STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA PAQUETTE, Guardian and Conservator of RICHARD PAQUETTE, a Legally Incapacitated Person,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTO INSURANCE COMPANY,

Defendant-Appellant,

and

ARVILLA WOODS, SHANNE SMITH, and MARISSA GIBBONS,

Defendants.

UNPUBLISHED
July 21, 2009

No. 279909
Macomb Circuit Court
LC No. 2004-002787-NO

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendant, State Farm Mutual Auto Insurance Company, appeals as of right from a jury verdict in favor of plaintiff. We affirm.

Plaintiff, Patricia Paquette, on behalf of her son, Richard Paquette a legally incapacitated person, filed a complaint to recover attendant care costs and other benefits not paid to family members for providing services to Richard. Richard was catastrophically injured in a motor vehicle accident on March 16, 1985, and had suffered a severe traumatic brain injury. Defendant was the insurer at the time of the accident. Plaintiff alleged that defendant concealed the entitlement to personal injury protection benefits, but defendant asserted that plaintiff's request was untimely and all benefits were paid.

I. Application of MCL 500.3145

Defendant first alleges that plaintiff's recovery was limited by the one-year-back limitation period contained in MCL 500.3145(1). We disagree. Summary disposition decisions are reviewed de novo on appeal. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006).

Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent – the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is clear or unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Application of the law to the facts is reviewed de novo. *Centennial Healthcare Mgt Corp v Dep't of Consumer & Industry Services*, 254 Mich App 275, 284; 657 NW2d 746 (2002).

MCL 500.3145 governs the time for commencement of an action to recover insurance benefits and provides in relevant part:

> (1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

Defendant alleges that a claim pursuant to MCL 500.3145(1) is barred because: (1) there is no fraud exception to the one-year back limitation on recovery; (2) even if a fraud exception existed, plaintiff voluntarily withdrew her fraud claim; and (3) even if an equitable estoppel exception existed, the elements of the claim were not established.

In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 564-565; 702 NW2d 539 (2005), the plaintiff's son suffered a traumatic brain injury when he was involved in an automobile accident at the age of sixteen. Insurance coverage was available through the no-fault automobile insurance policy issued to his parents. After discharge from the hospital, the plaintiff cared for her son, and benefits were paid to her. However, after the defendant received a physician's prescription indicating that the son could function without close supervision, the defendant discontinued home health care payments to the plaintiff. The plaintiff filed a complaint for payment for services rendered, and the defendant sought to limit the benefits to the one-year period prior to the filing of the complaint, citing MCL 500.3145(1). *Id*.

The Supreme Court accepted the bypass application for leave to appeal to determine if *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), should be overruled. *Devillers, supra* at 564. In *Lewis*, the Court "adopted a judicial tolling doctrine under which the one-year statutory period is tolled from the time a specific claim for benefits is filed to the date the insurer formally

denies liability." *Id*. The Supreme Court overruled *Lewis* by concluding that the decision was contrary to the plain language of the statute. *Id*. at 586. However, in doing so, the Court acknowledged that the courts possess equitable power and that power may be invoked under "unusual circumstances" such as instances of fraud or mutual mistake. In the absence of allegations of unusual circumstances, there was no basis to invoke the Court's equitable powers. *Id*. at 590-591.

In *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 402; 751 NW2d 443 (2008), the sister plaintiffs sustained severe brain injuries when they were passengers in a vehicle driven by their mother in January 1987. After being discharged from the hospital in October 1987, both plaintiffs required 24-hour attendant care. However, in the fall of 1989, only one of the plaintiffs required continuous nursing care. At the time of the accident, the plaintiffs' mother was working at a rate of $50 per day. The defendant's claim representative suggested that she quit her job to stay home and provide care at a rate of $50 per day. In September 1991, the rate was increased, by agreement, to $75 per day. In 1998, the rate was changed to $6.50 per hour and in October 2000, it was changed to $10 per hour. By December 2003, the defendant had paid more than $5.6 million in PIP benefits pursuant to the no-fault act. *Id*.

In 2003, the plaintiffs filed suit, alleging that the defendant failed to pay all of the PIP benefits to which they were entitled and for underpayment of benefits. When it was learned that the minority tolling provision would not apply to the no-fault act, MCL 500.3145, the plaintiffs amended their complaint to assert a new cause of action. Specifically, the plaintiffs alleged that the claim representative fraudulently induced the mother to accept unreasonably low compensation for her in-home attendant care services by telling her that if she did not quit her job she would be personally responsible for payment of nursing care, she had a parental obligation to provide the care, her child would be institutionalized if she did not quit her job, the rate was non-negotiable, and other improper statements designed to induce them to accept the defendant's terms and payments. *Id*. at 403-404.

The Supreme Court concluded that the plaintiffs could maintain a cause of action for fraud notwithstanding the provisions of MCL 500.3145(1):

> The one-year-back rule of [MCL 500.3145(1)] limits recovery of PIP benefits to those incurred one year before the date on which the no-fault action was commenced. PIP benefits include "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a).
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> Plaintiffs argue that by alleging in their amended complaint that defendant fraudulently induced [the plaintiffs' mother] to accept an unreasonably low compensation rate for her in-home attendant-care services, plaintiffs brought a common-law fraud claim that is distinct from a no-fault claim for benefits, and that such claim therefore is not subject to the one-year-back rule of MCL 500.3145(1). A fraud action is not subject to the one-year-back rule of MCL 500.3145(1) because the one-year-back rule applies only to actions brought under the no-fault act, and a fraud action is a distinct and independent action brought under the common law. A fraud action is not an "action for recovery of [PIP] benefits payable under [the no-fault act] for accidental bodily injury." Rather, in

> the context of an insurance contract, a fraud action is an action for recovery of damages payable under the common law for losses incurred as a result of the insurer's fraudulent conduct. There is a distinction between claiming that an insurer has refused to pay no-fault benefits to its insureds and claiming that the insurer has defrauded its insureds. A fraud action is conceptually distinct from a no-fault action because: (1) a fraud action requires an insured to prove several elements that are different from those required in a no-fault action; (2) a fraud action accrues at a different time than a no-fault action; and (3) a fraud action permits an insured to recover a wide range of damages that are not available in a no-fault action.
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> A fraud claim is clearly distinct from a no-fault claim. First, a fraud claim requires proof of additional elements, such as deceit, misrepresentation, or concealment of material facts, and the substance of such claim is the insurer's wrongful conduct. Unlike a no-fault claim, a fraud claim does not arise from an insurer's mere omission to perform a contractual or statutory obligation, such as its failure to pay all the PIP benefits to which its insureds are entitled. Rather, it arises from the insurer's breach of its separate and independent duty not to deceive the insureds, which duty is imposed by law as a function of the relationship of the parties. Second, unlike an action for no-fault benefits, which arises when the insurer fails to pay benefits, an action for fraud arises when the fraud is perpetrated. *Hearn v Rickenbacker*, 428 Mich 32, 39; 400 NW2d 90 (1987). Finally, under a no-fault cause of action, the insureds can only recover no-fault benefits, whereas under a fraud cause of action, the insureds may recover damages for any loss sustained as a result of the fraudulent conduct, which may include the equivalent of no-fault benefits, reasonable attorney fees, damages for emotional distress, and even exemplary damages. See *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 250-251; 531 NW2d 144 (1995); *Veselenak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982); *Phinney v Permutter*, 222 Mich App 513, 527; 564 NW2d 532 (1997); *Clemens v Lesnek*, 200 Mich App 456, 463-464; 505 NW2d 283 (1993). [*Cooper, supra* at 406-409 (footnotes omitted).]

Accordingly, defendant's contention that a fraud claim may not be maintained where the underlying misconduct arises from a no-fault action is simply without merit. The *Devillers* Court held that unusual circumstances, including fraud and mutual mistake, would allow a court to invoke its equitable powers to allow a cause of action to proceed, *Devillers, supra* at 590-591, and the *Cooper* Court expressly held that a fraud action could be maintained. *Cooper, supra* at 407-408.

Defendant asserts that even if a fraud action could be maintained, reversal is required because plaintiff dismissed the fraud claim prior to trial.[1] We disagree. Review of the *Devillers* decision reveals that when a defendant challenged a complaint based on the limitations period contained in MCL 500.3145(1), the plaintiff could invoke the court's equitable powers by raising allegations of fraud, mutual mistake, and *other circumstances*. *Devillers, supra* at 590-591. In the present case, when defendant raised the one-year back rule found in MCL 500.3145(1), plaintiff raised equitable estoppel as a defense to the limitations period. This course of action demonstrates that when faced with the issue of the limitations period, plaintiff invoked the court's equitable powers by relying on estoppel to preclude defendant from benefiting from its misconduct.[2] Accordingly, defendant's assertion is without merit.

Defendant further asserts that plaintiff failed to establish equitable estoppel. We disagree. Equitable estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe certain facts with the other party justifiably relying upon those facts and prejudice arises when the representing party is allowed to deny the existence of the facts. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006). Equitable estoppel is not a cause of action but is utilized as a defense. *Id*. Although equitable estoppel may only be available as a defense, promissory estoppel may be used as a cause of action for damages. *Hoye v Westfield Ins Co*, 194 Mich App 696, 705; 487 NW2d 838 (1992). The equitable estoppel doctrine is based on the principle that loss must be borne by the one whose erroneous conduct, by commission or omission, caused an injury. *American Trust Co v Bergstein*, 246 Mich 527, 530; 224 NW 327 (1929).

The elements of equitable estoppel are: (1) a party induces another party to believe facts through representations, admissions, or silence intentionally or negligently; (2) the other party justifiably relies and operates on the belief; and (3) the other party is prejudiced if the first party is permitted to deny the existence of the facts. *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005). To apply equitable estoppel in the insurance context, the insured must establish that the insurer induced a belief through acts, representations, or silence regarding coverage or the lack thereof, the insured justifiably relied on this belief, and the insured was prejudiced as a result of the reliance. See *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 204; 702 NW2d 106 (2005). The application of a legal doctrine presents a question of law. *James v Alberts*, 464 Mich 12, 14-15; 626 NW2d 158 (2001). When the doctrine of estoppel is applied in the context of a deprivation of legal rights, the application presents a mixed question of law and fact, and the jury must draw the conclusions from the evidence. *State Bank of Standish v Curry*, 442 Mich 76, 84 n 6; 500 NW2d 104 (1993); *Maxwell v Bay City Bridge Co*, 41 Mich 453, 467-468; 2 NW 639 (1879).

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[1] Plaintiff's case proceeded to trial before the *Cooper* decision was released.

[2] Moreover, we note that MCR 2.118(C) provides that the parties may seek to amend the pleadings to conform to the evidence when issues are expressly or impliedly tried, and amendment of the evidence to conform to the pleadings may be made by motion even after judgment.

Defendant contends that a claim for equitable estoppel fails because a no-fault insurer has no obligation as a matter of law to advise a claimant regarding the benefits available. Regardless of the provisions of the no-fault act, the testimony at trial revealed that defendant did have such an obligation. Specifically, the claims representative for defendant, Arvilla Woods, testified that, irrespective of whether the insured was represented by counsel or not, the family of an insured should be paid for providing services, and there was no record evidence in the claims file that she notified plaintiff's family or counsel of the entitlement to benefits for services rendered. Thus, the lack of a statutory obligation is irrelevant where Woods testified that defendant's policies and procedures involved providing family members with notice of the benefits available and making payment for those benefits when the family rendered services. Therefore, this challenge to the equitable estoppel claim is without merit.

Defendant also contends that the misrepresentation requirement of the claim of equitable estoppel cannot be satisfied because plaintiff was not entitled to recover the benefits requested. Defendant merely makes a conclusion and fails to set forth the reasons why plaintiff was not entitled to benefits. An appellant's failure to properly address the merits of an assertion of error with citation to authority constitutes abandonment of the issue. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008). An appellant may not simply announce a position or assert an error and leave it to the appellate courts to discover and rationalize the basis for the claims and then search for authority to sustain or reject the position. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Therefore, this claim of error does not provide defendant with relief.[3]

II. Jury Panel

Defendant asserts that the summary exclusion of defendant's policyholders from the jury venire constituted legal error and an abuse of discretion. We disagree. A trial court's factual findings regarding juror qualifications are reviewed for clear error. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). Clear error occurs when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* Application of the law to the facts is reviewed de novo. *Centennial, supra*.

Jurors may be challenged for cause where the person "has a financial interest other than that of a taxpayer in the outcome of the action." MCR 2.511(D)(11). Where the court concludes that a person is not qualified to serve as a juror, or is exempt from service, or claims an exemption, the court shall discharge the person from further attendance. MCL 600.1337. However, an error committed when determining juror qualifications does not lead to automatic reversal. MCL 600.1354 provides, in relevant part:

> (1) Failure to comply with the provisions of this chapter shall not be grounds for a continuance nor shall it affect the validity of a jury verdict unless the party requesting the continuance or claiming invalidity has made timely objection and

[3] In light of our holding, we need not address the application of plaintiff's alternative theory of recovery to MCL 500.3145(1).

> unless the party demonstrates actual prejudice to his cause and unless the noncompliance is substantial. …

A trial court's decision to excuse a juror for health reasons during a trial without consulting counsel and without making a record of the juror conversation does not satisfy the actual prejudice and substantial noncompliance provision of MCL 600.1354(1). *Haberkorn v Chrysler Corp*, 210 Mich App 354, 363; 533 NW2d 373 (1995). However, a juror's representation that she was never convicted of a felony when, in fact, she had been convicted of an offense involving her hire of an assassin to kill a drug informant, satisfied the actual prejudice requirement. *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 135; 523 NW2d 849 (1994). In the present case, defendant fails to allege or demonstrate actual prejudice as a result of the trial court's ruling. Accordingly, this claim of error does not provide defendant with appellate relief.[4]

III. Admission of Evidence

Defendant next asserts that the trial court erred by admitting plaintiff's exhibits 41 and 42, admitting the testimony of plaintiff's expert, Steven Prater, and admitting deposition excerpts from other unrelated cases. We disagree. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*. Reversal on the basis of the erroneous admission of evidence is unwarranted unless a substantial right of a party is affected, and it affirmatively appears that the failure to grant relief is inconsistent with substantial justice. *Id*. An abuse of discretion standard acknowledges that "there will be circumstances in which there is no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (internal quotation omitted). Accordingly, if the trial court selects one of multiple principled outcomes, an abuse of

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[4] Case law provides that jurors who are members of a mutual insurance company should be disqualified as jurors in an action to which the insurance company is a party and liable to be assessed. See *Fedorinchik v Stewart*, 289 Mich 436, 439; 286 NW 673 (1939) ("Members of a mutual insurance company liable to be assessed to pay losses incurred by the company, are disqualified from serving as jurors in an action to which it is a party; or in which it is interested."); *Martin v Farmers Mut Fire Ins Co*, 139 Mich 148, 151; 102 NW 656 (1905) ("The fact that these jurors were members of this mutual fire-insurance company, liable to be assessed and to pay if this case went against the company, disqualified them from sitting."). On appeal, defendant acknowledges the case law cited by plaintiff, but asserts that it is inapplicable because it pre-dates the creation of the Michigan Court Rules. Furthermore, defendant concludes that defendant is not an assessing mutual insurance company and that any benefits would be paid by the Michigan Catastrophic Claims Association (MCCA) for claims in excess of $250,000; therefore, the underlying rational of the case law cited by plaintiff was not invoked. However, defendant makes blanket assertions. There was no evidence submitted in the lower court regarding defendant's insurance status and there was no evidence that the claims were, in fact, paid by the MCCA. In light of defendant's failure to lay a foundation to support its position, this claim of error cannot be examined. See *Goolsby, supra*.

discretion has not occurred, and it is appropriate for the reviewing court to defer to the trial court's judgment. *Id*. In Michigan, this is the default abuse of discretion standard. *Id*.

Defendant objected to the admission of plaintiff's exhibits 41 and 42 during trial. Because the issue was raised, addressed, and decided in the lower court, the issue is preserved for appellate review. *Persinger v Holst*, 248 Mich App 499, 510; 639 NW2d 594 (2001). However, the exhibits were not submitted with the record on appeal. Defendant, as the appellant, had the duty to provide the full record on appeal. *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). This Court does not consider any alleged evidence or testimony proffered by the parties for which there is no evidentiary support. *Id*. In light of the fact that these documents were not submitted with the record on appeal or attached to the brief on appeal, this issue cannot be reviewed.

Defendant contends that it was erroneous to admit the testimony of plaintiff's insurance expert, Steven Prater, because it was irrelevant, and the probative value of the testimony was outweighed by the danger of unfair prejudice. We disagree. Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination more or less probable, and evidence is admissible if relevant. MRE 401; MRE 402. Relevant evidence may be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice. …" MRE 403. Evidence may be relevant and material when it supports or challenges a party's theory of the case. See *Smith v Michigan Employment Security Comm*, 410 Mich 231, 266; 301 NW2d 285 (1981).

Defendant contends that the admission of Prater's testimony was improper when the only issue in the case was whether defendant failed to pay attendant care benefits that were properly due and owing. On this record, we cannot conclude that the trial court's decision to admit this evidence constituted an abuse of discretion. Although defendant opined that the only issue in the case involved a failure to pay, plaintiff asserted that defendant had a duty to advise of entitlement to insurance payments for services rendered by family members, but defendant deliberately failed to apprise the family of benefits. Plaintiff further asserted that defendant was estopped from limiting the amount of damages recoverable in light of its deliberate misconduct. The contested evidence was relevant and material to plaintiff's theory of the case. *Smith, supra*.

Defendant also contends that it was erroneous to allow the testimony of other claims adjusters to testify regarding defendant's claims handling practices because the evidence was irrelevant, the probative value was outweighed by the danger of unfair prejudice, and there was no statistical analysis to demonstrate a continuous pattern or scheme. We conclude that the trial court did not abuse its discretion by admitting this testimony. *Maldonado, supra*. Plaintiff's theory of the case was that defendant had a policy of failing to apprise family members of an entitlement to be paid for services rendered. The testimony of other agents established that the failure to pay plaintiff for services was not an isolated event. Thus, this evidence was offered to substantiate plaintiff's theory of the case. *Smith, supra*. The probative value of this testimony was not outweighed by the danger of unfair prejudice. Further, the evidence was offered to counter defendant's theory of the case. Defendant's theory was that it had paid all benefits to which plaintiff was entitled, plaintiff's attorney made claims for benefits that were paid, and plaintiff failed to file suit against Richard's estate to recover unpaid benefits for services rendered. The testimony of the other claims representatives countered defendant's assertion that it paid all benefits to which plaintiff was entitled; specifically it challenged the assertion that

attendant care costs were paid for family services. Although defendant asserts that plaintiff did not provide statistical analysis to demonstrate a common plan or scheme, defendant failed to cite any authority that statistical analysis was required to support admission. An appellant's failure to properly address the merits of an assertion of error with citation to authority constitutes abandonment of the issue. *Woods, supra*.

IV. Ex Parte Communications with the Jury

Defendant alleges that reversible error occurred when the trial court engaged in ex parte communications with the jury. We disagree. The question of the propriety of an ex parte communication is subject to de novo review. See *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). Application of the law to the facts is reviewed de novo, *Centennial, supra*, but the clear error standard applies to the trial court's factual findings, *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006).

Review of the record reveals that the jury was instructed, and the parties did not object to the instructions. The jury was sent to deliberate at 9:45 a.m. On the record, there was no statement regarding the presence of counsel during deliberations. The next day, court resumed. The trial court indicated that it needed to make a record of the jury notes that had been received the prior day. Specifically, the jury was provided calculators in response to a request, but the jury was denied the request for additional charts and told to use the charts provided or to perform their own calculations. The fourth note from the jury requested clarification regarding what the term "harm" meant on the verdict form. The trial court answered in a written note, "Harm would mean nonpayment of attendant care that they find was owed." Counsel for defendant objected to the instruction to the jury, stating that it was an incorrect statement of the law. Counsel further indicated that he was present from 1:15 p.m. to 3:00 p.m., and then returned at 4:00 p.m. However, his co-counsel was available by telephone for the entire afternoon. Defendant moved for a mistrial based on the failure to provide notice.

The trial court denied the request. First, the court noted that it was unaware of the presence of counsel. Second, the court stated that "unique circumstances" had occurred that day, but did not expand on those circumstances on the record. The trial judge then stated that the court officer gave notice to defense counsel who indicated that he "had no problem at that time." Because the instructions to the jury were benign and did not provide any sort of opinion regarding the merits of the case, the trial court denied the motion for a mistrial, concluding that reversible error had not occurred where proper notice was given through the court officer. At that time, counsel for defendant acknowledged receiving notice from the court officer, but stated that he was unaware of the nature of the question.

On appeal, defendant submits that MCR 6.414 provides that the court must provide notice to the parties. However, ultimately counsel acknowledged that he received notice. Despite the notice, there is no indication that counsel conveyed to the court officer that the content of the notes should be revealed contemporaneously and on the record. A party may not harbor error as an appellate parachute by assenting to action at trial and raising the issue on appeal. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005).

Furthermore, the civil rules of procedure, MCR 2.516(B)(4) govern instructions to the jury and provide that while the jury is deliberating, the court may further instruct in the presence

of or after reasonable notice to the parties. A party may assign error to the giving of an instruction after deliberations commence by specifically stating the matter to which the party objects and the grounds for the objection. MCR 2.516(C). A party's failure to object when informed of the communication is evidence that the communication was not prejudicial. *Meyer v City of Center Line*, 242 Mich App 560, 565-566; 619 NW2d 182 (2000). Additionally, a party must provide evidence of prejudice by the court's answer to the jury question. *Id*. A trial court does not abuse its discretion in denying a motion for a new trial based on the court's answer to a jury question when a party fails to demonstrate prejudice. *Id*.

Review of the record in the present case reveals that counsel for defendant acknowledged notice of the jury note through the court officer. However, there is no evidence that counsel made inquiry regarding the content of the note or requested an opportunity to address the note on the record. An objection did not occur until the next day when the court made a record. Defense counsel fails to dispute the trial court's factual finding that it provided reasonable notice to the parties, MCR 2.516(B)(4), and we cannot conclude that the trial court's factual finding was clearly erroneous. *Herald, supra*. Moreover, defendant fails to provide evidence of prejudice by briefing the propriety of the answer to the question, *Meyer, supra*, and fails to identify evidence of prejudice wherein the jury question addressed plaintiff's *alternate* theory of recovery. Accordingly, this issue is without merit.

V. No-Fault Interest

Defendant contends that the penalty interest provision can only be applied thirty days after the verdict was rendered. We disagree. The issue of the application of a statutory interest provision presents a question of law subject to de novo review. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998). However, the issue of reasonableness "is generally a question of fact to be determined by the trier of fact." *Payne v Farm Bureau Ins*, 263 Mich App 521, 523 n 1; 688 NW2d 327 (2004).

MCL 500.3142(2) provides in relevant part: "Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer."

The purpose of no-fault interest is to provide a penalty for the insurer's misconduct; it is not intended as compensation for the insured for damages. *Regents of the Univ of Michigan v State Farm Mutual Ins Co*, 250 Mich App 719, 735; 650 NW2d 129 (2002). To recover this interest, the plaintiff is not required to prove that the defendant acted arbitrarily or unreasonably delayed the payment of benefits. *Id*. Rather, the statute only requires the insured to present the insurer with reasonable proof of loss. *Id*. If the insurer does not pay the claim within 30 days after receiving the proof, the insurer is liable to pay the interest. *Id*. When a hospital sought to recover no-fault benefits for care administered to an uninsured patient, the defendant insurance carrier did not have notice of the amount of the loss until the complaint was filed. *Id*. at 735-736. Consequently, the penalty interest could only be calculated from the date of notice of the amount of the loss, which was the date of the filing of the lawsuit. *Id*. at 736.

In the present case, plaintiff testified that the family provided attendant care services for Richard, and defendant's case manager was aware of the provision of services, but failed to pay. The issue of the reasonableness of defendant's payment of benefits and knowledge was properly submitted to the trier of fact. *Payne*, *supra*. Moreover, the plain language of the statute provides that benefits are overdue if not paid within 30 days after reasonable proof of the fact and of the amount of the loss. The plain language does not provide that a jury verdict's determination of reasonableness is required to invoke the penalty interest provision. *Neal*, *supra*. Therefore, this claimed error does not provide defendant with relief. *Payne*, *supra*.

VI. Motion for Judgment Notwithstanding the Verdict

Lastly, defendant contends that the trial court erred in failing to grant judgment notwithstanding the verdict (JNOV) when plaintiff offered the only evidence in support of attendant care expenses. We disagree. The trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). When reviewing the denial of a JNOV motion, the appellate court views the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine if a party was entitled to judgment as a matter of law. *Id*. The motion should be granted only when there is insufficient evidence presented to create a jury-triable issue. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18-19; 684 NW2d 391 (2004). When reasonable jurors could honestly reach different conclusions regarding the evidence, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

In *Kallabat v State Farm Mut Automobile Ins Co*, 256 Mich App 146, 150; 662 NW2d 97 (2003), the defendant asserted that it was entitled to JNOV because the plaintiff failed to introduce evidence that medical bills evidencing treatment by two doctors was both reasonable in amount and reasonably necessary to the plaintiff's care, recovery, or rehabilitation. This Court rejected the challenge, stating:

> Whether expenses are reasonable and reasonably necessary is generally a question of fact to be resolved by the jury. In determining damages for allowable expenses, the jury must not be allowed to speculate concerning the cost of a particular procedure or service, and a trial court should grant a motion for judgment notwithstanding the verdict if the jury was permitted to engage in such speculation.
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> At its core, defendant's claim is that a plaintiff in an action under MCL 500.3107 must offer *direct* evidence from the treating physician that the expenses incurred were both reasonable and reasonably necessary in order for the plaintiff to prevail. We find no such requirement within the language of the statute, and we cannot find, and defendant does not cite, any binding precedent in this regard. Rather, as with any civil case, the jury is entitled to consider all the evidence introduced by the plaintiff to decide whether the plaintiff has proved by a preponderance of the evidence that the expenses were reasonable and necessary. Thus, direct and circumstantial evidence, and permissible inferences therefrom, may be considered by the jury to determine whether there is sufficient proof that the expenses were both reasonable and necessary. [*Id*. at 151-152 (Citations omitted, emphasis in original).]

Accordingly, whether the expenses for services rendered by plaintiff and her daughters to Richard were reasonable and necessary was an issue for the trier of fact. Although defendant contends that there was merely a subjective assessment by plaintiff that the services were required, Dr. Ancell performed an investigation and concluded that the lift was in fact a two-person job. While defendant raised the possibility that equipment was available to perform a lift with one person, Dr. Ancell opined that the type of equipment used was based in part on the person's stature, and Richard was over six feet tall and weighed over 200 pounds. Therefore, he concluded that two people were necessary to lift Richard. Therefore, the jury was not asked to merely accept plaintiff's subjective testimony. Moreover, when plaintiff inquired about her daughter being paid for lifts because she was unable to perform them alone, the nursing company provided notice to Woods that it would require a minimum two-hour payment for the service and questioned whether defendant could pay the daughter directly. Ultimately, Woods conducted an investigation and authorized payment. Therefore, the attendant care costs with regard to lifts was not merely based on plaintiff's assessment.

With regard to the statement of the issue, defendant raises the issue of attendant care and does not indicate that case management services were also duplicative. Therefore, the issue of case management services was abandoned. *Woods, supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis