STATE OF MICHIGAN

COURT OF APPEALS

IMAD TAHBOUB,

Plaintiff-Appellee/Cross-Appellant,

v

GENESYS PHO, L.L.C.,

Defendant-Appellant/Cross-Appellee,

and

PHYSICIANS GROUP PRACTICE, P.C., GENESYS PHYSICIANS GROUP PRACTICE, P.C., GENESYS HEALTH SYSTEM, GENESYS INTENGRATED GROUP PRACTICE, P.C., and MICHAEL JAMES,

Defendants.

UNPUBLISHED
May 4, 2001

No. 218748
Genesee Circuit Court
LC No. 96-051984-NO

Before: Holbrook, Jr., P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendants appeal as of right, following a jury trial, from a $147,000 judgment in favor of plaintiff. Plaintiff cross-appeals from the trial court's orders regarding attorney fees. We reverse and remand for a new trial.

In anticipation of health care reform, defendants created a system that allowed patients to be treated at hospitals, nursing homes, rehabilitation systems, or office practices. As a result of the organization, patients could come to the system and have virtually all their health needs satisfied. The system was an efficient method for reducing health care costs by its coordination of services and referral system. In order to ensure a steady stream of patients into the hospital, defendants would purchase physician practices and hire physicians to work in the practices. A physician employed by defendants could become a member of an integrated group practice,

Genesys Integrated Group Practice (GIGP), or be an independent contractor. Under either category, a physician would be a shareholder of Group Physician Group Practice (GPGP)[1] and had to keep his or her patients in defendants' health care system. In group practice, the physician was provided management support, accounting services, payment of set up costs, and assistance with management, if requested. In independent practice, the physician had to set up the office himself, and defendants only provided a computer and billing system. Defendants purchased the practices of two physicians, Dr. Ronald H. Smalley, who retired, and Dr. Pankaj Vakharia, who planned to return to India.

Plaintiff was born in Jordan, grew up in Syria, and graduated from medical school in Syria in 1983. After graduation, plaintiff came to the United States and received three additional years of training in Flint, Michigan. He passed his boards and worked in West Virginia before returning to Flint in 1994. Upon his return, plaintiff began working as an employee of "St. Joe's Hospital" in internal medicine and was assigned to work in the practices of Drs. Smalley and Vakharia. Plaintiff received a salary of $140,000 per year and a bonus based on productivity. Plaintiff decided that he wanted to purchase the practices and hired attorney Brian Barkey to negotiate the transaction. Barkey called Michael James, president of Genesys PHO, to assist in the purchase of the practices.

The parties agreed that, during the negotiations, James explained the difference between the integrated practice and the independent model. However, the parties' testimony regarding the selection process diverged. Plaintiff testified that he had no intention of being an employee of defendants and did not want to join the integrated model. Plaintiff alleged that he agreed to the integrated model only after being orally assured that he could leave that model and join the independent model at any time. Plaintiff further alleged that James failed to advise him that no physician had ever left the integrated practice and transferred to the independent model. Consequently, plaintiff alleged that there was no mechanism in place to handle the transfer to the other practice model.

However, James testified that, during the course[2] of the negotiations, Barkey was advised that no one had ever left the integrated model to transfer to the independent model. James alleged that he prepared an April 1, 1996 document that acknowledged the transfer from the integrated to the independent model, but that document was prepared at Barkey's request and referenced other documents. Therefore, it was not intended as a complete listing of what was required if plaintiff opted to transfer to the independent model. Furthermore, the board of directors had to determine the terms of transfer that were contingent upon what had transpired during the course of the working relationship. For example, any debts owed by the individual physician had to be repaid in order to effectuate the transfer.

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[1] GPGP was created because GIGP was a single corporation with sixty-seven physicians, but also included hospital employed physicians and independent physicians who participated with Genesys PHO.

[2] James testified that he could not identify when conversations occurred due to the numerous discussions that had occurred over the course of the negotiations through the closing on April 1, 1996.

Despite the difference in opinion regarding the negotiation period, the closing for plaintiff's purchase of the two practices[3] occurred on April 1, 1996. Plaintiff did not purchase any account receivables and would incur costs on his first day of operation, while it would require time for him to receive third-party payments from insurance companies.[4] Accordingly, it was defendants' policy to advance funds to physicians to cover initial costs until third-party insurance payments were made to the physician. Therefore, both plaintiff and James were included on the signature card on the account. Defendants would receive funds from insurance companies for services rendered by plaintiff and would "sweep" the money into the jointly signed account. Plaintiff admitted that he was told that he was to take a "draw" from this account to cover his salary, but was also told that he could not overdraw the account. Therefore, if money was unavailable for his salary, he could not take his draw.

In April 1996, plaintiff deposited $21,000 into the account and $6,000 was received from insurance payments. In May 1996, deposits of $21,000 went into the account, but that amount included $8,700 advanced by defendants. In June 1996, deposits of $32,000 went into the account, and in July 1996, deposits in the amount of $52,000 went into the account. By August 1996, plaintiff owed defendants approximately $40,000 from advances. Defendants had a billing system that allowed them to monitor the account activity of all physicians. Defendants were required to pay any overdraft charges. If defendants determined that an account was or would be overdrawn, they called the physician's office and asked that any available deposits be made. If deposits were unavailable, defendants would advance funds to avoid an overdrawn account.

Despite an increase in the amount of deposits into the account, plaintiff did not arrange to pay back his accumulation of advances of nearly $40,000. Defendants tried to make arrangements for a payment plan. Cindy Lamb, an employee of defendants, contacted plaintiff's office on three occasions. Each time, she asked to speak to plaintiff. However, Lucy Combs, plaintiff's office manager, would come to the telephone. Lamb notified Combs that defendants needed to speak to plaintiff about a payment plan for the advances. Each time, Combs indicated that she would convey the message to plaintiff and call back, but she did not.

When Lamb's efforts to obtain repayment were unsuccessful, Elizabeth Jones, an employee in defendants' finance department, tried to speak to plaintiff. Jones called plaintiff's office on two or three occasions. Although Jones asked to speak to plaintiff, Combs came to the telephone. Combs acknowledged speaking to Lamb and again represented that she would call them back. Unable to obtain action or a response from plaintiff, Jones discussed the account

[3] Because of his membership in the integrated model, plaintiff's practices were staffed by defendants' employees. Plaintiff purchased the practices for approximately $130,000 less than the price paid by defendants.

[4] Plaintiff also alleged that defendants began an "experimental" program regarding provider numbers. Provider numbers are needed to obtain payments from insurance companies. Plaintiff alleged that this "experimental" program caused a delay in receipt of insurance payments. However, at trial, documentary evidence established that plaintiff received payments from insurance companies within the estimated time frame given by defendants to Barkey. While plaintiff alleged the contrary, he could not identify any documentation to support his assertion. The trial court granted defendants' motion for directed verdict regarding this claim.

deposits and advances with Paul Garcon, an accountant employed by defendant Genesys PHO. It was determined that the account held a balance of approximately $16,000. Defendants determined that a withdrawal of $8,100 would leave funds available for any outstanding checks written by plaintiff. Therefore, on August 30, 1996, Jones called plaintiff's office and asked for him. Again, Combs came to the telephone. Jones advised Combs of the withdrawal of $8,100 that would occur. Combs did not mention any outstanding checks and indicated that she would let plaintiff know of the withdrawal.

Five days after the withdrawal,[5] Barkey met with James to discuss plaintiff's transfer from the integrated to the independent model. James testified that, under either model, the generated revenue was the same for defendants. In fact, a physician in the independent model resulted in less maintenance or expenditures because defendants were not required to provide services such as staffing. James testified that, in preparing for the meeting, he determined the amount of outstanding advances and expected that plaintiff would set up a repayment schedule in light of his desire to transfer to the independent model. Barkey indicated that he was unaware of the fact that plaintiff had received advances.

After the withdrawal of $8,100 from plaintiff's account, two checks "bounced" because of insufficient funds in the account. Defendants alleged that they did not treat the account differently after the withdrawal. However, plaintiff set up a different account and began to deposit all in-office payments, such as co-pays, into a separate account. Defendants continued to deposit money for the salary of the employees in the joint account, but did not deposit the "sweep" because of plaintiff's conduct in setting up a new account and the outstanding advance debt. Additionally, defendants continued to pay for plaintiff's health care and malpractice insurance.

After learning of plaintiff's actions, defendants sent a letter delineating the steps necessary for plaintiff to transfer to the independent model. Plaintiff alleged that defendants did not want him to transfer to the independent model and placed additional conditions on his transfer that were not previously stated in the April 1, 1996 document.

Plaintiff told others that he was "at war"[6] with James and pulled all of his patients out of defendants' health care system. The documents executed by plaintiff provided that he would treat all of his patients within defendants' health care system regardless of his status as an integrated or an independent physician. If plaintiff did not comply with the terms of the agreement, there was a covenant not to compete contained in the documents. Plaintiff was not permitted to practice within ten miles of defendants' office for a two-year period. Plaintiff did not relinquish the patients, but continued to treat them at McLaren Hospital. James testified that the health care system was designed to ensure a steady stream of patients into the hospital, and

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[5] During their depositions, Barkey and plaintiff testified that the withdrawal of $8,100 occurred on the date that plaintiff's desire to "go independent" was conveyed to defendants. At trial, they conceded that allegation was not accurate, and the withdrawal occurred five days earlier.

[6] Plaintiff testified that he had seen three wars in the Middle East. He testified that guns are used in war, but what defendants did to him was worse because they hurt him economically.

the sale of the practices would not have occurred without the assurance that the patients would remain in defendants' health care system.

James testified that the parties were negotiating the transfer of plaintiff to independent status when the lawsuit was filed. In essence, plaintiff alleged that defendants allowed him to believe that the practice was his, but interfered through their actions over the account and refused to allow him to transfer to the independent model. Defendants filed a countercomplaint alleging that plaintiff was in breach of the covenant not to compete when patients had been taken from their health care system and treated elsewhere.

The legal issues were submitted to a jury for decision. While the jury was deliberating, the trial court decided the equitable issues. The trial court found in favor of defendants. Specifically, the trial court held that there was no fraud committed to cause plaintiff to enter into the transaction and defendants had every right to withdraw the money for repayment of the advance. The trial court indicated that, because the litigation had been pending for two years, it would extend the covenant not to compete for a two-year period. The trial court left any other remedy for decision by the jury. However, the jury decided in favor of plaintiff and awarded him $147,000. The jury did not award any money to defendants on their countercomplaint. The parties failed to submit a special verdict form to the jury despite the fact that fraud, breach of contract, and securities claims were submitted for decision. Accordingly, the basis for the jury verdict is unknown.

We conclude that the cumulative effect of errors requires reversal and remand for a new trial. *Haynes v Seiler*, 16 Mich App 98, 103; 167 NW2d 819 (1969). Defendants first allege that the trial court erred in failing to give a curative instruction following improper statements in closing argument by plaintiff's counsel. This Court, when reviewing alleged improper comments by an attorney, must first determine whether the attorney's action was error, and if so, determine whether the error requires reversal. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id*. "Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Id*. (Citations omitted.)

At the start of trial, defendants moved to exclude an advertisement regarding Dr. Vakharia's return to practice. The trial court excluded the advertisement, but noted that the issue might become relevant later on at trial. In opening arguments, plaintiff's counsel stated that he would prove that defendants intended to return Dr. Vakharia to practice to compete against plaintiff and take away his patients. However, when plaintiff's counsel sought to introduce evidence through Barkey, defense counsel objected, and a conference was held at the bench. When the record resumed, there was no express ruling on the record, but plaintiff's counsel moved on to a different area, indicating that the objection had been sustained. Later during examination by plaintiff's counsel, Barkey acknowledged hearing the statement in opening argument that Dr. Vakharia was "coming back into the picture." When asked, "did that happen," Barkey responded, "Yes." Once again, defendants' counsel objected to the testimony, and a conference was held at the bench. When the proceedings resumed on the record, there was no

express ruling on the objection, but plaintiff's counsel moved for admission of exhibits. Based on the record, we can infer that the objection was sustained.

The next attempt to elicit evidence regarding Dr. Vakharia occurred during plaintiff's cross-examination of Garcon. Defense counsel objected to the question that plaintiff lost patients to Dr. Vakharia. Again, a conference at the bench occurred without an express ruling on the record. When questioning resumed, Garcon was asked a hypothetical question regarding competition with plaintiff without mentioning any specific doctors. Garcon merely stated that there could be many reasons why plaintiff lost patients and competition could be one of them. To combat this testimony, on cross-examination, Garcon was asked whether there was any evidence that plaintiff lost patients. Garcon testified that the only evidence of patient loss was due to plaintiff's failure to continue to participate in certain insurance programs. Despite that fact, plaintiff's revenue increased.

Accordingly, at trial, plaintiff's counsel only established that Dr. Vakharia had "come back into the picture." Plaintiff's counsel was prohibited from further inquiry to establish any sort of competition. Furthermore, the hypothetical raised did not have an evidentiary basis, and plaintiff's counsel failed to present witnesses of his own to establish loss of patients to competition. Despite the lack of evidence, in closing argument, plaintiff's counsel stated that "doctors are [were] set up to compete with him and take his patients back …" Defense counsel objected to the testimony. The trial court stated that the jury would recall if there was evidence and advised plaintiff's counsel to proceed. However, plaintiff's counsel did not move to a new topic, but stated, "… the real knife was setting up a doctor to compete with him …" Defense counsel objected again, and the trial judge advised plaintiff's counsel that he wanted him to "move on from that." Despite being admonished, plaintiff's counsel continued in this area again, and the trial court advised him to "please move on."

Plaintiff states that closing argument was proper commentary on the evidence elicited by trial counsel and that defendants also intentionally elicited evidence regarding competition. Review of the record reveals that plaintiff's counsel failed to establish that Dr. Vakharia came out of retirement at defendants' behest to compete with plaintiff. Furthermore, the testimony elicited by defense counsel from Garcon was rehabilitation to establish that the hypothetical posed by plaintiff's counsel did not have an evidentiary foundation.

When reviewing alleged improper comments by an attorney, we must first determine whether the attorney's action was error, and if so, determine whether the error requires reversal. *Hunt, supra*. In *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 513; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1998), the defendant argued that the plaintiff's counsel improperly argued during closing argument that the decedent would have been killed even if she had been wearing her shoulder harness. This Court concluded that the argument was improper "because no evidence was presented at trial to support such an inference."[7] Likewise, in the present case,

[7] In *Klinke, supra* at 514, the trial court gave a curative instruction, and this Court concluded that the jury's verdict strongly indicated that the defendant was not prejudiced by the improper argument.

plaintiff failed to present any evidence regarding competition, and the statement in closing argument was improper.

However, reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice the jury or deflect the jury's attention from the issues. *Hunt, supra*. It is unknown why plaintiff's counsel continued to address competition once the trial court noted that the jurors were to rely on their memories regarding that issue. Furthermore, after ruling on the motion in limine to exclude Dr. Vakharia's advertisement, the trial court noted that it would hold future reference rulings in abeyance pending an offer of proof. Despite that ruling, plaintiff's counsel failed to bring in evidence to establish defendants' acts or involvement in competition with plaintiff. Plaintiff's counsel continued to mention this issue, but failed to bring in patients or his accountant to demonstrate competitive loss or solicitation of patients by defendants. Although this issue presents a close call, we cannot conclude that reversal is required based solely on the improper statement in closing argument and the trial court's failure to give a curative instruction. *Hunt, supra*.[8]

Defendants next argue that the trial court erred in denying their motion for a directed verdict of the fraud claim involving plaintiff's ability to transfer from the integrated to the independent physician model. We agree. Appellate review of the denial of a motion for a directed verdict is de novo. *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 176; 617 NW2d 735 (2000). In *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997), this Court stated:

> To establish a cause of action for fraud or misrepresentation, a plaintiff must prove (1) that the defendant made a material representation, (2) that the representation was false, (3) that when the defendant made the representation, the defendant knew that it was false, or made it recklessly without knowledge of its truth or falsity, (4) that the defendant made it with the intent that the plaintiff would act on it, (5) that the plaintiff acted in reliance on it, and (6) that the plaintiff suffered injury. An action for fraudulent misrepresentation must be predicated on a statement relating to a past or an existing fact. Future promises are contractual and cannot constitute actionable fraud. [Citations omitted.]

The fraud alleged to have occurred in the present case related to a future event. That is, plaintiff signed the agreement to become a member of the integrated model and relied on representations that, in the future, he could become an independent physician if he chose to do so. In his response to defendants' argument regarding future events, plaintiff's counsel stated that plaintiff was told, don't worry, "when you want to go independent," plaintiff would be able to do so. The ability to transfer to the independent model related to a decision and act to occur in the future.

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[8] While the trial court failed to give a curative instruction regarding that particular point, the trial court did instruct the jury that arguments of counsel are not evidence, and any statement by an attorney that was not supported by the record should be disregarded. Although we will not reverse solely on the basis of the statement by plaintiff's counsel, we conclude that the statement was improper due to the lack of evidentiary support and should not occur on retrial.

Accordingly, the trial court erred in allowing this fraud claim to be presented to the jury. *Eerdmans, supra*.

We acknowledge that, although not argued by plaintiff, there is a bad faith exception to the future events fraud claim. In *Danto v Charles C. Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930), the Supreme Court, quoting *Boston Piano & Music Co v Pontiac Clothing Co*, 199 Mich 141, 147; 165 NW 856 (1917), stated:

> Statements promissory in their character that one will do a particular thing in the future are not misrepresentations, but are contractual in their nature, and do not constitute fraud.

In order to avoid that holding, the defendants in *Danto* argued that where representations were made with no present intent to carry them out, the representations still constitute fraud. In response to this argument, the Supreme Court stated:

> The cases enunciating this rule, however, are based upon facts which show that at the very time of making the representations, or almost immediately thereafter, statements or acts of the parties indicated that there was no intention on their part to carry out their representations. Had there been any showing of any statements made or acts done by [the] plaintiff, at or about the time the alleged representations were made, tending to show an intention on his part not to carry them out, there would be some force in [the] defendants' contention. At least it would be a question for the jury to determine. The record, however, is absolutely devoid of any showing whatsoever of any statement or action by [the] plaintiff at or about the time he is alleged to have made the representations that would show an intention on his part not to carry them out. [*Id*. at 425-426.]

Additionally, in *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 338-339; 247 NW2d 813 (1976), the plaintiff relied on a letter as demonstrating bad faith with an intent not to perform. However, the letter was dated three years after the promises were made. The Supreme Court concluded that the bad faith exception was not demonstrated because the evidence of fraudulent intent must relate to the conduct of the actor at the time of making the representations or almost immediately thereafter. *Id*. The letter dated three years later was too remote in time to demonstrate that there was no intention of fulfilling the promise at the time it was made. *Id.*

In the present case, plaintiff's counsel argued that plaintiff relied on the representation that all that was required to "go independent" was a stock for asset transfer, but then James sent a letter delineating seven points that had to be fulfilled to "go independent." However, this seven point letter sent by James was dated October 2, 1996. This letter does not evidence a contemporaneous intent not to perform where the agreement was entered into on April 1, 1996, and the letter was written October 2, 1996. Accordingly, plaintiff's fraud claim relating to the future act of transferring to the independent model future fails. *Hi-Way, supra; Danto, supra.*

Furthermore, in *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989), this Court stated:

> Fraud will not be presumed but must be proved by the plaintiff by clear, satisfactory and convincing evidence. The fraudulent misrepresentation may be based on a promise made in bad faith without intent to perform. To fall within this "bad faith" exception, the evidence of fraudulent intent must relate to conduct by the actor at the time the representations are made or almost immediately thereafter.

In the present case, plaintiff has failed to demonstrate evidence of an intent not to perform at the time of the representations or shortly thereafter with clear, satisfactory, and convincing evidence. Accordingly, the trial court erred in failing to direct a verdict in favor of defendants for a fraud claim addressing the terms of a decision to transfer to the independent model in the future.[9] *Gauntlett, supra*.

Defendants next argue that the trial court erred in instructing the jury that plaintiff had the right to withdraw from the contract if fraud was found.[10] We agree. Appellate courts review jury

[9] MCR 2.112(B)(1) governs pleading special matters and provides that allegations of fraud must be stated with particularity. See also *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 374; 532 NW2d 541 (1995). Review of the complaint, the arguments of defendants' counsel, and the trial court's ruling regarding the motion for directed verdict regarding the fraud claims reveals that this rule was not satisfied. The complaint contained general factual allegations, and the fraud claim did not incorporate the facts to allege specific claims, but merely delineated the elements of fraud. When ruling on the motion for directed verdict regarding the fraud claims, the trial court repeatedly stated that *if* the plaintiff had alleged this type of fraud claim, *then* the ruling was either granted or denied. The failure to plead fraud with specificity is fatal to the complaint. *Zimmerman v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 151 Mich App 566, 574; 391 NW2d 353 (1986); *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 184; 318 NW2d 679 (1982). We presume that the parties will resolve this issue on retrial when comprising the special verdict form to ensure that duplicate fraud claims are not presented to the jury and the trial court when considering the equitable issues as this confusion may have contributed to the inconsistency of the verdicts.

[10] While the parties agree that the verdicts rendered by the trial court and the jury were inconsistent, neither party has raised the issue of the consistency of the verdicts in their statements of questions presented. Plaintiff did mention the issue in his pleadings on crossappeal addressing attorney fees, but not in the statement of questions presented. Where an issue is not set forth in the statement of questions presented, review is waived. *Orion Twp v State Tax Comm*, 195 Mich App 13, 18; 489 NW2d 120 (1992). However, we note that the result in this case is problematic. Common issues of fact were presented to the trial court and jury for resolution of the issues of law and equity, and by the nature of the verdicts, it appears that inconsistent verdicts were rendered. Arguably then, the same facts were presented to judge and jury, and each reached a conclusion contrary to the other. Michigan case law provides that an inconsistent verdict may be rendered where a jury and a trial court, acting as a Court of Claims judge, reach different conclusions. *Phinney v Perlmutter*, 222 Mich App 513, 557-558; 564 NW2d 532 (1997); *Lumley v Board of Regents for the University of Michigan*, 215 Mich App 125, 134-135; 544 NW2d 692 (1996). In those cases, any inconsistency in the two verdicts can be accepted based on the fact that, by statute, the trial court sits as the trier of fact against a state party only whose liability is not before the jury. However, federal case law provides that an inconsistent verdict by a judge and a jury in a case involving legal and equitable issues may not occur. Rather, the common issues of fact must be presented to the jury, and the trial court must

(continued…)

instructions in their entirety. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). It is error to instruct a jury about an issue unsustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). "However, there is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury." *Id*. The determination whether an instruction is accurate and applicable to the case rests within the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). Supplemental instructions may be given on applicable law not covered by the jury instructions. MCR 2.516(D)(4); *Meyer v City of Center Line*, 242 Mich App 560, 567; 619 NW2d 182 (2000). Supplemental instructions "must be modeled as nearly as practicable after the style of the SJI, and must be concise, understandable, conversational, unslanted, and nonargumentative." *Id*. An instructional error will not result in vacating a jury verdict unless the failure to do so would be inconsistent with substantial justice. *Cox, supra*.

In the present case, the trial court gave the standard instructions regarding fraud.[11] The trial court then proceeded to instruct the jury regarding breach of contract, then stated:

> Under the law of Michigan, attorney fees and interest are recoverable by the victim as a direct result of fraud.
>
> If a fraud has been perpetrated against a party to a contract, he has the right to withdraw from the contract.

In *Gloeser v Moore*, 284 Mich 106, 118; 278 NW 781 (1938), the Supreme Court set forth the remedies available when bringing a claim of fraud:

(…continued)

rely on those findings in deciding the equitable claims. The rationale being that to do otherwise is to deprive a litigant of the right to trial by jury. *Therma-Tru Corp v Peachtree Doors, Inc*, 44 F3d 988, 994-995 (Mich 1995); *Gutzwiller v Fenik*, 860 F2d 1317, 1333 (6th Cir 1988); *Garza v City of* Omaha, 814 F2d 553, 557 (8th Cir 1987); *Dybczak v Tuskegee Institute*, 737 F2d 1524, 1526-1527 (11th Cir 1984). However, *Brown v Kalamazoo Circuit Judge*, 75 Mich 274, 275-276, 280; 42 NW 827 (1889), held a statute was unconstitutional when it removed circuit court and appellate review of jury factfinding, limited the preservation of the record, and effectively gave a trial by jury the effect of a common-law inquest. In dicta, the Supreme Court stated that a "right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury." Subsequent to the *Brown* decision, the Michigan Constitution and Michigan Court Rules were amended many times, and it was unclear whether the dicta of *Brown, supra*, remained viable after the amendments. See Joiner and Geddes, The Union of Law and Equity: A Prerequisite to Procedural Revision, 55 Mich L Rev 1059, 1100-1103 (1957); 3 Dean & Longhofer, Michigan Court Rules Practice (4th ed.), § 2505.10, pp 79-80. While we also question the viability of common issues of fact and its impact on a right to trial by jury, Const 1963, art 1, § 14; MCR 2.508(A), the parties have not thoroughly briefed or addressed this argument on appeal. Furthermore, it appears that the dicta stated in *Brown* was adopted by our Supreme Court in *Abner A Wolf, Inc v Walch*, 385 Mich 253, 265-266; 188 NW2d 544 (1971).

[11] The trial court also, for some unknown reason, gave the jury a negligence instruction, although no claim of negligence was alleged.

> Plaintiff had a right, if she was defrauded, to rescind the contract and sue to recover the value of what she had paid. To do this, she must have tendered back the property received. Or, she had a right to retain what she had received and sue to recover damages for the fraud. But she could not do both.

See also *Schaffer v Eighty-One Hundred Jefferson Avenue East Corp*, 267 Mich 437, 448; 255 NW 324 (1934) (when plaintiffs do not seek rescission, their remedy for fraud is an action for damages.) The trial court failed to advise the jury that plaintiff had two options: either to rescind the contract and recover the value of what was paid or continue the contract and sue for damages for the fraud. The supplemental instruction, in the present case, did not adequately and fairly present the applicable law to the jury. *Murdock, supra*. While we cannot conclude that the failure to vacate the verdict solely on this basis would be inconsistent with substantial justice, *Cox, supra*, this error coupled with the failure to grant a directed verdict with respect to the fraud claim and the inappropriate commentary during closing argument without an evidentiary foundation requires that a new trial be granted.[12] *Haynes, supra*.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Donald E. Holbrook
/s/ Harold Hood
/s/ Janet T. Neff

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[12] At trial, plaintiff's counsel argued that attorney fees were recoverable if the jury found fraud. Barkey and plaintiff testified regarding the amounts expended for attorney fees. The jury reached a general verdict, accordingly, it was unknown if attorney fees were included in the award. Our conclusion that a new trial is warranted renders this issue moot. However, we note that the trial court's legal conclusion, that it should presume that attorney fees were not awarded, was erroneous. Plaintiff waived this issue by agreeing to the general verdict form and presenting the issue of attorney fees to the jury. *Dedes v Asch*, 233 Mich App 329, 334; 590 NW2d 605 (1998). We presume that the parties will cure this problem on retrial.