STATE OF MICHIGAN

COURT OF APPEALS

COMMUNITY RESOURCE CONSULTANTS, INC.,	UNPUBLISHED March 1, 2011
Plaintiff-Appellee,	
v	No. 293932 Macomb Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	LC No. 2004-002536-CK
Defendant-Appellant.	

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

PER CURIAM.

In this action, plaintiff Community Resource Consultants, Inc. sued defendant State Farm Mutual Automobile Insurance Company, seeking to recover payment for rehabilitation and/or case management services that plaintiff rendered to defendant's insureds. Following a jury trial, the jury awarded plaintiff $205,649.52 for 14 of the 15 consolidated cases, plus penalty interest under the no-fault act, MCL 500.3142, in the amount of $24,681.94, for a total jury award of $230,331.46. The trial court awarded plaintiff $87,500 in attorney fees under MCR 2.403(O)(6)(b), $69,250 in attorney fees under MCL 500.3148(1) and costs of $490. A judgment entered July 10, 2007, awarded plaintiff $431,502.25, which included the jury award, attorney fees and costs, and post-judgment interest of $43,930.79. After the trial court granted defendant's motion for judgment notwithstanding the verdict (JNOV) based on the one-year-back rule of MCL 500.3145(1), plaintiff appealed by leave granted, and this Court granted leave and reversed and remanded for entry of an order reinstating the July 10, 2007, judgment. *Community Resource Consultants, Inc v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 7, 2009 (Docket No. 281966). On July 7, 2009, the trial court entered an amended reinstated July 10, 2007, judgment in the amount of $469,924.12, which included the reinstated judgment amount of $431,502.25, plus interest of $38,421.87. Defendant now appeals as of right. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This Court articulated most of the relevant facts and procedural history for this case when it granted plaintiff leave to appeal the trial court's granting of defendant's motion for JNOV based on the one-year-back rule:

Wilma Judkins, who was insured under a no-fault policy of insurance issued by defendant, suffered injuries in an automobile accident on December 28, 2000. After providing rehabilitative services or case management services to Judkins, plaintiff sued defendant for payment of the services. In its answer to plaintiff's complaint, defendant asserted the one-year-back rule, MCL 500.3145(1), as an affirmative defense to plaintiff's claim. The trial court subsequently consolidated the case with 14 other cases in which plaintiff sought payment from defendant for services rendered to defendant's insureds. Plaintiff has asserted, and defendant does not contest, that the consolidated complaints requested $357,648.10 from defendant for services rendered to defendant's insureds.

An eight-day jury trial on the 15 consolidated cases commenced on August 29, 2006. After both parties completed their presentation of proofs, defendant raised the one-year-back rule in a discussion with the trial court and plaintiff in chambers. It then moved for a directed verdict on plaintiff's claims for payment of services rendered more than one year before the filing of the complaints. The trial court took the motion under advisement, "but for the time being preclude[d] . . . defendant from referring" to the one-year-back rule. The trial court explained that defendant had not raised the one-year-back rule either during pretrial proceedings or trial and that, by only raising the issue after the proofs had been completed, defendant had denied plaintiff the "opportunity to rebut." The jury returned verdicts in favor of plaintiff in 14 of the 15 cases, awarding plaintiff $205,649.52 for services rendered and $24,681.94 in statutory interest. The trial court entered judgment against defendant in the amount of $431,502.25, which included costs, fees, and interest.

Defendant then moved for JNOV. It argued that, based on the Supreme Court's decisions in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006), and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), the trial court erred in submitting to the jury plaintiff's bills for services rendered more than a year before the complaints were filed. The trial court granted the motion. It concluded that, because of the *Cameron* and *Devillers* decisions, plaintiff was precluded from recovering payment for services rendered more than one year before the complaints were filed and, therefore, it should have ruled as a matter of law that plaintiff was limited to recovering only those expenses incurred within one year of the filing of the complaints and so instructing the jury. The trial court further reasoned that plaintiff, by seeking damages to which it was not entitled, caused prejudice to defendant; plaintiff deprived defendant of a fair trial by exaggerating its claimed damages. The trial court believed that the amount of plaintiff's claims for payment barred by the one-year-back rule would be determinable by the proofs presented at trial, but if the parties were unable to agree on adjusted figures and a stipulated judgment, it ordered defendant to schedule an evidentiary hearing.

Plaintiff applied for leave to appeal the trial court's order granting JNOV. This Court granted the application. *Comm Resource Consultants, Inc v State*

> *Farm Mut Automobile Ins Co*, unpublished order of the Court of Appeals, entered December 26, 2007 (Docket No. 281966). [*Community Resource Consultants, Inc*, slip op pp 1-2 (footnote omitted).]

This Court reversed and reinstated the jury's verdict, ruling that JNOV was not the proper method for the trial court to remedy its failure to enforce the one-year-back rule:

> In this case, the jury awarded plaintiff $205,649.52 for services rendered in 14 of the 15 cases. In moving for JNOV, defendant did not claim that the evidence presented to the jury, when viewed in the light most favorable to plaintiff, was insufficient to establish that plaintiff provided services worth $205,649.52 to defendant's insureds for injuries arising out of automobile accidents. Rather, defendant argued that JNOV should be granted because the trial court submitted evidence for the jury's consideration that was contrary to the Supreme Court's decisions in *Cameron* and *Devillers*. The trial court granted JNOV on this basis. However, because there was no claim that the evidence submitted to the jury was insufficient to support the jury's verdict, and because the trial court made no such finding, the trial court used an improper basis for granting JNOV. In other words, the trial court erred in granting defendant's motion for JNOV because JNOV was not the proper method for the trial court to remedy its perceived legal error of failing to enforce the one-year-back rule. Any such error was an error of law, rather than an error in the sufficiency of the evidence. [*Id.*, slip op p 3.]

After this Court reversed and reinstated the jury's verdict, the trial court entered an order reinstating the July 10, 2007, judgment, and adding $38,421.87 in interest. The trial court subsequently entered an amended order reinstating the judgment, which made no changes to the judgment, but added language stating that the order resolved all pending claims and closed the case. Defendant appeals as of right.

II. ANALYSIS

A. DIRECTED VERDICT

Defendant argues that the trial court erred in denying its motion for directed verdict based on the one-year-back rule in MCL 500.3145(1).

This Court reviews de novo the trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). With respect to the motion, the evidence and all legitimate inferences are examined in a light most favorable to the nonmoving party. *Id*. A directed verdict is only appropriate if there is no factual question on which reasonable jurors could differ. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "A motion for directed verdict . . . should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Sniecinski*, 469 Mich at 131. "Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the

credibility and weight of the testimony." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

As noted above, defendant moved for directed verdict orally after the parties had presented their proofs, arguing generally that the one-year-back rule of MCL 500.3145(1) precluded plaintiff's recovery. The trial court took the matter under advisement, but precluded defendant from referring to the one-year-back rule. The trial court explained that defendant had failed to raise the one-year-back rule either during pretrial proceedings or at trial and that by raising the issue after the proofs had been completed, defendant had denied plaintiff the "opportunity to rebut." The trial court did not come back and address defendant's motion for directed verdict before the jury rendered its verdict, however; essentially, then, the trial court's decision to take the matter under advisement and preclude defendant from referring to the one-year-back rule was tantamount to a denial of defendant's motion.

The one-year-back provision of the no-fault act is contained in MCL 500.3145 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. . . .

In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005), our Supreme Court held that MCL 500.3145(1) "limits *recovery* . . . to those losses incurred within the one year preceding the filing of the action." (Emphasis in original).

In our previous opinion in this case, we declined to address defendant's argument that the trial court erred in denying its motion for directed verdict based on the one-year-back rule, stating:

> Although the parties present arguments regarding whether the trial court properly denied defendant's motion for a directed verdict predicated on the one-year-back rule, we decline to address the merits of the trial court's decision. We do so because the record before us on the interlocutory appeal is insufficient to allow us to come to any conclusion that is not based on speculation and assumptions. Transcripts of the eight-day trial are not included in the record, nor are the exhibits that were admitted into evidence. Thus, for example, we do not know how the trial court directed the parties to bring and argue motions for directed verdict. We are also unable to evaluate whether the one-year-back rule can be applied with any certainty to the jury's verdict, given that the jury did not

> award plaintiff all of its requested damages. Nothing in this opinion shall be read to preclude defendant from arguing in an appeal as of right that the trial court erred in denying its motion for a directed verdict. [*Community Resource Consultants, Inc*, slip op p 4 n 2.]

While defendant correctly asserts that based on the one-year-back rule, MCL 500.3145(1), plaintiff would not be entitled to payment for any losses incurred before the filing of the actions in this case, defendant fails to sufficiently argue this issue on appeal. For example, defendant does not specify in its appellate brief which of the 14 clients for which plaintiff was awarded damages incurred losses prior to the cut-off date for the one-year-back rule. Defendant also fails to articulate in its appellate brief specific dollar amounts for any losses that were allegedly incurred prior to the cut-off date for the one-year-back rule for any of these clients. Moreover, while the trial court consolidated the 15 cases, there were originally separate complaints filed with respect to each client, and defendant fails to inform this Court regarding the filing dates of the relevant complaints to enable this Court to determine a cut-off date regarding payment of benefits for each client in this case. Defendant has also failed to cite any trial testimony or explain how any documentary evidence submitted to the trial court that would establish that any of the losses of defendant's insureds were incurred prior to the cut-off date. In sum, defendant has completely failed to argue how the facts or documentary evidence support its position, even if its statement of the law regarding the one-year-back rule is correct. "A party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). As our Supreme Court stated in *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

> It is not enough for an appellant . . . simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claim, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.

Furthermore, defendant's conduct at trial also deprived the trial court of the opportunity to properly address its motion for directed verdict. As the trial court noted, defendant failed to raise the one-year-back rule during pretrial proceedings or during trial. Defendant could have raised the issue in a motion for summary disposition, with documentation to support the motion, but it did not do so. While defendant raised the one-year-back rule in its affirmative defenses, defendant concedes that it did not raise the issue again until after the parties had presented their proofs. Under MCR 2.507(B)(2), defendant had the burden of proving its affirmative defenses, but defendant did not present any evidence, either testimonial or documentary, regarding the one-year-back rule. Moreover, defendant's motion for directed verdict also lacked specificity. Under MCR 2.515, a party "must state specific grounds in support of" a motion for a directed verdict. *Garabedian v Beaumont Hosp*, 208 Mich App 473, 476; 528 NW2d 809 (1995). We find that, under the facts of this case, defendant's motion lacked sufficient specificity. Although defendant did file a written motion for directed verdict regarding exemplary damages and a written motion for directed verdict regarding an estoppel issue, his motion for directed verdict based on the one-year-back rule was oral, with no accompanying written motion. While defendant's oral motion for directed verdict cited the one-year-back rule, it did not provide the trial court with any information regarding what clients' claims were barred by the one-year-back rule and how much of those claims were barred. Furthermore, defendant did not specify that its

motion was actually a motion for partial directed verdict, thus implying that all of the charges were barred by the one-year-back rule, when that clearly is not the case.

We acknowledge that there was documentary evidence, submitted by *plaintiff* at trial, that indicates that at least some of defendant's clients' losses may have been incurred prior to the cut-off date for the one-year-back rule. The first of the consolidated complaints that plaintiff filed in this case was the complaint related to Wilma Judkins, and that complaint was filed on June 17, 2004. Thus, it would appear that any costs incurred prior to June 17, 2003, for any of the clients would be banned by the one-year-back rule. Plaintiff submitted as an exhibit at trial copies of balance statements for case management services provided to defendant's insureds. The statements contain information including the date of the service and the amount due for the service. Wilma Judkins' statement includes charges for $150.15 on February 11, 2003, $3,045.00 on February 26, 2003, and $2,210.25 on February 26, 2003. Based on the date her complaint was filed, it appears that these charges should be precluded by the one-year-back rule. There are charges for several other clients that might possibly be outside the cut-off date for the one-year-back rule as well. For example, Florian Dedaj incurred charges on three separate dates in January 2003, for case management services totaling $11,954.25. In addition, the balance statements for other of defendant's insureds also contain charges that appear to be incurred prior to or near the cut-off date for the one-year back rule, based on the date that Judkins' complaint was filed. Again, however, without knowing the dates the various complaints were filed, it is impossible to determine the exact cut-off date for application of the one-year-back rule. In moving for directed verdict, defendant failed to cite this evidence and failed to specifically argue what portions of what claims were barred by the one-year-back rule.

Application of the one-year-back rule was uniquely complicated in this case because of the large number of clients for which plaintiff sought reimbursement for case management services and the fact that there were separate complaints filed for each client, resulting in different cut-off dates for the various clients regarding application of the one-year-back rule. Under such circumstances, defendant had a duty, at a minimum, to specifically alert the trial court to the balance sheet evidence that plaintiff, not defendant, admitted at trial. Defendant's oral motion for directed verdict, citing the one-year-back rule in general was not sufficiently specific in this case. Moreover, at the hearing on defendant's motion for directed verdict, the trial court explicitly asked defense counsel for a written brief on the one-year-back rule; defense counsel indicated that it would provide a written brief, but it never did so. Defendant's motion for directed verdict also lacked specificity regarding the amount of money that defendant asserted should have been precluded under the one-year-back rule. At various times, defendant argued at least three different total amounts that it asserts were barred by the one-year-back rule. At the hearing on defendant's motion for directed verdict, defendant asserted that two different amounts, $92,262 and $96,229, were precluded by the one-year-back rule. Furthermore, in its motion for JNOV, defendant argued that the judgment should be reduced in the amount of $83,313.80 based on the one-year-back rule. In sum, for all the reasons cited above, we find that defendant failed to be sufficiently specific in articulating its grounds for directed verdict as required by MCR 2.515. Thus, the trial court did not err in denying defendant's motion for directed verdict.

At oral argument, defendant argued that it was entitled to a new trial on the issue of the one-year-back rule. We disagree. Because defendant failed to comply with MCR 2.515 in

moving for directed verdict, the trial court's denial of defendant's motion was not in error. Furthermore, "[a]n appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996). For all the reasons articulated above, any error in the trial court's handling of the one-year-back rule was largely due to defendant's own failures. Defendant is not entitled to a new trial.

B. RESPONSE TO DISSENT

The dissent's contention that our decision in this case amounts to a conclusion that defendant is equitably estopped from relying on the one-year-back rule mischaracterizes our holding in this case and ignores the fact that it is simply not clear that the jury actually awarded damages in violation of the one-year-back rule. In fact, with respect to most of defendant's insureds, it is clear that the jury did not award damages in violation of the one-year-back rule because the dates the charges were incurred were not outside the one-year-back cutoff date (based on the filing date of Wilma Judkins' complaint), and a comparison of the damages awarded by the jury for the individual insureds are consistent with the charges on the billing statements. The record is admittedly unclear regarding whether the one-year-back rule was violated with respect to the jury's award of damages for one or two of defendant's insureds in this case. However, defendant's failure to adequately brief this issue on appeal prevents this Court from ascertaining with any degree of certainty whether a portion of the jury's damages for certain insureds were awarded in violation of the one-year-back rule. It was the responsibility of defendant to demonstrate to this Court with *some* degree of certainty how the jury's award was contrary to the one-year-back rule. In this case, defendant, despite having numerous opportunities before the trial court and this Court, has failed to do so. As a consequence, other than speculation, defendant has made no argument which could lead us to reverse a jury verdict that was arrived at by a fair and impartial jury.

The dissent accuses the majority of evading or avoiding application of the one-year-back rule in this case and suggests that the majority fails to follow the mandate of MCL 500.3145(1), which clearly prevents plaintiff from recovering for any losses that were incurred more than one year preceding the commencement of the action. We concede to our dissenting colleague that this issue is unclear, which is precisely our point. Since it is unclear that such damages were improperly awarded in this case based on the jury's verdict, as this Court previously stated regarding the applicability of the one-year-back rule to this case: it is impossible "to evaluate whether the one-year back rule can be applied with any certainty to the jury's verdict, given that the jury did not award plaintiff all of its requested damages." *Community Resource Consultants, Inc*, slip op p 4 n 2.[1] Moreover, defendant claims in its brief on appeal that plaintiff sought to recover $90,000 in benefits that should have been precluded by the one-year-back rule. The jury awarded plaintiff $151,998.58 less in damages than those requested by plaintiff; thus, it is

[1] The consolidated complaints in this case sought to recover $357,648.10 for services rendered to defendant's insureds, but the jury only awarded plaintiff $205,649.52 for services rendered.

arguable and even plausible that the jury did not award any damages for losses that were incurred prior to the one-year-back cutoff date. At the very least, these figures further underscore the lack of certainty regarding whether the jury awarded any damages in violation of the one-year-back rule. In sum, given the jury's verdict and defendant's failure to demonstrate that any of the damages awarded to plaintiff were awarded in violation of the one-year-back rule, the dissent's conclusion that the one-year-back rule was violated in this case is pure speculation.

C. JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant argues that the trial court erred in denying its motion for JNOV because plaintiff did not present sufficient evidence that the expenses incurred for case management services for the majority of the clients at issue in this case were reasonably necessary because over 40 physicians were involved in treating the clients at issue in this case, and plaintiff only presented the testimony of two doctors and one neuropsychologist for all of the clients.

This Court reviews de novo a trial court's decision on a motion for JNOV. *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 255; 761 NW2d 694 (2008). "When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law." *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123-124; 680 NW2d 485 (2004). A motion for JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Sniecinski*, 469 Mich at 131.

MCL 500.3105(1) provides: "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." The specific requirements for medical benefits are governed by MCL 500.3107 and MCL 500.3157. MCL 500.3107(1)(a) provides that "personal protection insurance benefits are payable for . . . [a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. . . ." 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. . . .

To establish that a no-fault insurer is liable to pay for a particular expense under personal injury protection coverage, an insured must show that (1) the expense was incurred by the insured, (2) the expense was for a product, service, or accommodation reasonably necessary for the injured person's care, recovery, or rehabilitation, and (3) the amount of the expense was reasonable. *Hamilton v AAA Michigan*, 248 Mich App 535, 543; 639 NW2d 837 (2001). The plaintiff has the burden of proving the reasonableness and necessity of a particular expense. *Id.* at 543-544. The determination whether medical treatment expenses are reasonable and reasonably necessary is generally an issue of fact for the jury. *Advocacy Org for Patients &*

Providers v Auto Club Ins Ass'n, 257 Mich App 365, 380; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005).

Defendant essentially argues on appeal that there was not sufficient evidence that the expenses incurred for case management services were reasonably necessary because over 40 physicians were involved in the treatment of the clients at issue in this case, and plaintiff only presented the testimony of two doctors and one neuropsychologist for all of the clients. In *Kallabat v State Farm Mut Auto Ins Co*, 256 Mich App 146; 662 NW2d 97 (2003), this Court rejected the argument that the no-fault act requires a plaintiff in an action for the payment of personal protection insurance benefits to offer direct evidence from a treating physician that the expenses incurred were both reasonable and reasonably necessary:

> 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. M Civ JI 3.09. 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. . . . [*Kallabat*, 256 Mich App at 151-152 (emphasis in original).]

In light of *Kallabat*, any argument that plaintiff failed to introduce sufficient evidence regarding the need for case management services for the clients at issue in this case because it failed to present medical testimony from each client's treating physician is without merit.

Moreover, there was sufficient evidence, direct or circumstantial, regarding the need for case management services for the clients at issue in this case. Defendant challenges the sufficiency of the evidence with respect to the following clients in this case: Wilma Judkins, Kimberly Verburg, Roger Teply, Florian Dedaj, Christopher English, Steven Grenier, Angelita Long, Hubert Taylor, Gail Waite and Debra Rogalski. We have carefully reviewed the evidence and conclude that in each of these cases, there was evidence that the client was involved in an accident, suffered injuries and had a need for case management services. In other words, there was sufficient evidence regarding the need for case management services for the clients at issue. The trial court did not err in denying defendant's motion for JNOV on this basis.

D. PENALTY INTEREST UNDER MCL 500.3142

Defendant argues that the trial court erred in denying its motion for JNOV because plaintiff did not provide "reasonable proof of the fact and of the amount of loss sustained" under MCL 500.3142(2) and the jury therefore should not have awarded plaintiff penalty interest under the statute.

We previously articulated the standard of review for a motion for JNOV. To the extent that this issue requires this Court to construe MCL 500.3142, this Court reviews de novo issues of statutory interpretation. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Id.*

The jury awarded plaintiff $24,681.94 in penalty interest under MCL 500.3142. MCL 500.3142 provides:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) 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. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. . . .
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum.

This statute is intended to penalize insurers that refuse to comply with the act's goal of providing prompt reparation. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 601-602; 648 NW2d 591 (2002). Interest under MCL 500.3142 "is awarded as a penalty for the insurer's misconduct and is not intended to compensate the insured for damages." *Regents of the Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 735; 650 NW2d 129 (2002). "To recover interest, a plaintiff is not required to prove that the defendant acted arbitrarily or unreasonably delayed in payment of benefits. . . . Instead, the statute 'only requires that the insured present the insurer with reasonable proof of loss. If the insurer does not pay the claim within 30 days after receiving this proof, it becomes liable for interest.'" *Id.*, quoting *Fortier v Aetna Casualty & Surety Co*, 131 Mich App 784, 793; 346 NW2d 874 (1984). MCL 500.3142(2) "requires only *reasonable* proof of the amount of loss, not exact proof." *Williams v AAA Mich*, 250 Mich App 249, 267; 646 NW2d 476 (2002) (emphasis in original).

The evidence in this case provided reasonable proof of the fact of and the amount of the loss. At trial, Charles Roberts, plaintiff's owner, testified that he believed the billing packets submitted by plaintiff to defendant for the clients constituted reasonable proof of the fact and amount of loss. These billing packets were admitted as exhibits at trial, and, Roberts testified regarding the contents. According to Roberts, the billing packets contained: "the invoice, that tells the, the gross amount that's due. The statement of time and services details what we've done on, on a day by day, line item, by basis. And then the, the, the month end report is a summary." In addition, the final balance statements for the clients were admitted as an exhibit at trial. Information on the final balance statements includes the date that services were provided, a description of the transaction, and the amount due. Viewing the evidence and all reasonable inferences therefrom in the light most favorable to plaintiff, as the nonmoving party, there was

reasonable proof of the loss. *Merkur Steel Supply, Inc*, 261 Mich App at 123-124. Thus, the trial court properly denied defendant's motion for JNOV.

Defendant argues that it repeatedly requested copies of plaintiff's notes to support its billings and identify who performed the services for its clients, but that such notes were never forthcoming. As noted above, however, MCL 500.3142(2) "requires only *reasonable* proof of the amount of loss, not exact proof." *Williams*, 250 Mich App at 267 (emphasis in original). Thus, the fact that the person who provided the services was not specifically identified in the billings does not affect plaintiff's establishment of the proof of the loss. Defendant also argues that plaintiff double billed for one file. Even if this is true, an isolated billing problem does not negate plaintiff's otherwise reasonable proof of the loss. Therefore, we hold that the trial court did not err in denying defendant's motion for JNOV predicated on the jury's award of penalty interest under MCL 500.3142(2) because the evidence, viewed in the light most favorable to plaintiff, provided reasonable proof of the fact of and the amount of the loss.

E. ATTORNEY FEES UNDER MCL 500.3148(1)

Defendant argues that the trial court erred in awarding plaintiff attorney fees under MCL 500.3148(1) because the legitimacy of plaintiff's billings was uncertain and therefore defendant's delay in making payment of the claims was reasonable.

Our Supreme Court articulated the standard of review for a trial court's award of attorney fees under MCL 500.3148(1) in *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008):

> The Court reviews de novo issues of statutory interpretation. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). This Court reviews de novo questions of law, but we review findings of fact for clear error. *Id.* "A decision is clearly erroneous when 'the reviewing court is left with a definite and firm conviction that a mistake has been made.'" *Id.*, quoting *Kitchen v Kitchen*, 474 Mich 654, 661-662; 641 NW2d 245 (2002). Moreover, we review a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.*

The trial court initially denied plaintiff's request for attorney fees under MCL 500.3148(1), but ultimately awarded attorney fees to plaintiff in the amount of $69,250 "for Defendant's unreasonable refusal to pay Plaintiff's claim . . . ."

The no-fault act provides for reasonable attorney fees when an insurer unreasonably withholds benefits:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are

> overdue. The attorney fee shall be a charge against the insurer in addition to the benefits recovered, *if the Court finds that the insured unreasonably refused to pay the claim or unreasonably delayed in making proper payment.* [MCL 500.3148(1) (emphasis added).]

MCL 500.3148(1) establishes two prerequisites for the award of attorney fees. *Moore*, 482 Mich at 517. "First, the benefits must be overdue, meaning 'not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained.'" *Id.*, quoting MCL 500.3142(2). "Second, in postjudgment proceedings, the trial court must find that the insurer 'unreasonably refused to pay the claim or unreasonably delayed in making proper payment.'" *Moore*, 482 Mich at 517, quoting MCL 500.3148(1).

"The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured." *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008). Therefore, when an insurer refuses or delays payment of PIP benefits, it has the burden of justifying its refusal or delay under MCL 500.3148(1). *Id.* "[A] delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). The determinative factor "is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable." *Ross*, 481 Mich at 11.

Citing *Attard*, defendant asserts that there was a factual uncertainty regarding plaintiff's billings because plaintiff had engaged in double billing and billed defendant at case management rates for secretarial work and also because plaintiff failed to submit documentation or proof to sustain its claims. According to defendant, plaintiff engaged in double billing on the Missie Graham file. The jury did not award plaintiff any damages for plaintiff's case management of Graham, however, so the jury appears to have resolved any factual uncertainty regarding the billing for Graham in defendant's favor. Defendant also suggests that there was a factual uncertainty regarding plaintiff's billings because time spent performing clerical functions should be billed at clerical rates whereas time spent performing professional functions should be billed at professional rates. Defendant's argument in this regard is purely speculative, however, as defendant does not articulate any specific instances where such improper billing took place. Thus, defendant has failed to establish a legitimate factual uncertainty in this regard. *Attard*, 237 Mich App 11. Finally, as discussed previously in this opinion, plaintiff did submit sufficient documentation to sustain its claims. For all these reasons, we hold that defendant has failed to meet its burden to justify its refusal or delay in paying plaintiff by establishing a legitimate factual uncertainty. The trial court did not err in awarding plaintiff attorney fees in the amount of $69,250 under MCL 500.3148(1) because defendant failed to establish a legitimate factual uncertainty regarding plaintiff's billings for the clients at issue in this case.

Affirmed. Plaintiff, being the prevailing party, may tax costs. MCR 7.219(F).

/s/ Michael J. Kelly
/s/ Stephen L. Borrello

STATE OF MICHIGAN

COURT OF APPEALS

COMMUNITY RESOURCE CONSULTANTS, INC.,	UNPUBLISHED March 1, 2011
Plaintiff-Appellee,	
V	No. 293932 Macomb Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	LC No. 2004-002536-CK
Defendant-Appellant.	

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

K. F. KELLY, J. *(dissenting.)*

I respectfully dissent. The trial court clearly erred in refusing to address, and thereby effectively denying, defendant State Farm Mutual Automobile Insurance Company's motion for directed verdict with regard to plaintiff's claims under the no-fault act, MCL 500.3101 *et seq*. Because a new trial is required due to the errors of the trial court in abdicating its responsibility to address the one-year-back rule, MCL 500.3145(1), it is unnecessary to address the other issues on appeal. I would reverse and remand.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

On June 17, 2004, plaintiff Community Resource Consultants, Inc. sued defendant seeking to recover payment for case management services that plaintiff rendered to defendant's insured, Wilma Judkins. Attached to the complaint was an "Affidavit of Account" claiming an unpaid balance of $7,694.40 for services plaintiff allegedly rendered to Judkins. The affidavit of account was signed and sworn to by Charles E. Roberts, plaintiff's president and treasurer. Defendant timely answered the complaint and asserted as an affirmative defense:

> That the Plaintiff's complaint is barred in whole or in part by the one-year-back rule and/or the one year statute of limitations of the Michigan No-Fault Act and, therefore, the Plaintiff's complaint must be dismissed.

In addition, defendant's counsel submitted a "Counter-Affidavit in Opposition to Account Stated" averring:

> That the Affiant is informed and believes that the Plaintiff's claim is outside the scope of the Michigan No-Fault Act and, in fact contrary to that Act and, therefore, is not compensable and the "Account Stated" is inaccurate and improperly premises [sic] as a matter of law.

Over the following several months, plaintiff filed 14 additional cases for unpaid services provided to other of defendant's insureds.[1] Defendant timely answered each complaint and again asserted the one-year-back rule as an affirmative defense. All 15 cases were eventually consolidated under one caption and docket number on August 18, 2005.

Trial commenced on August 29, 2006 and lasted eight days. The case was not generally presented in terms of each of the 15 consolidated cases, but rather by category.[2] Relevant to the issue of the motion directed verdict, in defendant's opening statement, counsel informed the jury that he would introduce a tape recording of Roberts stating "[plaintiff] will be continuing to submit bills, maintain integrity under the one-year-back rule." This statement was subsequently confirmed in Roberts' testimony. Plaintiff continually emphasized through Roberts and its other witnesses' testimony that "up until" approximately two years preceding the trial, defendant had not disputed any of the claimed billings.

During his testimony, Roberts utilized a "summary chart" of what he sought as damages for services rendered by plaintiff, but unpaid by defendant. No detail was provided until one week after trial began. During the afternoon of September 5, 2006, plaintiff offered exhibit 17. This exhibit consisted of 31 pages of what plaintiff claimed were past due billings that detailed the foundation for Roberts' use of the "summary chart." These billings contained amounts billed both before and after June 17, 2003.[3] The trial court admitted the exhibit over objection.

At the conclusion of plaintiff's proofs, the trial court would not entertain any motions for directed verdict stating "[a]ll motions are reserved. We talked about that."[4] After both parties

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[1] On June 17, 2004, plaintiff filed complaints in Macomb County Circuit Court, including Docket Nos. 2004-002561-CK, 2004-002563-CK, 2004-002564-CK, 2004-002566-CK, 2004-2565-CK, 2004-2567-CK, and 2004-002568-CK. On July 23, 2004, plaintiff filed additional complaints in Macomb County Circuit Court, including Docket Nos.: 2004-003095-CK and 2004-003096-CK. On January 27, 2005, plaintiff filed Docket Nos. 2005-00346- CK and 2005-00347-CK. On March 28, 2005, plaintiff filed Docket No. 2005-001227-CK. On April 25, 2005, plaintiff filed Docket Nos. 2005-001646-CK and 2005-001649-CK.

[2] By way of example only: whether general types of case management services were "reasonable and necessary" under the no-fault act; whether secretarial services were properly billed at the case management rate of $105 rather than a rate reflective of their actual pay of $12.50 per hour; whether files were "double billed," etc.

[3] One year "back" from the date of filing case the instant case.

[4] Throughout the course of these proceedings, the trial judge continually expressed concern over how long the trial was taking, as he had pre-scheduled plans to go out of the country.

had rested, defendant moved for a directed verdict pursuant to the one-year-back rule and addressed whether the defense had been properly preserved:

> *Mr. Hewson (attorney for the defense)*: The directed verdict on the one-year-back rule, we have this debate about whether or not I was precluded from raising a legal argument after the plaintiff has put his proofs in. The plaintiff did not submit exhibit 17, the copies of his exhibit, until 3:00 on Tuesday afternoon.
>
> *The Court*: May I make this addition?
>
> *Mr. Hewson*: I'm sorry.
>
> *The Court*: You said after the plaintiff put his case in, it was raised after the entire testimony was in, plaintiff and defendant's case.
>
> *Mr. Hewson*: But you took my motions under advisement.
>
> *The Court*: No, but in regards to the one-year-back rule, you didn't raise that until we were back in conference after the testimony portion was over. Am I right?
>
> *Mr. Hewson*: That no, is not correct. *But the Court took all of my motions for directed verdict under advisement at the close of plaintiff's proofs so we could move forward and finish the proofs.* I didn't waive any directed verdict motions. [Emphasis added.]

The trial court proceeded to hear the motion, taking it under advisement, "but for the time being preclude[d] . . . defendant from referring" to the one-year-back rule, effectively denying the motion. As a consequence, the jury was permitted to evaluate all the submitted past due billings, including those which were clearly prohibited by MCL 500.3145(1).

As noted by the majority, the jury returned verdicts in favor of plaintiff for 14 of the 15 past due accounts, awarding plaintiff $205,649.52 for services rendered and $24,681.94 in statutory interest.[5] It is impossible to determine from the verdict which past due accounts were awarded or whether individual billings were awarded in full or discounted. One judgment was

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[5] No damages were awarded on the Missie Graham account. Julianne Budden Bronsink testified that she is a licensed attorney and was appointed as a successor guardian for Graham by the Kent County Circuit Court. In that role, she determined that plaintiff's services were unnecessary and duplicative given that a case manager was already assigned and active as Graham's case manager; and that defendant had fully paid for those services. She further testified that plaintiff's case manager for Graham was "unprofessional" and was ultimately forced to prohibit any contact between plaintiff's employee and her ward. In her opinion, plaintiff should not be paid for any of plaintiff's claimed services to Graham and had communicated the same to defendant.

entered by the trial court. Defendant successfully moved for judgment notwithstanding the verdict (JNOV), arguing based upon the Supreme Court's decisions in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006),[6] and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), that the trial court erred in failing to consider the one-year-back rule and presenting to the jury bills concerning services rendered by plaintiff more than a year before the complaints were filed. As set forth in the majority, this Court reversed and remanded the case for further proceedings. *Community Resource Consultants, Inc v State Farm Mut Auto Ins Co*, unpublished opinion of the Court of Appeals, entered April 7, 2009 (Docket No. 281966), slip op 1. After remand, the trial court reinstated the jury verdict.

II. STANDARD OF REVIEW

We review de novo the trial court's decision on a motion for a directed verdict. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). "We review all the evidence presented up to the time of the motion in a light most favorable to the nonmoving party, to determine whether a question of fact existed." *Silberstein*, 278 Mich App at 455. "A party may move for a directed verdict at the close of the evidence offered by the opponent." MCR 2.515; *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59; 631 NW2d 686 (2001). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006).

III. DIRECTED VERDICT

Defendant argues that the trial court erred in effectively denying its motion for directed verdict based on the one-year-back rule in MCL 500.3145(1) and, as a result, defendant was prejudiced. I agree.

In deciding whether to grant a motion for a directed verdict, the trial court must view the testimony and all legitimate inferences from the testimony in the light most favorable to the nonmoving party to determine whether a prima facie case was established. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). If no factual question exists, the trial court may grant a directed verdict. *Mich Mut Ins Co v CNA Ins Cos*, 181 Mich App 376, 380; 448 NW2d 854 (1989).

The one-year-back provision of the no-fault act is contained in MCL 500.3145 and provides, in relevant part:

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[6] Overruled on other grounds in *Regents of Univ of Michigan v Titan Ins Co*, 487 Mich 289, 302; __ NW2d __ (2010) (concluding that that the one-year-back rule is inapplicable when a state entity is a plaintiff).

> (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.* . . . [Emphasis added.]

In *Devillers,* our Supreme Court found this bar on recovery to be clear and unambiguous holding:

> [A]though a no-fault action to recover PIP benefits may be *filed* more than one year after the accident and more than one year after a particular loss has been incurred . . . § 3145(1) nevertheless limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action. [473 Mich at 574 (emphasis in original).]

Our Supreme Court further held that the "one-year-back rule of MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have had it written." *Id*. at 586.

Here, defendant deferred its motions for directed verdict until the close of proofs pursuant to the order of the trial court. It then argued that the one-year-back rule of MCL 500.3145(1) precluded plaintiff's recovery, citing in support the Supreme Court's decisions in *Cameron* and *Deviller.* Defendant also provided copies of the cases to the trial court. Plaintiff objected to defendant referring to the one-year-back rule to the jury. It did not contest the purpose or relevance of the rule, or that its application would result in the reduction of its claimed damages. Rather, it opposed the motion because defendant "refused or failed to file a motion for summary disposition on the one-year-back rule" and was therefore equitably estopped from asserting the defense, and because defendant had continually been aware of the "four to five year time frame detailing the exact dates of service[.]" In response, defendant argued:

> [T]he motion for directed verdict is not to allow the case to go to the jury. You don't have to argue the one-year-back rule. *What I'm asking the Court to do is apply the law.* If you apply the law, then the arithmetic necessary to deduct the ninety-six thousand two hundred and twenty nine dollars for the plaintiff's claim is simple. I've already done it. *All you have to do is go through the bills they have presented.* Counsel has not cited you to one case, one Court Rule, one anything, that says the failure to file a motion for summary disposition precludes directed verdict.
>
> His proofs, whether he presented bills in the past during the course of discovery, has nothing to do with the evidence he presents at trial. Until he presents it as an

> exhibit, there is no way to know what he's going to ask this jury for. *And until he presented those things on Tuesday afternoon, I had no idea that he would have the temerity to suggest to the Court and this jury, that damages that are outside of the one year prior to the time that he filed his lawsuit would be presented to the jury.* [Emphasis added.]

The trial court took the matter under advisement, but precluded defendant from referring to the one-year-back rule effectively denying the motion. Defendant argues that this effective denial was clear error of law. I agree. Plaintiff is not entitled to recover for any portion of its losses incurred more than one year preceding the filing of the complaint. MCL 500.3145(1); *Cameron*, 476 Mich at 63; *Devillers*, 473 Mich at 574.

The majority concedes that defendant correctly asserts that based on the one-year-back rule plaintiff would not be entitled to payment for any losses incurred before the filing of the complaint in this case. It nonetheless reaches a result not permitted under the law holding that "defendant fails to sufficiently argue this issue on appeal." I respectfully disagree. In my view, defendant more than adequately addresses the issue. From the briefs and exhibits filed on appeal, it is abundantly clear that defendant is claiming the trial court erred in denying the motion for directed verdict. Defendant cited the applicable law, attached exhibit 17 delineating pre and post-June 17, 2003 billings and filed the complete transcripts of the lengthy trial. The majority further concedes that these final billing statements for defendant's insureds were admitted at trial and contain the date services were rendered, a description of the service, and the amount due. We also have the original record from the trial court to review. An appellant has the burden of providing "the reviewing court with a record that verifies the basis of any argument on which reversal or other claim for appellate relief is predicated." *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). Defendant has met this burden. Moreover, this Court may review an issue if failure to consider it would result in manifest injustice. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). Manifest injustice results if the defect constitutes plain error requiring a new trial or pertains to a basic and controlling issue. *Internat'l Union, UAW v Dorsey*, 268 Mich App 313, 324; 708 NW2d 717 (2005), rev'd in part on other grounds 474 Mich 1097; 711 NW2d 79 (2006). Based on this record, it is painfully obvious that the trial court plainly erred. The error flies in the face of our Supreme Court's explicit directive that the "one-year-back rule of MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it[.]" *Devillers*, 473 Mich at 586. Defendant was prejudiced by the trial court's error; it directly pertains to a basic issue in controversy. A new trial is warranted.

The majority also complains that "while the trial court consolidated the 15 cases, there were originally separate complaints filed with respect to each client, [] defendant fails to inform this Court regarding the filing dates of the relevant complaints to enable this Court to determine a cut-off date regarding payment of benefits for each client in this case." This issue was never raised in the trial court and was never decided by the trial court. As such, it is unpreserved. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Moreover, I am at a loss as to why this is even relevant at this stage of appellate proceedings; rather it was an issue that should have been addressed by the trial court in a timely manner instead of taking the motion "under advisement" and submitting the matter to the jury without addressing the issue as was its duty and responsibility as a trial court. This is particularly true in light of the jury

verdict. The jury did not award plaintiff all its claimed damages and it is impossible to tell which billing items the jury awarded. Thus, even if there was a "sum certain" presented by defendant at this stage of the appellate proceedings, it cannot simply be deducted from the verdict as it presently stands. Even plaintiff's counsel recognized the problem with the trial court's failure to rule on the motion for directed verdict:

> [W]hat is the Court to do with this one-year-back rule if the jury comes back with any number, whatever the number might be – one hundred, two hundred, three hundred, four hundred – how is the jury then, or the judge then, to implement a decision on the one-year-back rule, not knowing what the basis of the jury's decision was?

This is *precisely* why the remedy here is a new trial. It is impossible to determine if the jury awarded any or all damages outside the one-year-back period; declined to award certain damages within the one-year-back period; or, awarded damages for all overdue billings but reduced the claimed hourly rate of $105 to some other number.

In addition, the filing dates are easily ascertainable and are set forth in footnote 1 above. Moreover, "a circuit judge may take judicial notice of the files and records of the court in which he sits." *Knowlton v City of Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959); see also *People v Sinclair*, 387 Mich 91, 103; 194 NW2d 878 (1972). But more importantly, even if the trial court was somehow unaware of the filing dates for the consolidated cases it was trying, which I find difficult to believe, the trial court was required to view the evidence and all legitimate inferences from the evidence in the light most favorable to the nonmoving party. *Locke*, 446 Mich at 223. If the June 17, 2004 filing date of the Wilma Judkins case was the only filing date the trial court was aware of, then in the light most favorable to plaintiff, the June 17, 2004 filing date would be the one the trial court should have utilized, despite the later filing of other cases. I would also note that the trial court, the parties and this Court have treated the case as one single case. But, instead of filing one case with multiple counts, plaintiff filed 15 different actions, several on the same day. Each case alleged that plaintiff provided case management services to defendant's insureds and defendant refused to pay. As the cases were processed, a series of orders "consolidating" different cases were entered until all of the cases were consolidated. The parties were the same; the case carried only one docket number; the case was presented and defended as one claim alleging multiple unpaid accounts; and there was only one judgment.

The majority also evades the application of the one-year-back rule by chastising defendant for (1) failing to raise the one-year-back rule during pretrial proceedings or during trial; (2) failing to raise the issue in a motion for summary disposition, with documentation to support the motion; (3) failing to timely raise the issue; (4) failing to present evidence in support of its affirmative defense; and (5) failing to file a motion with adequate specificity. I disagree with, and the record does not support, the majority's criticisms. The defense was properly pleaded as an affirmative defense. Filing a motion for summary disposition is not a prerequisite

for relying on a properly pleaded affirmative defense.[7] During trial, plaintiff's offer to "maintain integrity with the one year back rule" was referred to by defendant in opening statements and confirmed by Roberts, plaintiff's president and treasurer. The motion was brought as soon as the trial court permitted it.[8] With regard to the failure of defendant to present evidence in support of its motion, I can only note that *this was a motion for directed verdict.* MCR 2.515. As such, it tests the sufficiency of the *plaintiff's* proofs as a matter of law; defendant relied upon plaintiff's exhibit 17 in support of its motion. Nor, in my view, did the motion lack specificity. Defendant cited the applicable statute, relied upon evidence presented at trial, and provided relevant case law to the trial court. Distilled to its essence, plaintiff contends, and the majority appears to agree, that defendant is equitably estopped from relying on the one-year-back rule. However, permitting the judiciary to provide a plaintiff with equitable relief from the application of the one-year-back-rule is expressly disallowed. *Devillers*, 473 Mich at 586.

The majority notes that at the hearing on defendant's motion for directed verdict, defendant asserted that two different amounts, $92,262 and $96,229, were precluded by the one-year-back rule and that in its motion for JNOV, defendant argued that the judgment should be reduced in the amount of $83,313.80 based on the one-year-back rule. The differences in the amounts requested by defendant are irrelevant here given the trial court's total abdication of its duty to address the motion and the resulting jury verdict. In fact, the purpose of requiring a trial court to decide such motions as a matter of law is to resolve such issues. And, it must be noted that even the majority does not have any difficulty with determining what billings are outside the one-year-back period. It is incomprehensible why the trial court did not simply rule on the motion.

The past due accounts that were submitted to the jury were in clear violation of the one-year-back rule and it was a matter of law for the trial court to rule on. Even were they properly submitted for the jury's consideration as a factual dispute to be resolved, the trial court compounded the problem presented here: the jury was never told about the one-year-back rule, the trial court prohibited defendant from mentioning it and was not instructed on the statute.

The trial court should have timely ruled on the applicability of the one-year-back rule as it related to plaintiff's exhibit 17 and determined which billings were excluded. The trial court clearly erred and its refusal and failure to address defendant's motion for directed verdict

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[7] Taking this point of the majority to its logical conclusion, plaintiff did not object, deny or otherwise complain about the affirmative defense. Plaintiff did not move for summary disposition pursuant to MCR 2.116(C)(9) nor did plaintiff seek to limit the issue in the pretrial scheduling order under MCR 2.401. Under the majority's reasoning, plaintiff has waived its right to object to the defense. Clearly, such a circumstance is simply not supportable in our court rules and case law.

[8] I fail to see how defendant can be blamed for the trial court's refusal to hear argument on the issue until the proofs were completed, particularly in light of its statement "all motions are reserved. We talked about it." Any error in this regard is attributable to the trial court.

reversibly corrupted the integrity of the jury's verdict. And, the error simply cannot be corrected at this point in time. As this Court previously held, it is impossible "to evaluate whether the one-year back rule can be applied with any certainty to the jury's verdict, given that the jury did not award plaintiff all of its requested damages." *Community Resource Consultants, Inc*, slip op p 4 n 2.

I would reverse and remand for a new trial.

/s/ Kirsten Frank Kelly