, where there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000).

VIII

Defendants argue that the verdict is excessive because Allstate failed to present evidence to support the amount of damages attributable to each Allstate insured who was treated at Broe.

During closing arguments, defense counsel told the jury, after listing the names of Allstate's insureds and their damage calculations, that "over $500,000 that Allstate is demanding back, -- with no proofs at all." Defendants argue on appeal that "the maximum amount which

the jury could have awarded with the removal of these seven individuals on whom no evidence was presented at trial was $3,241,630.76." The jury awarded $3 million.

At the hearing on the motion for new trial, defendants argued that Allstate was not entitled to all of the money paid for claims on behalf of their insureds. They noted that Allstate was asking for "everything back [because] they couldn't separate it out." They contended that it was Allstate's burden to "separate it out." Defendants also argued that "At the most, all they were entitled back are those things that the jury specifically found were not provided or were fraudulent."

Allstate responded that:

> As to the damages issue, we put in the damages that we paid to this organization. The jury had every right to believe that not a penny of it should've been paid. They had every right to believe that. And the reason they had every right to believe it is, these arguments counsel makes is, well, they had overhead. They paid these things. They should've been considered.
>
> None of that was put into evidence by way of their affirmative defenses or their counter-complaint. And the damages was fully and completely discussed by Ms. Monte Ferris when she said these are the things we paid. Why did the jury have to believe anything they say or that this is a valid program? The jury does not. That's why we have a jury here.

The trial court denied the motion for new trial in an order dated November 1, 2006.[10]

Given the circumstances of this case, we conclude that sufficient evidence was presented to allow the jury to determine the amount of damages if the jury accepted Allstate's theories that defendants are not properly licensed and that they improperly billed for services not performed or that they were not authorized to perform. Indeed, the jury apparently found that defendants were entitled to some payments for services rendered, as reflected in the amount of the verdict, which was less than the amount Allstate was seeking. The trial court did not abuse its discretion by denying defendants' motion for a new trial.

IX

Defendants contend that the trial court erred by denying their motion for directed verdict on Allstate's breach of contract claim.[11] This Court reviews a trial court's decision on a motion

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[10] A copy of the order and/or opinion and order is not contained in the lower court record and has not been supplied to this Court. Consequently, review for an abuse of discretion is not possible.

[11] Although defendants' statement of the question presented states that the trial court erred by denying both defendants' motion for directed verdict and motion for judgment notwithstanding the verdict, defendants present no argument regarding the contents of its motion for judgment notwithstanding the verdict or any citation to legal authority as to why it should have been

(continued…)

for directed verdict de novo. *People v Passage*, 277 Mich App 175, 176; 743 NW2d 746 (2007). "When reviewing a ruling regarding a motion for a directed verdict, this Court reviews the evidence presented up to the time of the motion to determine whether a question of fact existed. [ ]. In doing so, this Court views the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party." *Boyt v Grand Trunk Western RR*, 233 Mich App 179, 183; 592 NW2d 426 (1998) (citations omitted).

Defendants' argument is premised on a finding that Allstate failed to present evidence of the existence of a contract. We disagree. Manning testified that she submits proposals for services to Allstate and that Allstate accepts the proposals.[12] This constitutes a very basic form of agreement that may be construed as a contract. Since this agreement could be construed as a contract, there was sufficient question of fact as to the existence of a contract to defeat defendants' motion for directed verdict.

X

Timothy and Eleanor argue that the trial court erred by entering a judgment against them in their individual capacities. We disagree.

A corporation is generally considered distinct from its shareholder(s). *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 393; 600 NW2d 406 (1999). Where there is evidence of fraud, illegality, and injustice, piercing that corporate veil is appropriate. *Id.* We have already concluded that the fraud claim was properly submitted to the jury, and the jury found in favor of Allstate on the claim.

At a motion hearing on September 20, 2006, the trial court noted that the original lawsuit was titled with Broe Rehabilitation, Inc., and Timothy Broe and Eleanor Broe, jointly and severally, as defendants. The court noted that no motion to amend was ever filed. Thus, the court properly entered the judgment against all defendants, jointly and severally.

Defendants argue in the alternative that the jury was "never instructed on the law governing shareholder liability for the obligations of a corporation." To preserve an alleged error regarding jury instructions for appeal, a party must request the instruction before

(…continued)

granted. *Goolsby v City of Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Furthermore, defendants neglected to even mention the motion for judgment notwithstanding the verdict at all in the text of either brief and we deem that portion of their argument abandoned. "[This] question is [not] argued in any real sense of the word and [ ] is [not] briefed; [it is] simply announced. … This is insufficient to present [this] question[ ] for consideration in this forum." *Mitcham v City of Detroit*, 355 Mich 182, 203 94 NW2d 388 (1959).

[12] Although Manning was called as a witness by defendants, when reviewing a ruling regarding a motion for a directed verdict, this Court reviews the evidence **presented up to the time of the motion** to determine whether a question of fact existed." *Boyt, supra.* at 183 (emphasis added). This standard does not suggest that this Court may only consider evidence presented by plaintiff's witnesses. Manning testified before defendants brought their first motion for directed verdict.

deliberations begin or must object to the instructions given within the same timeframe. *Id.; Leavitt v Monaco Coach Corp.*, 241 Mich App 288, 300; 616 NW2d 175 (2000). "This Court will review an unpreserved issue concerning an error in jury instruction only when necessary to prevent manifest injustice. Manifest injustice results where the defect in instruction is of such magnitude as to constitute plain error, requiring a new trial, or where it pertains to a basic and controlling issue in the case." *Mina v General Star Indemnity Co.*, 218 Mich App 678, 680-681; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866; 568 NW2d 80 (1997) (citations omitted).

Here, plain error is not evident. Allstate presented sufficient evidence of fraud on the part of Timothy Broe to support the fraud element, the element at issue here. While the evidence of fraud on the part of Eleanor Broe is not as strong, evidence was presented that she is the secretary and treasurer of the corporation, as well as an owner of TECMA, which owns properties used by Broe to operate its business. She testified that she was aware that Broe loaned money to clients from time to time and that clients were given stipends for spending money. She also testified that she was aware that non-professional relationships with clients could impair professional judgment or increase the risk of harm to clients.

Cross-Appeal

Allstate argues that the trial court erred by denying its request for attorney fees under MCL 500.31488(2). A trial court's decision to award or deny attorney fees is reviewed for an abuse of discretion. *Beach v State Farm Mutual Automobile Ins Co,* 216 Mich App 612, 627; 550 NW2d 580 (1996). Its findings regarding the fraudulent, excessive, or unreasonable nature of a claim under MCL 500.3148(2) are reviewed for clear error. *Id.*

In general, a party may not recover attorney fees as an element of costs or damages unless a statute, court rule, or judicial exception expressly allows that remedy. *Shanafelt v Allstate Ins Co,* 217 Mich App 625, 635; 552 NW2d 671 (1996). Michigan's no-fault automobile insurance act contains a provision allowing the award of attorney fees to an insurer for defending against a claim that was in some respect fraudulent or so excessive that it had no reasonable foundation. MCL 500.3148(2).

Here, Allstate sought to recover the entire amount of attorney fees incurred in bringing its own claims as well as the fees incurred in defending the counterclaim. Clearly, the fees incurred in bringing *its own claims* are not fees incurred "in defense against a claim" and, therefore, such fees are not recoverable under MCL 500.3148(2).

At the hearing on the motion, the trial court stated:

> While the Court could award plaintiff a portion of the fees sought, it would be impossible to separate the amount of attorney fees contributable to the defense of the no-fault claim in the counter-complaint from the defense of other claims. Because the award of attorney fees under the statute is discretionary and only relates to the defense of a no-fault claim, attorney fees are therefore denied.

Allstate's argument is premised on the assumption that the trial court MUST award attorney fees if its finds that a defendant's claim is fraudulent or so excessive as to have no

reasonable foundation. This premise is mistaken, as the award of attorney fees is discretionary. Further, the trial court did not find that defendants' counterclaim was fraudulent or excessive. Allstate maintains that the sheer difference between the amount sought on the counterclaim ($850,000) and the amount awarded (zero), demonstrates that defendants' counterclaim was fraudulent or excessive. However, the mere fact that the jury did not award defendants' any damages on their counterclaim does not necessarily mean that the jury found the counterclaim to be fraudulent or excessive.

Allstate also argues that it is entitled to an evidentiary hearing regarding the reasonableness of the attorney fee requested. However, the issue in this case was not the reasonableness of the fees, but whether Allstate was to receive attorney fees at all. The trial court denied attorney fees. Thus, the reasonableness of the attorney fees sought is not at issue.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey