STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE CO, CNA PERSONAL INSURANCE, and CONTINENTAL INSURANCE CO,

Plaintiffs-Appellants,

v

FREDERICK K. LEWERENZ, DO, d/b/a DEARBORN DIAGNOSTIC CLINIC, NFC/TRI-COUNTY, FAMILY REHABILITATION CENTER, LEWERENZ HEALTH & WELLNESS CO, LEWERENZ CENTER FOR HEALTH, FK LEWERENZ HEALTH & WELLNESS, DEARBORN FAMILY & SPORTS MEDICINE, LEWERENZ CLINIC PC NFC, LEWERENZ CLEARING, LEWERENZ CLINIC PC, and JASPER MCLAURIN, MD,

Defendants-Appellees.

UNPUBLISHED
October 19, 2006

No. 261296
Macomb Circuit Court
LC No. 2002-002895-CK

ALLSTATE INSURANCE CO, CNA PERSONAL INSURANCE, and CONTINENTAL INSURANCE CO,

Plaintiffs-Appellants,

v

FREDERICK K. LEWERENZ, DO, d/b/a DEARBORN DIAGNOSTIC CLINIC, NFC/TRI-COUNTY, FAMILY REHABILITATION CENTER, LEWERENZ HEALTH & WELLNESS CO, LEWERENZ CENTER FOR HEALTH, FK LEWERENZ HEALTH & WELLNESS,

No. 262199
Macomb Circuit Court
LC No. 2002-002895-CK

DEARBORN FAMILY & SPORTS MEDICINE, LEWERENZ CLINIC PC NFC, LEWERENZ CLEARING, LEWERENZ CLINIC PC, and JASPER MCLAURIN, MD,

Defendants-Appellees.

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In Docket No. 291296, plaintiffs appeal as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). In Docket No. 262199, plaintiffs appeal as of right an order awarding defendants $23,000 in attorney fees and $3,683.79 in costs and fees. We affirm in both cases.

I. FACTS AND PROCEDURAL HISTORY

This case involves a lawsuit filed by plaintiffs, insurance companies, seeking repayment of monies that plaintiffs paid to defendants, who are health care providers, on behalf of plaintiffs' insured under the Michigan no-fault act, MCL 500.3101 *et seq.* Defendants are Dr. Frederick K. Lewerenz, an osteopathic physician whose practice focuses on family and sports medicine, numerous clinics that have been owned and operated by Dr. Lewerenz, and Dr. Jasper McLaurin, a neurologist who worked at one of the clinics.

Plaintiffs filed a complaint against defendants after Gloria Urquhart, an investigator in plaintiff Allstate's fraud department, undertook an investigation of defendant Dr. Lewerenz and his clinics and defendant Dr. McLaurin. Plaintiffs' amended complaint contained counts for misrepresentation, breach of contract, violation of the no-fault act, and fraud. In Count I of their amended complaint, plaintiffs alleged that defendant Dr. Lewerenz, through the use of various business entities that were not valid legal corporations or lacked proper filing for a corporation working under an assumed name, submitted billings to plaintiffs with improper tax identification numbers seeking to recover for osteopathic medical services, physical therapy services, or other services that they provided to plaintiffs' insureds. Count I further alleged that Dr. Lewerenz "utilized these various alleged business entities to conceal his billing practices, and the total amount of billings to Plaintiff, all of which were excessive, unreasonable, and unnecessary pursuant to the terms and conditions of the Michigan No-fault Act." In addition, Count I alleged that defendant Dr. Lewerenz used the various business entities to conceal his improper business practices of making referrals between the various business entities to increase billing for unnecessary and unreasonable services and billing for persons not legally licensed to practice.

In Count II of their amended complaint, plaintiffs alleged that defendants violated the no-fault act by charging insured patients more for services than they charged uninsured patients, billing plaintiffs for unnecessary and unreasonable services, and making excessive and fraudulent claims for services.

In Count III of their amended complaint, plaintiffs alleged that defendants Drs. Lewerenz and McLaurin fraudulently: billed plaintiffs for services not rendered, excessively billed plaintiffs for unnecessary services, billed for services performed by individuals who were not properly supervised or were not properly licensed, billed for services performed by persons who were not doctors or properly qualified medical personnel, submitted bills for companies that did not exist and had no legal status, billed for services without sufficient documentation to substantiate the services allegedly rendered, billed for referrals when doctors worked in the same clinic, and charged more for services to plaintiffs' insureds than they charged to uninsured or under-insured patients. According to plaintiffs, they relied on these bills to their detriment in that they paid defendants more than $400,000 based on defendants' material misrepresentations.

Defendants moved for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10). Defendants argued, among other arguments, that plaintiffs' claims of misrepresentation, fraud, and breach of contract must be dismissed because notwithstanding the fact that some of the clinics were not properly named in bills submitted to plaintiffs or were not incorporated, defendants were still "lawfully rendering treatment" under MCL 500.3157. According to defendants, the bills all named Dr. Lewerenz or Dr. McLaurin as the treating physician, the names of the clinics on the bills were similar, the billing address and telephone number on the bills were identical, and the bills contained valid tax identification numbers. Therefore, defendants contended, plaintiffs knew whose claims they were processing and they were not injured in any way. Defendants also argued that contrary to plaintiffs' assertion, defendants did not present bills for services performed by persons who were not properly qualified or who had not been properly delegated the responsibility to undertake the duties which they performed. According to defendants, the public health code grants physicians broad discretion to assign tasks to their staff as long as proper supervision is provided, and plaintiffs offered no evidence that Dr. Lewerenz or Dr. McLaurin failed to properly supervise staff in performing delegated duties. Defendants further argued that Drs. Lewerenz and McLaurin's rent agreement, whereby Dr. McLaurin paid Dr. Lewerenz 25 percent of his collected gross receipts as payment for rent, supplies, personnel, and services, was proper because it related to the amount services that Dr. McLaurin used while working at Dr. Lewerenz's clinic. Defendants finally argued that plaintiffs could not establish fraud or misrepresentation because they suffered no damages.

Plaintiffs argued that defendants were not entitled to summary disposition of plaintiffs' claims for fraud and misrepresentation because defendants submitted medical bills under the names of non-existent corporations and defendants therefore were not "lawfully rendering treatment" under MCL 500.3157. Plaintiffs further argued that defendants' charging of a $25 overhead fee for lights, power, water, and equipment for each patient visit was also fraudulent. In addition, plaintiffs contended that Dr. McLaurin was an employee of Dr. Lewerenz and that the rent payment agreement constituted improper fee splitting.

The trial court denied defendants' motion under MCR 2.116(C)(7), and granted in part and denied in part defendants' motion under MCR 2.116(C)(10). The trial court ruled that notwithstanding the fact that the bills submitted to plaintiffs were submitted under names of corporations that were not validly incorporated, defendants were "lawfully rendering treatment" under MCL 500.3157. The trial court also ruled that the improper naming of defendant corporations did not constitute fraud, misrepresentation, or breach of contract. According to the

trial court, the act of improperly naming a corporation on a bill submitted for payment does not constitute a material misrepresentation that is false. Furthermore, the trial court ruled that plaintiffs failed to demonstrate how their reliance upon any alleged misrepresentations resulted in injury. The trial court also granted summary disposition of plaintiffs' claim for fraud and violation of the no-fault act based on defendants' charging a $25 overhead fee to all patients. According to the trial court, the no-fault act permits health care providers to charge a reasonable amount for the products, services, and accommodations rendered to patients, and "[a] physician[']s 'overhead' for lights, tables, heat, supplies, and rent may reasonably be interpreted to be included within the meaning of 'accommodations.'" Finally, the trial court ruled that charging the $25 overhead fee under the billing code "99211PT" did not constitute fraud because there was no material misrepresentation.

The trial court did not rule on plaintiffs' claims that Drs. Lewerenz and McLaurin's rent payment agreement constituted unlawful fee splitting because it stated that it would have been premature to grant summary disposition on that issue. However, the trial court later issued a separate order addressing plaintiffs' argument that the rent payment agreement constituted improper fee splitting. The trial court ruled that Dr. McLaurin was not an employee of Dr. Lewerenz and that the rent payment agreement was not illegal, unreasonable or against public policy and that the amount correlated to the amount of services provided to Dr. McLaurin by Dr. Lewerenz's staff.

After the trial court granted defendants' motion for summary disposition, defendants filed a Motion for Taxation of Costs, Fees and Case Evaluation Sanctions. Plaintiffs argued, among other arguments, that the trial court should deny defendants' motion under MCR 2.403(O)(11), which grants the trial court discretion to refuse to award actual costs "in the interest of justice[.]" The trial court awarded defendants attorney fees in the amount of $23,000 and $3,683.75 in costs.

II. ANALYSIS

Plaintiffs first argue that the trial court erred in ruling that plaintiffs had the burden of proving that defendants were not entitled to recover no-fault benefits under MCL 500.3107(1)(a). We disagree.

Contrary to plaintiffs' argument on appeal, the trial court never specifically stated that plaintiffs had the burden of proof under MCL 500.3107(1)(a). Rather, the trial court's statements regarding plaintiffs' failure to establish an issue of material fact were proper and related to plaintiffs' burden of proof in responding to defendants' motion for summary disposition. A party moving for summary disposition based on the lack of a material dispute has the initial burden of supporting its position with documentary evidence. *E R Zeiler Excavating, Inc v Valenti Trobec Chandler Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006). The burden then shifts to the opposing party to present legally admissible evidence to demonstrate that a genuine issue of material fact exists for trial. *Id.* If a party opposing a motion for summary disposition fails to present documentary evidence establishing the existence of a material factual dispute, summary disposition is properly granted. *Koenig v South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999).

Defendants, as the moving party, had the initial burden of supporting their position with documentary evidence. In their brief on appeal, plaintiffs note that defendants bore the burden of establishing that they were entitled to recover the expenses they sought reimbursement for under MCL 500.3107(1)(a); however, plaintiffs do not contend that defendants failed to meet their initial burden. Instead, plaintiffs argue that they did not have the burden of disproving defendants' entitlement to recovery under MCL 500.3107(1)(a). This may be true, but once defendants satisfied their initial burden of supporting their position with documentary evidence, the burden then shifted to plaintiffs to present evidence to establish the existence of a material factual dispute. The trial court's statements properly asserted that plaintiffs failed to satisfy their burden to present evidence establishing a genuine issue of material fact. Moreover, we note that plaintiffs' amended complaint contained claims of fraud or misrepresentation and breach of contract. In an action for fraud, the burden of proof is upon the party who alleges fraud, *Seaboard Finance Co v Barnes*, 378 Mich 627, 631; 148 NW2d 756 (1967), and in a breach of contract action, the party asserting a breach of contract has the burden of proving its damages with reasonable certainty. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Plaintiffs therefore did have the burden of proof with respect to these claims.

Plaintiffs next argue that the trial court erred in ruling that the $25 overhead fee that defendants charged their patients was an "allowable expense" under MCL 500.3107(1)(a). We disagree.

MCL 500.3107 provides:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured persons's care, recovery, or rehabilitation. . . .

An expense is an "allowable expense" under MCL 500.3107(1)(a) if (1) the charge for the expense is reasonable, (2) the expense is reasonably necessary, and (3) the expense is incurred. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990).

In ruling that the $25 overhead fee constitutes an "allowable expense" under MCL 500.3107(1)(a), the trial court stated:

> The No Fault Act provides that providers may charge a reasonable amount for the products, services *and accommodations rendered* to patients falling under the purview of the act. Again, the Court must interpret the statute as written and apply the ordinary meaning to terms used in the statute. "Accommodation" is defined as "the provision of conveniences"; and "conveniences; things furnished for use: chiefly applied to board, lodging, etc". *Webster's New Universal Unabridged Dictionary, deluxe second edition, (1983).* A physician[']s "overhead" for lights, tables, heat, supplies, and rent may reasonably be interpreted to be included within the meaning of "accommodations". Consequently, Defendants['] billing for such is not a per se violation of the No Fault Act.

Determining whether an overhead fee of $25 is an "allowable expense" under MCL 500.3107(1)(a) requires this Court to interpret and construe MCL 500.3107(1)(a). Interpretation of the no-fault act presents a question of law subject to de novo review. *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004). When interpreting a statute, this Court must ascertain the legislative intent that may be reasonably inferred from the statutory language itself. *Griffith v State Farm Mutual Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted. *Id.* Terms contained in the no-fault insurance act must be read in the context of its legislative history and of the act as a whole. *Frierson*, *supra* at 734. In construing the no-fault act, a court should use common sense. *Id.* The no-fault act is remedial and must be liberally construed in favor of the persons who are its intended beneficiaries. *Id.*

Plaintiffs assert that the trial court erred in ruling that the $25 overhead fee constituted an "accommodation" under MCL 500.3107(1)(a). The term "accommodation" is not defined by the no-fault act. See MCL 500.3101 *et seq*. If a statute does not provide a definition for a term, the term is to be construed according to its plain and ordinary meaning. *Griffith*, *supra* at 526. In so doing, it is appropriate to look to the term's dictionary definition. *Id.* The term "accommodation" is broad, encompassing, among other things, "food and lodging" and "*anything* that supplies a need, want, convenience, etc." *Random House Webster's College Dictionary* (1997) (emphasis added). Defendants supplied space, medical supplies, and medical services to accommodate the medical needs of plaintiffs' insureds. Edmund Michael, defendants' business manager, testified that the $25 fee was for "overhead," including things such as lights, heat, and supplies. We find that these services and supplies constitute an "accommodation" as that term is broadly defined in *Random House Webster's College Dictionary* (1997) because they all satisfy the need for plaintiffs' insureds to obtain medical care.

Plaintiffs also argue that the $25 overhead fee is not an "allowable expense" under MCL 500.3107(1)(a) because it was not directly related to the "care" of an injured person. The term "care" "may encompass expenses for products, services, and accommodations that are necessary because of [an] accident but that may not restore a person to his preinjury state." *Griffith*, *supra* at 535. We reject plaintiffs' contention that the $25 overhead fee is not related to the "care" of plaintiffs' insureds because it covers the expenses associated with medical supplies, medical services, and costs associated with accommodating patients injured in automobile accidents with medical appointments.

Plaintiffs next argue that the trial court erred in granting summary disposition in favor of defendants under MCR 500.3157. We disagree.

The trial court granted summary disposition under MCR 2.116(C)(10). Our review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v DOT*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered

> by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005).]

According to plaintiffs, the trial court erred in granting summary disposition in favor of defendants under MCR 500.3157 because defendants were not "lawfully rendering treatment" under MCL 500.3157. MCL 500.3157 provides, in relevant part:

> A physician, hospital, clinic or other person or institution *lawfully rendering treatment* to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. . . . [Emphasis added.]

Plaintiffs assert that defendants were not "lawfully rendering treatment" in part because defendants used multiple corporate names in submitting bills and claims for payment and the corporations were not lawfully incorporated or were operating under an assumed name without the filing of an "assumed name" certificate. The trial court rejected plaintiffs' claim, ruling:

> The Court is satisfied that the plain language of the No Fault Act is unambiguous and must be interpreted as written. The Court finds the language, that "a physician, hospital, clinic or other person or institution *lawfully rendering treatment* to an injured person", within MCL 500.3157 to be dispositive on this issue. The Court is satisfied that the language "lawfully rendering treatment" does not mean or imply that a corporation must be lawfully registered with the state in order to lawfully render treatment. If that is what the legislature intended, it would have placed "lawful" or "proper legal entity" prior to "physician, hospital, clinic or other person or institution" in the statute. Plaintiffs' interpretation that a stale or defunct corporation violates the No Fault Act per se by submitting bills to an insurer under the Act is not supported by case law or statutory interpretation. Consequently, the Court is satisfied that Defendants are entitled to summary disposition on Plaintiffs' claim that in improperly identified corporation, or corporation not in compliance with the filing requirements of the Business Corporation Act can not lawfully render treatment to patients under the No Fault Act.

Determination of this issue requires this Court to construe the phrase "lawfully rendering treatment" in MCL 500.3157. We agree with the trial court's interpretation of this phrase. If the

Legislature had intended for MCL 500.3157 to require a health care provider to have a particular corporate status or to engage in specific corporate filing requirements, it could have made specific provisions mandating such requirements in MCL 500.3157. However, it did not do so. This Court may not read a provision into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). This Court will not read mandates into MCL 500.3157 which the Legislature did not include. Furthermore, it would be nonsensical and violate the rule that the no-fault act must be liberally construed in favor of its intended beneficiaries to interpret the no-fault act as not providing coverage for medical treatment rendered to victims of automobile accidents by licensed and competent medical professionals on the basis of the corporate status or lack thereof of the medical care providers. Therefore, we find that the trial court properly granted summary disposition on this issue.

Plaintiffs also argue that they established a genuine issue of material fact regarding whether defendants were "lawfully rendering treatment" because Dr. Stephen Castor, a chiropractor, rendered care beyond the scope of his licensure and because health care was rendered by unlicensed staff without proper supervision. Plaintiffs argue that the deposition testimony of Dr. Lewerenz and Gloria Urquhart establish a genuine issue of material fact on this issue. Specifically, plaintiffs contend that the testimony establishes that Dr. Castor examined non-spinal areas, performed an invasive procedure requiring instrumentation, dispensed drugs or medicine, adjusted or treated non-spinal areas, or used physical therapy modalities, such as hot and cold packs, outside the scope of a chiropractic practice as defined by MCL 333.16401(1)(b)(i), (ii), and (iii). We have carefully reviewed the testimony on the transcript pages cited by plaintiffs and conclude that, even viewing the testimony of Dr. Lewerenz and Gloria Urquhart as true, there is no evidence on the pages of the transcripts cited by plaintiffs to show that Dr. Castor performed functions outside the scope of a chiropractic practice as defined by MCL 333.16401(b).

Moreover, plaintiffs also failed to establish an issue of material fact regarding whether Dr. Lewerenz allowed his employees to render care without his supervision. According to plaintiffs, an issue of fact was established by Dr. Lewerenz's admissions that he spent about two days per week at one of his clinics, that he did not employ a physical therapist at that clinic and one other clinic, that he had no written protocols for administering physical therapy, that he permitted non-licensed staff to perform physical therapy, give injections, and perform blood draws, and that he did not have to be present when one of the employees drew blood as long as he was personally satisfied that the person was qualified and trained. Plaintiffs assert that these admissions establish that unlicensed individuals rendered health care without adequate supervision. MCL 333.16215(1) authorizes licensed physicians to delegate the performance of selected acts, tasks, or functions to individuals who are qualified by education, training, or experience to perform such acts, tasks, or functions within the scope of the practice of the licensee's profession and that will be performed under the licensee's supervision. MCL 333.16109(2) defines "supervision" as:

> the overseeing of or participation in the work of another individual by a health professional licensed under this article in circumstances where at least all of the following conditions exist:

(a) The continuous availability of direct communication in person or by radio, telephone, or telecommunication between the supervised individual and a licensed health professional.

(b) The availability of a licensed health professional on a regularly scheduled basis to review the practice of the supervised individual, to provide consultation to the supervised individual, to review records, and to further educate the supervised individual in the performance of the individual's functions.

(c) The provision by the licensed supervising health professional of predetermined procedures and drug protocol.

Even accepting all of Dr. Lewerenz's statements as true, they do not establish the absence of the continuous availability of direct communication, MCL 333.16109(2)(a), the unavailability of Dr. Lewerenz on a regularly scheduled basis to review the practice of the supervised individual and consult with and further educate the supervised individual, MCL 333.16109(2)(b), or the absence of predetermined procedures and drug protocol, MCL 333.16109(2)(c). None of the testimony cited by plaintiffs establishes a question of fact regarding whether Dr. Lewerenz failed to properly supervise his employees under MCL 333.16109(2). A party may not merely announce its position and leave it to this Court to search for authority to sustain its position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Plaintiffs have failed to articulate specific facts establishing that defendants' employees were not supervised within the meaning of MCL 333.16109(2), and we will not search for a factual basis to sustain plaintiffs' position.

Plaintiffs next argue that the trial court erred in concluding that Dr. McLaurin's payment of 25 percent of his collected gross receipts to Dr. Lewerenz as payment for rent did not constitute improper fee splitting in violation of MCL 333.16221(d)(ii) and (iii) and MCL 750.428. We decline to address this issue because plaintiffs failed to include it in their statement of questions presented. Issues not raised in the statement of questions presented are waived on appeal. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

Plaintiffs next argue that the trial court abused its discretion in denying their motion for reconsideration of the trial court's decision to grant summary disposition of plaintiffs' fraud and misrepresentation claims. We disagree.

This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). Generally, a motion for reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); MCR 2.119(F)(3).

In granting summary disposition of plaintiffs' fraud and misrepresentation claims, the trial court essentially ruled that plaintiffs failed to establish the existence of an issue of material fact with proper documentary evidence. Plaintiffs argue that in moving for reconsideration, they submitted additional materials sufficient to establish a genuine issue of material fact. We conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration. To show that the trial court abused its discretion in denying plaintiffs' motion

for reconsideration, plaintiffs must show that the trial court made a palpable error that misled the parties, or that the summary disposition motion would have been denied if the error were corrected. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000); MCR 2.119(F)(3). According to plaintiffs' brief on appeal, they attached to their motion for reconsideration documentary evidence that established a genuine issue of material fact. Specifically, plaintiffs contend in their brief on appeal that the affidavits of Edmund Michael, Dr. Lewerenz's business manager, and Gloria Urquhart, plaintiffs' investigator, establish a genuine issue of material fact. However, defendants moved for summary disposition on June 30, 2004, and Michael's deposition was taken on May 14, 2004, and Urquhart's deposition was taken on December 1, 2003 and February 18, 2004. Plaintiffs do not argue that the affidavits could not have been presented to the trial court when defendants moved for summary disposition on June 30, 2004. A trial court does not abuse its discretion in denying a motion for reconsideration when the motion is based on facts that could have been presented to the trial court before it decided the original motion. *Churchman*, *supra* at 233.

Furthermore, even accepting plaintiffs' contentions as true, which this Court must do because plaintiffs were the nonmoving party, plaintiffs do not explain how Michael's and Urquhart's deposition testimony establishes an issue of material fact regarding the elements of fraud. To establish a cause of action for fraud or misrepresentation, a plaintiff must prove (1) that the charged party made a material representation; (2) that the representation was false; (3) that when he or she made the representation, he or she knew it was false, or made it recklessly, without any knowledge of its truth or falsity; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997); see also *Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 3; 506 NW2d 857 (1993). Beyond listing the elements of fraud in their brief on appeal and making conclusory statements about the effect of the deposition testimony of Michael and Urquhart, plaintiffs fail to explain or analyze how the deposition testimony of Michael and Urquhart establishes a genuine issue of material fact regarding any of the elements of fraud or misrepresentation. An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Wilson*, *supra* at 243. Furthermore, where, as here, plaintiffs have given an issue cursory treatment and have failed to properly address the merits of an assertion, this Court considers the issue abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Plaintiffs next argue that the trial court erred in awarding defendants case evaluation sanctions under MCR 2.403. The trial court awarded defendants $23,000 in attorney fees and $3,683.79 in costs and fees. According to plaintiffs, the trial court should have denied defendants' request for sanctions based on the "interest of justice" exception set forth in MCR 2.403(O)(11). We disagree.

This Court reviews de novo a trial court's decision to grant or deny case evaluation sanctions. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). However, because a trial court's decision whether to award costs under the "interest of justice exception" in MCR 2.403(O)(11) is discretionary, this Court's review of that decision is for an abuse of discretion. *Id.*

The purpose of MCR 2.403(O) is to "encourage settlement and deter protracted litigation . . . ." *Haliw v Sterling Heights*, 257 Mich App 689, 704; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700 (2005). MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

The term "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). However, if a "verdict" is reached on the basis of such a motion, "the court may, *in the interest of justice*, refuse to award actual costs." MCR 2.403(O)(11) (emphasis added); see also *Harbour*, *supra* at 466. The "interest of justice" exception should only be invoked if unusual circumstances exist. *Harbour*, *supra* at 466. Unusual circumstances which would justify the invocation of the "interest of justice" exception include, but are not limited to, cases of first impression, cases in which the law is unsettled and substantial damages are at issue, cases in which a party is indigent and an issue merits determination by a trier of fact, cases involving misconduct on the part of the prevailing party, and cases which may have a significant effect on third persons. *Haliw*, *supra* at 707. A grant of fees under MCR 2.405 should be the rule rather than the exception; otherwise, the "interest of justice" exception would be expanded to the point where it would render the rule ineffective. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 390-391; 689 NW2d 145 (2004), quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996).

Plaintiffs argued in their brief in support of their answer to defendants' motion for costs, fees, and case evaluation sanctions that the trial court could, in the interest of justice, refuse to award defendants costs and attorney fees. However, the only unusual circumstance cited by plaintiffs in their brief was the fact that "[p]laintiffs were not allowed to try the case[.]" At the hearing on the motion, plaintiffs also asserted that "[t]he court has indicated in the past that it was a novel theory on behalf of the plaintiffs." On appeal, plaintiffs argue that the case presents unusual circumstances because in a November 29, 2004, order, the trial court asserted that plaintiffs' interpretation of MCL 500.3157 presented an issue of first impression, defendants' failure to comply with plaintiffs' discovery requests prevented the court from deciding whether defendants were engaging in fee splitting and double billing, and that defendants' color-coded filing system, which differentiated patients' treatment based on the type of their insurance or lack thereof, was "unsettling."

Plaintiffs did not raise all of these specific arguments before the trial court, however, and now raises them for the first time on appeal.[1] Generally, to preserve an issue for appellate

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[1] Plaintiffs asserted on the record at the hearing that "[t]he court has indicated in the past that it was a novel theory on behalf of the plaintiffs." We do not believe that this constitutes advancement of the argument that the case presented an issue of first impression. In any event, while the trial court implicitly rejected any notion that the case involved unusual circumstances (continued…)

review, the issue must be raised before and addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Even if plaintiffs had raised these issues before the trial court, the trial court has a great deal of discretion in determining whether to invoke the "interest of justice" exception of MCR 2.403(O)(11). "[A]n abuse of discretion will be found when the decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Given the fact that plaintiffs did not argue unusual circumstances before the trial court, the trial court's ruling in this regard cannot be said to be so violative of fact and logic that it evidences the perversity of will, the defiance of judgment, or the exercise of passion or bias. Therefore, the trial court did not abuse its discretion in refusing to invoke the "interest of justice" exception of MCR 2.403(O)(11) and in awarding defendants costs and attorney fees.

Plaintiffs finally argue that the trial court abused its discretion in awarding defendants $500 that defendants were sanctioned as a condition for setting aside a default, $75 for a case evaluation fee, $40 for motion fees, $60 for depositions costs and service fees, unspecified costs for four depositions that were not filed with the clerk's office, and $10 in statutory attorney fees. We disagree.

This Court reviews an award of costs and attorney fees for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002); *In re Condemnation of Private Property for Highway Purposes (Dep't of Transportation v Curis)*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997).

Plaintiffs concede in their reply brief on appeal that they failed to raise any arguments that costs and attorney fees were not allowed by statute; however, they suggest that the fact that they indicated in their response to defendants' motion for costs that "the taxable costs listed are not allowable under the statutes and court rules" is sufficient to satisfy the requirement that they raised the issue before the trial court. An issue that has not been raised before and addressed by the trial court is not preserved for appellate review. *Fast Air, Inc*, *supra* at 549. Although it is true that plaintiffs generally alleged in their response to defendants' motion that the costs sought by defendants were not allowed by statute or court rule, they failed to raise the numerous specific arguments that they now raise on appeal, either in their brief in support of their answer to defendant's motion for taxation of costs, fees, and case evaluation sanctions or on the record at the hearing on the motion. The trial court therefore did not have the opportunity to address those issues. Because they failed to specifically raise the issues below and the trial court therefore did not address them, the issue is unpreserved. *Id.* Therefore, this Court need not review the issue. *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994).

(…continued)

warranting the invocation of MCR 2.403(O)(11), it did not specifically address whether the case involved an issue of first impression. An issue that has not been addressed by the trial court is not preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Although we may review an unpreserved issue if it is one of law and the facts necessary for the issue's resolution have been presented, *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992), we decline to address plaintiffs' numerous specific statutory arguments which plaintiffs assert for the first time on appeal when plaintiffs could have, and should have, raised such arguments before the trial court. In support of their claim for costs and attorney fees, defendants submitted a detailed document with the names of their two attorneys, the attorneys' hourly rate, the dates they provided legal services to defendants, what specific services were provided, and the number of hours of legal services they provided. According to the document, one attorney charged $400 per hour and the other charged $250 per hour. Defendants argued that the $400 hourly rate was excessive and asserted that a more appropriate rate was $150 to $200 per hour. The trial court agreed and reduced the hourly rate to $200 per hour, for a total award of $23,000 in attorney fees. Defendants also submitted a detailed document containing a list of the costs associated with defendant the action. Defendants sought $3,683.79, and the trial court awarded the full amount. This Court must give deference to a trial court's decision to grant costs and fees and in what amounts, *Kernen*, *supra* at 691, and given the documentation that defendants supplied in support of their claim for costs and attorney fees and the trial court's consideration and evaluation of that documentation, the trial court's decision to award costs and attorney fees was not palpably and grossly violative of fact or logic and did not constitute an abuse of discretion.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper