

IN THE SUPREME COURT OF IOWA

No. 16-2148

ROBERT W. MILAS, M.D.,

Plaintiff-Appellant,

vs.

SOCIETY INSURANCE and ANGELA BONLANDER,

Defendants-Appellees.

**APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY**

Scott County No. LACE124179

APPELLANT'S APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether a surgeon has a fraudulent misrepresentation claim against an insurance company who authorizes its employee to sign a contract to pay a stated fee even though it intends on coercing the surgeon to take a substantial reduction in fees after services are performed?

- II. Whether a surgeon has a punitive damages claim against an insurance company when it makes a fraudulent misrepresentation to that surgeon and that fraudulent misrepresentation results in litigation to compel payment for medical services provided and ultimately, a delay in medical care for the patient.

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STATEMENT SUPPORTING FURTHER REVIEW

The Supreme Court should grant further review of this case because this case presents an issue of broad public importance that the Supreme Court should ultimately decide. Iowa R. App. P. 6.1103(1)(b)(4). This case involves policies and procedures that *if adopted by more insurance companies* would negatively impact the medical care of patients in Iowa.

In this fraud action, an insurance adjuster for a worker's compensation carrier entered into a contract with a surgeon to pay a specific amount of money for the surgeon to perform a procedure on the injured employee, the surgeon's patient. The adjuster received approval from her supervisor before "signing off" on the amount stated in the contract. The adjuster never intended to pay the amount in the contract; yet, she signed the contract and sent it to the surgeon. In reliance on the adjuster's representation that it would pay the surgical fee stated in the contract, the surgeon performed the procedure.

At the time the adjuster signed the contract, the adjuster intended to negotiate the surgical fees according to the policies and procedures of the insurance company. The adjuster waited until after the surgery was performed before revealing to the surgeon that she did not intend to pay his agreed-upon fee, but rather wanted to negotiate a substantially reduced fee. The insurance company

then sought to coerce the surgeon to accept a substantially reduced payment by threatening delay of payment and additional reductions in the surgical fees.

The insurance company had signed a contract to pay the surgeon \$14,325.87 for a medically necessary surgery. The insurance company sent a check to the surgeon for approximately eleven percent (11%) of the agreed upon amount, \$1,620.52.

The surgeon refused to accept the reduced sum and brought this action for breach of contract and fraudulent misrepresentation. Although the surgeon was successful on his contract claim, the trial court granted summary judgment to the insurance company on the fraud claim and later refused the surgeon's request to submit the fraud claim to the jury. The court of appeals affirmed the trial court's summary judgment ruling and refusal to instruct the jury on the surgeon's fraud claim. This decision was erroneous and will have broad, adverse ramifications that the Supreme Court can avoid by accepting this appeal for further review.

In this case, the insurance company's attempt to negotiate the surgeon's fees after-the-fact negatively impacted the medical care received by the patient, leading to an unnecessary delay of a subsequent recommended surgery. More broadly, this "business" practice - if adopted by more insurance companies - will broadly impact the patients in the state of Iowa. No medical doctor will be willing to treat a patient covered by worker's compensation insurance if a signed contract to be paid

a stated amount must be enforced in court because the insurer is allowed, with impunity, to negotiate a lower fee under the threat of delay and litigation notwithstanding its contractual obligation.

Moreover, this decision has broader application to contracts for services in general. In essence, the court of appeals has ruled that a person may contract for services at a specified cost with the intention of negotiating a lower price once the services have been rendered. Then, once the services have been rendered, the recipient of the services may, without any reason other than material gain, force the service provider to accept a lower payment to avoid delay in payment, *and may do so without any legal liability for the misrepresentations and coercion*. The service provider in this case is a medical doctor who had the resources to seek a remedy for this wrong. But a house painter, for example, may not have the resources to sue a homeowner who reneges on a promise to pay a stated amount for the painter's services simply on the basis that the homeowner believes the painter will take a reduced amount rather than incur delay or the cost of litigation to enforce the contract. This "business" practice is permissible under the court of appeals' decision and would be used to the unfair disadvantage not only of medical providers, but of any service provider.

This case presents an issue of broad public importance, most notably the approval of a "business" practice that will negatively affect injured workers and

reduce their options for medical care. Plaintiff asks this Court to grant further review of this appeal to correct the injustice in this case and prevent it from happening again to other service providers and injured workers.

PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that this Appellant’s Final Reply Brief was served and filed on the 8th day of January 2018, upon the following persons and upon the Clerk of the Supreme Court by electronic filing and electronic delivery to the parties via the EDMS system, pursuant to Iowa R. App. P. 6.902(2) and Iowa Ct. R. 16.1221(2) to the following:

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STATEMENT OF THE FACTS

I. Dr. Milas informed Society Insurance exactly how much he would charge for performing surgery.

Dr. Robert Milas¹ concluded that his patient, Ricky Fitzgerald, needed surgery to his neck and lower back. App. 410-11. Dr. Milas, a board-certified neurosurgeon, decided to perform the surgery on the neck first, and then perform surgery on the back at a later date. *Id.* Generally speaking, this neck surgery involved cutting through skin and muscles to get to the bones or vertebrae of the neck. App. 412-419. Then, Dr. Milas would fuse the neck bones together with tiny screws while carefully avoiding the spinal cord and arteries that feed the brain stem. *Id.*

Dr. Milas had never dealt with Society Insurance before accepting Fitzgerald as a patient. App 357. To avoid any confusion, Dr. Milas told Society Insurance exactly how much he charged for performing each of two possible recommended sets of surgical procedures on Fitzgerald's neck.² App. 198-99. Dr. Milas faxed his surgical fees to Society Insurance because Dr. Milas wanted to know exactly how much he would be paid for his services *before he performed the surgery*. App. 421-

¹ The Iowa Workers' Compensation Agency had ordered that Dr. Milas would be the authorized surgeon to treat Ricky Fitzgerald's work injuries. App. 252. As the authorized surgeon, Dr. Milas did not need to get authorization from the insurance company to perform the surgery. App. 271. Dr. Milas wanted to get approval of his fees. App. 421-23.

²Dr. Milas proposed to address Fitzgerald's spinal issues through one of two possible sets of surgical procedures. App. 427-28; App. 198-99. Because he was not sure which method would be required, he sent two proposals to Society Insurance, one for each set of procedures. *Id.*

23. Dr. Milas requested that Society Insurance’s representative approve his surgical fees in writing. App. 198-99, 421-23.

II. Society Insurance unequivocally approved payment of Dr. Milas’s fees when its representative signed the proposals.

Angela Bonlander was the adjuster at Society Insurance who was in charge of Fitzgerald’s claim. App. 319. Bonlander had been working at Society Insurance for over nineteen (19) years, and one of her responsibilities was approving the payment of medical fees. *Id.*

On May 20, 2013, Bonlander received the two requests for approval of surgical fees submitted by Dr. Milas. App. 198-99. Each proposal explained the procedures and set forth the total fee Dr. Milas charged for performing that set of procedures. *Id.*

Bonlander discussed Dr. Milas’s surgical fees with her supervisor, Shawn Kelderman. App 323. Kelderman had worked in the insurance industry for decades, App. 361, and she knew that Dr. Milas was seeking “preauthorization” of his fees, App 363. In fact, Kelderman admitted the following during cross-examination at trial:

Q: [The] estimate represented preauthorization, did it not, on what Dr. Milas was going to charge?

A: Yes.

App. 363.

Kelderman had the authority to pay one hundred percent (100%) of Dr. Milas's surgical fees. App. 359-60.³ She told Bonlander to "sign off" on both of the proposals. App. 323. Bonlander signed the proposals and sent them back to Dr. Milas. App. 198-99.

III. Society Insurance withheld its corporate policy and procedures from Dr. Milas.

Bonlander "signed off" on the cost of the surgical fees even though she had no intention of honoring the contract. App. 322, 348. In fact, Bonlander admitted that her intention was to wait until after Dr. Milas performed surgery and then attempt to negotiate his fees:

Q: You never told Dr. Milas that you intended on negotiating his fees, true?

A: True.

App. 327.

Bonlander signed the contract without revealing the corporate policy and procedures of Society Insurance. App. 327. First, Society Insurance's corporate policy was to have another company negotiate directly with Dr. Milas. App. 250-51. Society Insurance calls this type of company a "cost-containment vendor." App. 266.

³ Society Insurance designated Kelderman as its corporate representative.

A cost-containment vendor is a company that increases an insurance company's profit by recommending that the insurance company pay less or "contain" its costs. App. 393-94. For an insurance company, "costs" include paying medical professionals for their services. *Id.*

If the "cost-containment vendor" cannot negotiate down the fees of a medical provider, then it is Society Insurance's policy to negotiate "a reduced rate in exchange for prompt payment." App. 251.

Society Insurance incentivizes its employees to follow this corporate policy with an end-of-the-year bonus. App. 373, 375-77, 393-94. Bonlander was eligible for an end-of-the-year bonus as an employee of Society Insurance. App. 333-36. Bonlander's supervisor was also eligible for an end-of-the-year bonus. App. 374-377. Their bonus was dependent in part on whether they followed the corporate cost-containment policy and procedures in adjusting workers' compensation claims. App. 373, 375-77, 393-94.

IV. Dr. Milas performed the surgery because he believed that he would be paid the stated amount in the proposals.

On June 3, 2013, Dr. Milas performed neck surgery on Fitzgerald. App. 201; App. 302-21. Dr. Milas performed this surgery in reliance on Society Insurance's agreement to pay his stated fee for the surgery. App. 429-34. Craig Nierman testified as an expert witness for Dr. Milas. Mr. Nierman had worked as a claims adjuster for approximately seven (7) years. App. 382-83. In addition, Mr. Nierman

has taught insurance law at the University of Iowa as an adjunct professor. App. 381-82. Based on his experience, education, and training, Mr. Nierman testified that it was appropriate for Dr. Milas to rely on Society Insurance to fully compensate him for his services after he performed surgery because Society Insurance's representative approved his surgical fees. App. 385.

V. Dr. Milas sent a final bill to Society Insurance for the exact amount stated in his proposal.

On June 4, 2013, Dr. Milas sent his bill for the surgery to Society Insurance for payment. App. 200. The final bill was exactly the same amount as the previously submitted surgical fees – to the cent. App. 320. The final bill for Dr. Milas's surgical fees was \$14,325.87. App. 200.

VI. After Dr. Milas performed surgery, Society Insurance and its agents attempted to coerce Dr. Milas to accept a substantially reduced payment by threatening delay of payment and additional reductions in the surgical fees.

After the surgery was performed and Dr. Milas had submitted his bill, Society Insurance sent the bill to its cost-containment vendor. App. 247-48. Thereafter, a negotiating company, Knowledgeable Provider Negotiators Services (hereinafter "the Negotiators"), faxed a "resolution agreement" with the caption "Negotiation of Workers' Compensation Charges" to Dr. Milas on June 25, 2013. App. 229-30.

The Negotiators recommended that Dr. Milas accept \$4,604.99 even though the signed proposal listed \$14,325.87 as the fee for the surgical procedures. *Id.* The Negotiators did not provide a reason for its suggested reduction of Dr. Milas’s fees. *Id.* The Negotiators did however warn Dr. Milas that he should accept the reduced fees in order to “avoid further bill review and any audit reductions.” App. 229.

Society Insurance’s “audit guidelines” provide a reason why the Negotiators told Dr. Milas to accept a reduction in his fees. App. 251. Society Insurance’s guidelines for its adjuster’s state: “If our Bill Review Company is unable to secure savings on your bill; as [sic] it is cost effective to do so, consider negotiating a reduced rate in exchange for prompt payment”! *Id.* In other words, if Dr. Milas did not accept the Negotiators’ offer, he could expect further delay in payment and additional reductions.

Dr. Milas declined the Negotiators’ offer, App. 231, and true to the Negotiators’ warning, there was a “further bill review” and further “audit reductions.” App. 247-48. On July 12, 2013, a “cost-containment vendor” named HSI performed a bill review audit and further reduced Dr. Milas’s bill. *Id.*

On July 15, 2013, Society Insurance sent Dr. Milas a check for approximately eleven percent (11%) of the agreed upon amount, \$1,620.52. App. 233.

On July 25, 2013, Dr. Milas wrote a letter to Society Insurance requesting that Society Insurance honor the contract. App. 232. Bonlander received this letter, App. 349, yet, Bonlander chose not to respond to Dr. Milas until a lawsuit was filed. App. 357.

VII. Procedural History

In his lawsuit against Society Insurance and Bonlander, Plaintiff alleged theories of breach of contract and fraudulent representation. Prior to trial, the district court granted summary judgment to Defendants on Plaintiff's fraud claim, and the contract claim proceeded to trial before a jury.

When submitting requested instructions, Plaintiff asked the court to instruct on his fraud claim. The court refused to do so, stating there had been "no evidence presented . . .that would support these claims." More specifically, the trial judge stated: "It's clear that the Defendants in this case have testified basically that they acted in accordance with how they conduct business on a regular basis. There was nothing intentional that they did towards Dr. Milas. . . ." The trial court also refused Plaintiff's request to submit punitive damages to the jury.

Plaintiff's contract claim was submitted to the jury, which returned a unanimous verdict in Plaintiff's favor against Society Mutual for the full amount of his contract damages, \$14,325.87.

Plaintiff appealed and the appeal was transferred to the court of appeals. In its first opinion, the court of appeals held that Plaintiff had failed to demonstrate a triable issue of fact on the scienter and intent to deceive elements of his fraudulent misrepresentation claim. In discussing the evidence, the court observed:

The fact that Society Insurance's employee, Angela Bonlander, knew the claim would be submitted to a bill review company does not by itself show a misrepresentation because notwithstanding a contract obligation to pay a sum certain there is no harm in later asking if a contract obligee is willing to take a lower payment. *The statement by Bonlander that she knew Society Insurance intended to negotiate the fees notwithstanding her signature to authorize the surgery was not presented until trial.*

(Emphasis added.) The court affirmed the district court's summary judgment ruling on this claim, but failed to address the instructional error raised by the Plaintiff. Having affirmed dismissal of the fraud claim, the court of appeals concluded there was no independent tort that would support the submission of punitive damages and so affirmed on that issue as well.

Plaintiff filed a motion for rehearing with the court of appeals, asking the court to rule on his claim that the district court had erred in not instructing the jury on his fraudulent misrepresentation claim based on the evidence introduced at trial that Bonlander intended to negotiate a lower fee. The court of appeals granted Plaintiff's motion for rehearing, but in its second opinion again held that Plaintiff had not introduced evidence of scienter and intent to deceive. The court of appeals rejected the importance of Bonlander's testimony that she intended to negotiate

Plaintiff's fee notwithstanding her authorization of the surgery. The court of appeals stated her testimony was not substantial evidence of fraudulent misrepresentation because it was "consistent with her testimony that she only authorized the surgery but did not agree to the fee." The court also noted:

The fact that Society Insurance's employee, Angela Bonlander, knew the claim would be submitted to a bill review company does not by itself show a misrepresentation because, notwithstanding a contract obligation to pay a sum certain, there is no harm in later asking if a contract obligee is willing to take a lower payment.

Plaintiff has now filed this Application for Further Review.

ARGUMENT

I. The court of appeals erred in affirming the district court’s dismissal of Plaintiff’s fraudulent misrepresentation claim on summary judgment, and its later refusal to instruct the jury on Plaintiff’s fraudulent misrepresentation claim.

The district court erred in granting summary judgment to the Defendants on Plaintiff’s fraudulent misrepresentation claim and in later denying jury instructions on fraudulent misrepresentation because there was substantial evidence to support all of the elements of a fraudulent misrepresentation claim.⁴ In its summary judgment ruling, the district court determined there was substantial evidence of a representation, falsity, materiality, and scienter to create a jury question. App. 101-02. However, the district court granted summary judgment on the basis that there was not a genuine issue of fact on the element of intent to deceive. *Id.* At the jury instruction conference, the district court refused to give Plaintiff’s proposed instructions on fraudulent misrepresentation. App 441-43.

The court of appeals erred in affirming the district court. More importantly for purposes of further review, the court of appeals has authorized a business

⁴ There are seven elements of the tort of fraudulent misrepresentation: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) justifiable reliance; and (7) resulting injury or damage. *Air Host Cedar Rapids, Inc. v. Cedar Rapids Comm’n*, 464 N.W.2d 450, 453 (Iowa 1990). On appeal, Defendants challenged the sufficiency of evidence with respect to only three of elements: the falsity of Society Insurance’s material representation and scienter/intent to deceive. Because the court of appeals focused only on the scienter and intent to deceive elements, Plaintiff will discuss those elements in this application. Nonetheless, because the falsity of the Defendants’ representation is integral to the scienter and intent to deceive elements, evidence of falsity will be discussed in addressing the scienter and intent to deceive elements. For a more focused discussion of falsity, the Court may refer to Plaintiff’s appellate briefs.

practice that allows a customer to represent his or her agreement to a stated price for services with the knowledge and intent that the customer—after receiving the services—will for no reason other than financial gain refuse to pay the full amount and will attempt to negotiate a lesser payment under the threat of delay and litigation.

A. Standard of Review

The standard of review of for a motion for summary judgment is based on errors of law. *See Iowa R. App. P. 6.907*. And, the standard of review of a failure to give a requested instruction is based on errors of law. *See Iowa R. App. P. 6.907*.

B. There is substantial evidence that Society Insurance had scienter and the intent to deceive Dr. Milas when its representative unequivocally signed the contract to pay the cost of his surgical fees even though Society Insurance intended on coercing him to take a substantial reduction in his fees after he performed surgery.

Contrary to the conclusion of the court of appeals, there is substantial evidence that Society Insurance had scienter and the intent to deceive Dr. Milas. The Iowa Supreme Court has stated the following with respect to these elements of fraud:

We have held that the intent to deceive element, *like the scienter element*, may be proved in one of two ways: “by proof that the speaker (1) has actual knowledge of the falsity of the representation or (2) speaks in reckless disregard of whether those representations are true or false.”

Dier v. Peters, 815 N.W.2d 1, 9 (Iowa 2012) (quoting *Rosen v. Bd. of Med. Exam'rs*, 539 N.W.2d 345, 350 (Iowa 1995)). There is substantial evidence in the record to support the scienter and intent-to-deceive elements of a fraudulent misrepresentation claim under both methods of proof.

1. There is substantial evidence that Society Insurance's representative, Bonlander, had actual knowledge that the representation was false.

There is substantial evidence in the record that Society Insurance had actual knowledge of the falsity of its representation. Society Insurance represented to Dr. Milas that it would pay the proposed surgical fees when its representative, Bonlander, signed the contracts. Yet, Bonlander knew that she was not going to pay Dr. Milas the amount in the contract. App. 348. *See City of McGregor v. Janett*, 546 N.W.2d 616, 619 (Iowa 1996) (holding that a statement of intent to perform a future act is a false representation if, when made, the speaker had an existing intention not to perform); *Lamasters v. Springer*, 251 Iowa 69, 72, 99 N.W.2d 300, 301–02 (1959) (“While it is true that a simple promise to do something in the future cannot alone be made the basis of fraud, yet when such promise is made with intent to breach it in the future, it is satisfactory proof of fraud.” (internal citations omitted)).

Bonlander's intention was always to “negotiate” his fees, i.e., to pay Dr. Milas less than the amount listed in the contract. App. 327. Consequently, Society

Insurance's representative, the one who signed the contracts, admitted that she had actual knowledge of the falsity of the representation. *See Turner v. Zip Motors*, 245 Iowa 1091, 1099, 65 N.W.2d 427, 430 (1954) (holding employer is responsible for employee or agent's fraud committed in the scope of employment under maxim of respondeat superior).

The court of appeals accepted the Defendants' argument that Bonlander did not intend to breach the promise to pay in the future "[b]ecause she did not believe she was entering into a contract paying Dr. Milas the amount listed on the authorization." (Appellees' Brief p.18) The court of appeals stated that Bonlander's testimony that she intended to negotiate Dr. Milas's fee was "consistent with her testimony that she only authorized the surgery but did not agree to the fee." The court of appeals overlooked the fundamental rule that the jury was not required to accept Bonlander's assertion that she didn't think she was agreeing to pay Dr. Milas's estimated fees upon completion of the surgery. In fact, the jury did not believe Bonlander as illustrated by the jury's verdict for Dr. Milas on the contract claim.

The jury was especially justified in not believing Bonlander's testimony that she had no knowledge of the falsity of her representation because her testimony was inconsistent with the testimony of her supervisor. Bonlander discussed Dr. Milas's surgical fees with her supervisor before Bonlander signed the authorization

on behalf of Society Insurance. App. 323. Her supervisor testified at trial that she—the supervisor—knew that Dr. Milas was seeking “preauthorization” of his fees. App. 363. Knowing this, the supervisor told Bonlander to “sign off” on both of the proposals. App. 323.

A jury could conclude that Bonlander’s denial of knowledge that she was pre-approving Dr. Milas’s fee was not credible. Jurors are allowed to use their common sense and life experience in weighing the evidence and deciding whether the representation was false. *City of Cedar Rapids v. Bd. of Trustees of Mun. Fire & Police Retirement Sys.*, 572 N.W.2d 919, 926 (Iowa 1998) (“We do not ask juries to leave their experiences and common sense behind when deliberating.”); *see Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 398 (Iowa 2001); *Boham v. City of Sioux City*, 567 N.W.2d 431, 436 (Iowa 1997). *See also Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 565–66 (Iowa 1987) (holding speaker’s existing intention to breach a promise in the future may be inferred from the circumstances). Plaintiff will illustrate the jury’s permissible use of common sense and life experience with an example involving a home improvement project.

Assume a painter provides a written proposal/estimate to a homeowner who wants to repaint a kitchen. The painter submits a written proposal to the homeowner that describes two options, each with a cost estimate: one option if one coat of paint is needed and the second option if two coats of paint are needed. If

the homeowner signs the proposal, it is reasonable for the painter to understand (and a jury to infer) that the homeowner's approval of the estimated costs for the work means that the painter's ultimate bill will be paid without question – assuming of course that the final bill is consistent with the estimates and the painter competently paints the kitchen. If the homeowner signs the proposal with no intention of paying the amount listed in the proposal (again assuming consistency with the estimate and competent performance) and instead plans to negotiate a lesser amount when the work is satisfactorily completed, a reasonable jury could find that the homeowner made a false representation when he approved the proposal showing the cost of the work.

Similarly, a jury could reasonably infer based on its common sense and experience that when Bonlander signed the proposal showing Dr. Milas's fees for the two surgical options that she was representing that Society Insurance would pay those fees upon competent performance of the surgery. The jury could also reasonably find that if Bonlander made that representation with the intent to negotiate a lower fee rather than to pay the approved fees, her representation was false when she signed the authorization. Thus, there is evidence from which a jury could find that Society, through its representative, Bonlander, made a false representation.

Bonlander's testimony that she was only authorizing Dr. Milas to perform the surgery, but not his fees, is also undermined by her testimony that she was not qualified to evaluate the propriety of the surgical procedure. App. 352. Bonlander admitted that it would be ridiculous for her to tell Dr. Milas what surgery he should or should not perform. App. 352. Moreover, the vice-president of Society Insurance agreed that the authorized doctor does not need to get approval from Society Insurance before performing surgery. App. 271. Legally, Dr. Milas, as the authorized physician, could use his medical judgment to recommend whatever treatment his patient needed, and he did not need Society Insurance's approval. *See Jones v. American Greetings*, File No. 5052089 (Alt. Care Dec. 1/28/15) (citing *Pote v. Mickow Corp.*, File No. 694639 (RR Dec. 6/17/86); *Punt v. De Jong Farms*, File No. 5048096 (Alt. Care Dec. 1/14/15); *Podgorniak v. Asplundh Tree Expert Co.*, File No. 5011317 (RR Dec. 5/8/15).

This evidence suggests, then, that there was another purpose for the signed authorization, namely, to authorize the performance of the described procedures *for the stated price*. Based on this evidence and the inferences that arise from it, a jury could find that Bonlander knew she was approving the surgery for the stated fees when she signed the proposal submitted by Dr. Milas, *and in fact, that was exactly what the jury found—that there had been a meeting of the minds—when it held Society Insurance liable for breach of contract*. Bonlander acknowledged that she

always intended to negotiate Dr. Milas's fees, evidence from which the jury could infer that Bonlander knew when she signed the authorization that her representation to pay Dr. Milas's stated fee was false. Thus, there is substantial evidence in the record of Bonlander's actual knowledge of the falsity of her representation and this is sufficient proof of her scienter and intent to deceive Dr. Milas.

As noted above, the court of appeals rejected this evidence as sufficient proof of scienter and intent to deceive, stating:

The fact that Society Insurance's employee, Angela Bonlander, knew the claim would be submitted to a bill review company does not by itself show a misrepresentation because, notwithstanding a contract obligation to pay a sum certain, there is no harm in later asking if a contract obligee is willing to take a lower payment.

Plaintiff respectfully suggests that the court of appeals has taken the most benign view of the evidence, which is contrary to the long-established rule that the evidence is viewed in a light most favorable to the nonmoving party and to the party requesting an instruction. *See Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017); *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445 (Iowa 2017). When the evidence is viewed in a light most favorable to the plaintiff, a jury could find that there is a meaningful difference between representing that a certain sum will be paid for services rendered and in fact intending to discount that fee and coerce acceptance of a lower sum to avoid delay and litigation. Contrary to the court of appeals' weighing of the evidence, a jury could reasonably find that Bonlander's

representation was false and that she knew it was false when she made it. Thus, the court of appeals (and district court) erred in concluding the evidence did not support submission of Plaintiff's fraudulent misrepresentation claim to the jury.

2. There is substantial evidence that Bonlander spoke in reckless disregard of whether its representation was true or false.

There is substantial evidence in the record that Society Insurance spoke in reckless disregard of whether its representation was true or false. As established above, there was substantial evidence that Bonlander knew when she signed the authorization that she was representing Society would pay the stated fees for that surgery.

Society Insurance argued on appeal that this statement was not false because it was "possible" that it would pay the full amount of Dr. Milas's fees. (Appellee's Brief, p. 18) This argument reveals the reckless disregard with which Bonlander acted when she signed the approval. Assume *arguendo* the jury believes that Bonlander did not know her statement was false because she thought it might be possible for Society Insurance to pay Dr. Milas's fees, the jury could also simultaneously conclude that Bonlander acted in reckless disregard of whether her representation was true or false. Bonlander intended when she signed the authorization to put Dr. Milas's bill through Society's cost-containment process. She did not know what Society's cost-containment vendor was going to recommend for payment but she knew that in all likelihood, the recommendation

would be less than the amount agreed upon in the authorization. Then, if there were no “savings” from the cost-containment vendor, Bonlander—in accordance with company policies and procedures—would then attempt to pay less than the fees stated in the contract.

Given the evidence that Bonlander knew her representation that Society would pay Dr. Milas’s fees as stated in the contract may not be true, a jury could reasonably find that she acted in reckless disregard of whether her representation was true or false when she signed the contract. There is substantial evidence to support such a finding, and accordingly, there is substantial evidence of Society Insurance’s scienter and intent to deceive.

II. The court of appeals erred in affirming the district court’s refusal to give jury instructions on punitive damages.

There is substantial evidence in the record to instruct the jury on punitive damages. Punitive damages serve a vital function in our tort system. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 865 (Iowa 1994). They punish a defendant and deter the offending party and like-minded individuals from committing similar acts. *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988). Iowa Code section 668A.1 provides that punitive damages may not be awarded unless the jury finds that “the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.” This standard is met by a showing of actual or legal malice. *See Cawthorn v. Catholic*

Health Initiatives Iowa Corp., 743 N.W.2d 525, 529 (Iowa 2007). It is well established that punitive damages may be awarded in an action for fraud when this standard has been met. *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 745 (Iowa 2009).

Here, the purpose of punitive damages has particular importance where the conduct of a workers' compensation insurer is at issue. Unless deterred, Society Insurance will continue its tactic of inducing medical providers to provide care to employees with promises of payment, only to deny and delay payment once medical services have been provided in the hope of "negotiating" (coercing) a savings.

A. Standard of Review

The standard of review of a failure to give a requested instruction is based on errors of law. *See* Iowa R. App. P. 6.907.

B. The court of appeals erred in affirming the district court's refusal to instruct the jury on punitive damages because there is substantial evidence in the record that Society Insurance acted with actual malice.

There is substantial evidence in the record that Society Insurance acted with actual malice toward Dr. Milas. Actual malice is characterized by such factors as personal spite, hatred, or ill will. *Schultz v. Sec. Nat'l Bank*, 583 N.W.2d 886, 888 (Iowa 1998).

Here, there is abundant evidence in the record that Society Insurance treated Dr. Milas differently than any other medical professional who provided medical

care to Ricky Fitzgerald. Society Insurance boasted that it had paid \$214,000.00 to medical professionals for providing care to Fitzgerald. App. 346. Yet, Society Insurance's payment to Dr. Milas was only \$1,620.52. App. 233.

Society Insurance paid for Fitzgerald to undergo an evaluation with its medical experts for litigation purposes. App. 353, 242. The medical expert did not actually provide medical care, rather, he gave medical opinions for litigation purposes. App. 353. Society Insurance prepaid the medical professional one hundred percent (100%) of his agreed upon fees about a month before the evaluation. App. 353, 242. Society Insurance paid its expert witness more for a one-time evaluation than it paid Dr. Milas for performing a delicate surgery and three months of follow-up care. App. 233, 353.

For another example, Society Insurance promptly paid the anesthesiologist who was present during the surgery performed by Dr. Milas. App. 241, 254, 354. Society Insurance paid the anesthesiologist more than what it paid Dr. Milas even though they were in the same operating room for the same amount of time. App. 241, 254.

Society Insurance has offered no credible reason for treating Dr. Milas any differently than it treated the other health professionals involved in Fitzgerald's care and the evaluation of his care. Society Insurance's representative claimed that she had to send Dr. Milas's fees to the cost-containment vendor, but this is simply

untrue. Society Insurance’s vice-president testified that Society Insurance’s representative had the power to disregard the cost containment vendor’s recommendation and pay Dr. Milas what she had agreed to pay him before the surgery. App. 272, 274. In other words, Society Insurance’s representative could have sent Dr. Milas a check for one hundred percent of his fees on June 4, 2013 – more than three years before the trial in this case. Instead, Dr. Milas had to struggle for more than three years with this insurance company, and actually go through a trial before Society Insurance paid him what it had agreed to pay in the first place.

Society Insurance’s conduct in processing the payment of Dr. Milas’s fees, particularly as compared to how it handled the payment for services of other medical professionals, would support a jury finding that Defendants acted with personal spite or ill-will toward Dr. Milas—a finding that would support an award of punitive damages. For this reason, the trial court erred in refusing to instruct the jury on punitive damages.

C. The court of appeals erred in affirming the district court’s refusal to instruct the jury on punitive damages because there is substantial evidence in the record that Society Insurance acted with legal malice.

There is substantial evidence in the record that Society Insurance acted with legal malice. Legal malice is conduct that exhibits a “willful and wanton disregard for the rights or safety of another.” Iowa Code § 668A.1(1)(a); *accord Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 256 (Iowa 1993).

It “involves wrongful conduct committed ‘with a reckless disregard of another’s rights.’” *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 745 (Iowa 2009) (quoting *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 82 (Iowa 1984)). The intentional acts of the defendant must be of “an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow....” *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990). Evidence of a “defendant’s persistent course of conduct . . . shows that the defendant acted with no care and with disregard to the consequences of [his] acts.” *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005); *accord Miranda v. Said*, 836 N.W.2d 8, 34 (Iowa 2013).

There was evidence in the record that Bonlander’s supervisor understood that Dr. Milas was requesting preauthorization of his fee for performing Fitzgerald’s surgery and that she nonetheless instructed Bonlander to sign the approval forms submitted by Dr. Milas. Bonlander did so with the intention that she would submit Dr. Milas’s fees to Society Insurance’s cost-containment vendor for review and with full knowledge that such a review would result in a reduction in Dr. Milas’s fees and an attempt to negotiate a savings for Society Insurance. Moreover, the evidence showed that these actions were encouraged, if not required, by Society Insurance’s corporate policies.

There was also evidence from which the jury could find that upon receipt of Dr. Milas's bill for performing the surgery, Society Insurance arbitrarily refused to pay that bill. Notwithstanding their preauthorization of the surgery in an amount identical to the bill ultimately submitted, Society Insurance's employees and agents attempted to coerce Dr. Milas to agree to a substantially reduced payment to avoid further delay and additional reductions in payment. When he refused to accept that offer, his bill was submitted to Society Insurance's cost-containment vendor who also recommended that Society Insurance pay a substantially reduced sum in payment of Dr. Milas's agreed-upon fees.

Bonlander's supervisor, Kelderman, even admitted their conduct was consistent with the custom and practice of Society Insurance. App. 378. Society Insurance's "audit guidelines" contain corporate policies and procedures governing payment of medical bills. App. 378-379. One policy and procedure in those guidelines states: "If our Bill Review Company is unable to secure savings on your bill; as [sic] it is cost effective to do so, consider negotiating a reduced rate in exchange for prompt payment"! App. 251. Thus, Society Insurance tells its employees—without qualification—that it is acceptable to withhold payments to medical providers in order to negotiate a reduced amount with those providers.

A jury could find from this evidence that Bonlander and her supervisor acted in reckless disregard of Dr. Milas's rights throughout their handling of Fitzgerald's

surgery, instead focusing on efforts to obtain a savings on the cost of the surgery to financially benefit Society Insurance and their individual year-end bonuses. A jury could also reasonably find from the evidence outlined above that Society Insurance engaged in a persistent course of conduct that disregarded the rights of medical providers and the adverse impact its conduct would have on patients receiving prompt medical care when their authorized, treating doctors are not fully compensated. Therefore, this evidence was sufficient to create a jury question on the issue of punitive damages, and the trial court erred in refusing to submit this issue to the jury under proper instructions.

CONCLUSION

For the reasons stated above, the court of appeals erred in affirming the rulings of the district court. Plaintiff respectfully requests that this Court remand this case for a new trial and direct the case to a different trial judge.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

We hereby certify that the costs paid for printing Appellant's Application for Further Review was the sum of \$ _____.

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IN THE COURT OF APPEALS OF IOWA

No. 16-2148
Filed November 8, 2017

ROBERT W. MILAS, M.D.,
Plaintiff-Appellant,

vs.

SOCIETY INSURANCE and ANGELA BONLANDER,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Henry W. Latham II (trial and motion to recuse) and Nancy S. Tabor (motion for summary judgment), Judges.

Plaintiff appeals following judgment entry in his claims for fraudulent misrepresentation and breach of contract. **AFFIRMED.**

Anthony J. Bribriesco, Andrew W. Bribriesco, and William J. Bribriesco of Bribriesco Law Firm, P.L.L.C., Bettendorf, for appellant.

Guy R. Cook and Aaron W. Lindebak of Grefe & Sidney, P.L.C., Des Moines, for appellees.

Considered by Danilson, C.J., McDonald, J., and Blane, S.J. Tabor, J., takes no part.

MCDONALD, Judge.

A treating physician brought an action for breach of contract, negligent misrepresentation, and fraudulent misrepresentation against a workers' compensation insurance carrier and its claims adjuster after the claims adjuster approved an elective surgery for the physician's patient but the carrier declined to pay the physician's entire fee for the elective surgery. The district court dismissed the misrepresentation claims on summary judgment. The claim for breach of contract was tried to a jury. The jury found in favor of the physician and awarded contract damages. The physician timely filed this appeal. He contends the district court erred in dismissing his fraudulent misrepresentation claim and erred in declining to submit the issue of punitive damages to the jury. He also contends the district court should have granted his motion for recusal.

I.

In January 2012, Rickey Fitzgerald seriously injured himself while performing work for Barker Apartments and filed a workers' compensation claim. Fitzgerald became dissatisfied with the medical care received, and he petitioned for alternate care with Dr. Robert Milas. The workers' compensation commissioner granted the petition, and Dr. Milas became Fitzgerald's treating physician. Dr. Milas recommended Fitzgerald undergo a cervical fusion to treat Fitzgerald's neck and back injuries. Dr. Milas sent a fee estimate to the workers' compensation insurance carrier, Society Insurance, in the amount of \$14,325.87. A claims adjuster, Angela Bonlander, signed the estimate. The signed estimate provided, "SIGNATURE FROM REPRESENTATIVE AT SOCIETY INSURANCE WILL BE THE AUTHORIZATION FOR SURGERY."

After receiving the signed estimate, Dr. Milas performed the cervical fusion. He submitted a bill to Society Insurance for \$14,325.87. Society Insurance provided the bill to a third-party auditing service, Health Systems International (HSI). Upon the recommendation of HSI, Society Insurance issued a check to Dr. Milas for \$1620.52. Dr. Milas rejected the check and demanded he be paid in full. Two years later, Society Insurance sent Dr. Milas another check for \$4958.03. Dr. Milas rejected that payment.

Dr. Milas brought this action against Society Insurance and Bonlander. Dr. Milas asserted claims for negligent misrepresentation, fraudulent misrepresentation, and breach of contract. Society Insurance moved for summary judgment on all counts. The district court granted Society Insurance's motion for summary judgment on the fraudulent misrepresentation claim, concluding there was no evidence showing the defendant had the intent to deceive Dr. Milas in authorizing the elective surgery.

The matter proceeded to trial on the negligent misrepresentation claim and the breach-of-contract claim. The first trial ended during the plaintiff's opening statement after the district court granted a motion for mistrial. Society Insurance subsequently filed a second motion for summary judgment, seeking dismissal of the negligent misrepresentation claim. The district court granted the motion, concluding the defendants were not in the business of providing information and were entitled to judgment as a matter of law.

The matter proceeded to trial on the claim for breach of contract. Prior to the second trial, Dr. Milas moved to recuse the presiding judge. The district court denied the motion. Dr. Milas sought interlocutory review of the order denying the

motion. That, too, was denied. The jury returned a verdict finding Dr. Milas and Society Insurance entered into a contract and finding Dr. Milas and Bonlander had not entered into a contract. The jury found Society Insurance breached the contract and awarded Dr. Milas \$14,325.87. Dr. Milas now appeals.

II.

In his first claim of error, Dr. Milas argues the district court erred in dismissing his claim for fraudulent misrepresentation. Dr. Milas contends Society Insurance, in signing the estimate, made a false representation that it would pay the proposed surgical fees knowing it intended to negotiate the fees at a later date. He contends this is a triable issue of fact.

This court reviews a district court's grant of summary judgment for correction of errors at law. See *Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 500 (Iowa 2013). A district court properly grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *id.* at 501. An issue of fact is material if "the dispute is over facts that might affect the outcome of the suit, given the applicable law." *Weddum v. Davenport Cmty. Sch. Dist.*, 750 N.W.2d 114, 117 (Iowa 2008). "An issue of fact is 'genuine' if the evidence is such that a reasonable finder of fact could return a verdict or decision for the nonmoving party." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). "We can resolve a matter on summary judgment if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Boelman*, 826 N.W.2d at 501. The burden is on the moving party to show it is entitled to judgment as a matter of law. *Sallee v. Stewart*, 827 N.W.2d 128, 133 (Iowa 2013).

There are seven elements of fraudulent misrepresentation: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) justifiable reliance, and (7) resulting injury or damage. *Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Comm'n*, 464 N.W.2d 450, 453 (Iowa 1990). Scienter and intent to deceive are closely related elements of fraudulent misrepresentation, and the same general analysis applies for each. See *Van Sickle Constr. Co. v. Wachovia Comm. Mortg., Inc.*, 783 N.W.2d 684, 688 (Iowa 2010). “Scienter and intent to deceive may be shown when the speaker has actual knowledge of the falsity of his representations or speaks in reckless disregard of whether those representations are true or false.” *Id.* (citation omitted).

On the summary judgment record, Dr. Milas failed to create a triable issue of fact on these two elements. There was no evidence in the summary judgment record showing the defendants made a false representation, had actual knowledge of a false representation, or spoke in reckless disregard of whether any representation was true or false. The fact that Society Insurance’s employee, Angela Bonlander, knew the claim would be submitted to a bill review company does not by itself show a misrepresentation because notwithstanding a contract obligation to pay a sum certain there is no harm in later asking if a contract obligee is willing to take a lower payment. The statement by Bonlander that she knew Society Insurance intended to negotiate the fees notwithstanding her signature to authorize the surgery was not presented until trial.

“Speculation is not sufficient to generate a genuine issue of fact.” *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005). In the absence of any evidence from

which a jury could infer scienter and intent to deceive, the district court correctly granted summary judgment. See, e.g., *Cannon v. Bodensteiner Implement Co.*, No. 15-0741, 2017 WL 1086787, at *4 (Iowa Ct. App. Mar. 22, 2017) (affirming dismissal of fraudulent misrepresentation claim where there were “no facts supporting the scienter and intent elements of [the] claim or creating a genuine issue material fact as to those elements”); *Polar Insulation v. Garling Const., Inc.*, No. 15-1051, 2016 WL 6396208, at *3 (Iowa Ct. App. Oct. 26, 2016) (affirming dismissal of fraudulent misrepresentation claim on summary judgment where claim was “largely an extension of [the plaintiff’s] breach-of-contract claim in that [plaintiff] claims [defendants] intended to deceive by not paying” and noting the “[f]ailure to fulfill obligations under a contract does not necessarily support a claim for fraudulent misrepresentation”); *Scholap Kohl v. Am. Family Mut. Ins. Co.*, No. 15-1612, 2016 WL 5407957, at *8 (Iowa Ct. App. Sept. 28, 2016) (affirming summary judgment where there was no evidence of intent to deceive regarding the terms of an insurance contract); *D & W Dev., Inc. v. City of Milford*, No. 12-0579, 2013 WL 2145735, at *6 (Iowa Ct. App. May 15, 2013) (affirming dismissal of fraudulent misrepresentation claim where there was no evidence of scienter or intent to deceive).

III.

Dr. Milas requested the jury be instructed on punitive damages. The court declined to give the instruction. Dr. Milas appeals that decision. We review the failure to give a jury instruction for correction of error at law. See *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999). Failure to give jury instructions on issues supported by substantial evidence is error. See *Meck v. Iowa Power & Light Co.*,

469 N.W.2d 274, 276 (Iowa Ct. App. 1991). Instructional error warrants reversal if it resulted in prejudice. See *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 555 (Iowa 1980).

Punitive damages may not be awarded unless the jury finds “by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.” Iowa Code § 668A.1 (2013). When the claim for punitive damages arises out of contract action, an award of punitive damages is allowed only “when the breach (1) constitutes an intentional tort, and (2) is committed maliciously, in a manner that meets the standards of Iowa Code section 668A.1 (1993).” *Magnusson Agency v. Pub. Entity Nat’l Co-Midwest*, 560 N.W.2d 20, 29 (Iowa 1997). Legal malice is conduct exhibiting “willful and wanton disregard for the rights or safety of another.” *Schultz v. Sec. Nat’l Bank*, 583 N.W.2d 886, 888 (Iowa 1998).

We cannot conclude the district court erred in declining to instruct the jury on punitive damages. There is not substantial evidence in support of such an instruction. Society Insurance’s use of a third-party audit service to advise on fees and negotiate fee payment does not constitute an independent tort. Similarly, the decision to negotiate fees is not evidence of legal malice. The mere fact the jury found a breach of contract here is insufficient to require an instruction on punitive damages. See *The Hansen Co. v. Rednet Env. Servs., L.L.C.*, No. 16-0735, 2017 WL 4570406, at *4–7 (Iowa Ct. App. Oct. 11, 2017); *Polar Insulation*, 2016 WL 6396208, at *4 (affirming decision to not instruct the jury on punitive damages for a claim of breach of contract).

IV.

In his last claim of error, Dr. Milas contends the trial judge should have recused himself from this proceeding. Prior to the second trial, Dr. Milas filed a motion for recusal. Dr. Milas argued the court should have recused itself because the court had an ex parte communication with Society Insurance's counsel, because the court "showed an unfavorable disposition towards" Dr. Milas and Dr. Milas's counsel, and because the court "made clear evidentiary error" against Dr. Milas. The district court denied the motion for recusal.

The burden of showing grounds for recusal is on the party seeking recusal. See *Campbell v. Quad City Times*, 547 N.W.2d 608, 611 (Iowa Ct. App. 1996). This burden is substantial and we will not overturn the trial judge's decision absent an abuse of discretion. See *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005). To show an abuse of discretion, a party must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *In re Estate of Olson*, 479 N.W.2d 610, 613 (Iowa Ct. App. 1991).

The Iowa Code of Judicial Conduct provides, "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Iowa Code of Judicial Conduct R. 51:2.2. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned" Iowa Code of Judicial Conduct R. 51:2.11(A). The Iowa Code of Judicial Conduct enumerates certain circumstances in which the judge must recuse himself. See Iowa Code of Judicial Conduct R. 51:2.11(A)(1)-(6). One such circumstance is when the "judge has a personal bias or prejudice

concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." Iowa Code of Judicial Conduct R. 51:2.11(A)(1). The enumerated circumstances are nonexclusive, however, and the judge is disqualified "whenever the judge's impartiality might reasonably be questioned." Iowa Code of Judicial Conduct R. 51:2.11 cmt. 1. "Before recusal is necessary, actual prejudice must be shown." *State v. Biddle*, 652 N.W.2d 191, 198 (Iowa 2002).

The record shows Society Insurance's counsel did have a brief ex parte communication with the court during the course of trial for the purpose of informing the court counsel wanted to make a record on an issue. The communication was permissible, routine, and not cause for concern. See Iowa Code of Judicial Conduct R. 51:2.9 (allowing "ex parte communication for scheduling . . . provided . . . the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond"). The court immediately notified Dr. Milas's counsel of the substance of the communication and gave his counsel an opportunity to respond. This incident does not serve as grounds for recusal.

Dr. Milas also contends the district court showed an unfavorable disposition toward Dr. Milas and his counsel. At one point during trial, outside of the presence of the jury, the court said, "[Counsel], it appears to me that Dr. Milas is kind of staring me down. I—it's very uncomfortable." The remainder of the evidence on this point consists of counsel's affidavit stating the district court's tone and temperament were inappropriate, without providing detail.

Dr. Milas also contends the court made an evidentiary error by admitting a record that contained hearsay. Dr. Milas does not challenge the admission of the exhibit by itself; he merely challenges the court's impartiality, citing the admission of this exhibit as proof of bias. Assuming without deciding the court did make an evidentiary error, that alone is not proof of any bias and it would not cause a reasonable person to question the court's impartiality.

With respect to these last two points, we cannot conclude the district court abused its discretion in denying the motion. The judge has the duty to decide. The judge is duty-bound to "hear and decide matters assigned to the judge, except when disqualification is required by rule 2.11 or other law." Iowa Code of Judicial Conduct R. 51:2.7.

Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally.

Iowa Code of Judicial Conduct R. 51:2.7 cmt. 1. It has thus been observed that mere speculation of partiality is not sufficient; "[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). Here, Dr. Milas's claims are mere speculation unsupported by the record. See, e.g., *In re Marriage of McGruder*, No. 06-1089, 2007 WL 3376899, at *4 (Iowa Ct. App. Nov. 15, 2007) (affirming denial of request for recusal where counsel complained of the judge's tone and tenor). There was no basis for the district

court judge to ignore the duty to decide. We affirm the district court's denial of Dr. Milas's motion for recusal.

VI.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	Case Title
16-2148	Milas v. Society Insurance

Electronically signed on 2017-11-08 08:53:17

1 and a lot of hyperreflexia. He was beginning to have
2 urinary urgency. So he had significant medical
3 problems.

4 Q. Okay. Now, let's break that down for the
5 ladies and gentlemen of the jury. Myelopathy, what is
6 that?

7 A. It means dysfunction of the spinal cord at
8 the cervical region, or it can be the thoracic, but
9 those are common myelopathies.

10 Q. And as we spoke about, the cervical is the
11 neck?

12 A. Yes.

13 Q. Now, when we talk about the extremities, what
14 are we talking about?

15 A. Arms and legs.

16 Q. All right. So sometime in May of 2013
17 or before, in using your medical judgment as a
18 neurosurgeon, did you believe that he needed surgery to
19 his neck and to his low back?

20 A. Yes.

21 Q. Which one did you proceed with first?

22 A. In this case I would proceed with the
23 cervical surgery.

24 Q. Why?

25 A. And the reason is that he had a progressive

1 myelopathy. In order to operate on his low back, I
2 would have to position him in such a way that it may
3 cause further damage to his cervical spinal cord. And
4 this could result in complete quadriplegia. So I
5 elected to do -- the sensible thing is to operate on
6 the most significant pathology, which was the one of
7 greatest risk to him.

8 **Q.** And that was his neck?

9 **A.** That was his neck.

10 **Q.** Now, doctor, before you performed surgery on
11 Rickey's neck on June the 3rd of 2013, did you send an
12 estimate of what it would cost to perform surgical
13 procedures to Rickey's neck?

14 **A.** I did.

15 **Q.** Now, let's talk about the first proposal.
16 And we have it marked as 2A, Plaintiff's Exhibit 2A.
17 And if we can show that.

18 **A.** Mine was somewhat smaller.

19 **Q.** Okay. Yeah. That's blown up, isn't it?

20 **A.** Yes, it is.

21 **Q.** And so the jury is able to understand from
22 your perspective what's on Exhibit 2A, could you lead
23 us through that.

24 **A.** Do you want me to itemize each one?

25 **Q.** Well, let's start generally. What is this

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Email: drmilas@mchsi.com
Website: robertwmilasmd.com
TAX ID# 36-3132612/NPI 1003808411

ESTIMATE OF PROPOSED ELECTIVE SURGERY

DATE: 05/20/13 Date of Surgery : 06/03/13

PATIENT: RICKY FITZGERALD Claim# WC1119765

SURGERY, FEE & CPT CODE #2 *Diagnosis 722.71 Cervical Myelopathy
723.0 Cervical Stenosis*

1.	63051 LAMINOPLASTY	\$6885.06
2.	22600 CERVICAL FUSION C3-C4	\$4695.40
3.	22614 ADD'L LEVELS C4-C5, C5-C6, C6-C7	\$ 783.06 per Level (\$2349.18 total)
4.	20930 BONE GRAFT	\$ 395.23
5.	GRAND TOTAL \$14325.87	

1. Trinity Medical Center will bill for use of their facility including operating room, nursing staff, supplies, labs, radiology and post-op care. Patient Accounting/Coding can give a general estimate of the fee for surgery with an overnight stay at 309-779-2650. This is considered inpatient.

PER YOUR INSTRUCTION, SIGNATURE FROM REPRESENTATIVE AT SOCIETY INSURANCE WILL BE THE AUTHORIZATION FOR SURGERY.

ANGELA BONLANDER - WC CLAIMS REP. *Angela Bonlander*
PRINT NAME AND TITLE SIGNATURE
DATE: 5/22/13 *Society Ins.*



1 today on Dr. Milas's claim that there was a breach of
2 contract?

3 **A.** That's correct.

4 **Q.** Have you formulated opinions in that regard?

5 **A.** I have.

6 **Q.** Let's talk about what your opinion is and
7 then we will talk about what the basis of your opinions
8 are.

9 **A.** Sure. So two main opinions, one is that
10 Ms. Bonlander had authority or permission from Society
11 Insurance to sign the authorization for surgery and
12 that Dr. Milas was reasonable -- it was appropriate for
13 him to rely on that authorization for surgery to go
14 ahead and perform the surgery and he reasonably
15 expected that he would be fully compensated by Society
16 Insurance for that.

17 **Q.** Okay. And what's the basis for those
18 opinions?

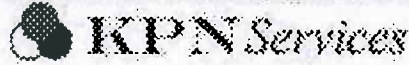
19 **A.** Sure. It's my review of the documents that
20 you sent me as well as my training and experience.

21 **MR. WILLIAM BRIBRIESCO:** Thank you. That's
22 all I have.

23 **THE COURT:** Mr. Cook.

24 **MR. COOK:** Thank you, Your Honor.

25



FAX Cover Sheet

To: Patient Accounts

From: Chastity Yarberry

Company: ROBERT W MILAS MD

Date: June 25, 2013

Fax number: 309-786-2003

Fax Number: (314) 436-1935

Phone Number: 309-786-2010

Phone Number: (314) 436-1926 x1757

Patient: RICKEY L FITZGERALD

Total no. of pages including cover: 2

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

KPN Bill ID# 3059042

SECOND REQUEST!

Attached is a Resolution Agreement for this bill. Please review the Resolution of Charges and if this meets with your approval to avoid further bill review and any audit reductions please sign and return this agreement. Upon returning it to me, I will issue an EOR for the agreed upon payment.

Thank you,

Chastity Yarberry
Phone: (314) 436-1926 ext. 1757
Fax: (314) 436-1935

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THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER



SOCIETY INSURANCE
150 Camelot Drive
P. O. Box 1029
Fond du Lac, WI 54936-1029

National Exchange Bank
Fond du Lac WI 54935
Claim Account
WC1119765

29-78
769

0000695129

CHECK DATE
JUL 15, 2013

\$*****1,620.52

PAY: ONE THOUSAND SIX HUNDRED TWENTY DOLLARS & 52/100

TO THE ORDER OF:

Robert W Milas MD
4333 18TH AVE STE B
ROCK ISLAND, IL 61201-3907

VOID AFTER SIX MONTHS
Two Signatures Required if \$50,000 or Greater

Edwin W Stores

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK HOLD AT AN ANGLE TO VIEW

⑈0000695129⑈ ⑆075900766⑆ 0000⑈04⑈0118⑈



- * It is not cost effective to request medical records for every medical bill... Look at the exposure of your claim, the cost of the medical records request in comparison to the cost of the medical bill, and the medical bill to determine if there is enough information to pay the bill... Log notes should clarify your thought process in this decision.
- * If our Bill Review Company is unable to secure savings on your bill; as it is cost effective to do so, consider negotiating a reduced rate in exchange for prompt payment. Vendors such as AAS can be used as it is appropriate to do so.
- * Initiate and maintain the Prescription Drug Card Program on appropriate claims.
- * Cards are automatically sent out on all claims except for claims involving minors and record only claims. As part of maintaining this program, it is the claim handler's responsibility to turn off or restrict access to the RX program as necessary.
- * Utilize Durable Medical Equipment (DME) providers when it makes sense to do so. Many times these providers can have significant savings, and can establish regular shipments of medical supplies. Shop around, different providers can provide better savings on different items.
- * Utilize all available discount programs such as the MDM diagnostic procedures, PPO Networks, or in some cases negotiate services on a claim basis.
- * Consider the use of medical case management to visit with the employer, claimant, and physician to establish a game plan on proposed medical treatment and early return to work efforts
- * As appropriate, IME's may be used to look at causation, reasonableness of the charges, and the necessity of medical treatment.
 - ◆ Other Less Costly and possibly faster Options Include:
 - ◆ When compensability is clear, Utilization Reviews should be considered to look at the necessity of treatment on claims involving extensive or questionable medical treatment.
 - ◆ Peer Reviews are a useful tool similar to a UR, but very often includes Peer to Peer consultation on the best services including the duration of those services necessary.
 - ◆ Record Reviews may be considered as a more in-depth evaluation of the claim short of an actual examination of the injured worker. They cannot be used for MMI.
 - ◆ All of these services can be done Prospectively, Concurrently, and Retrospectives as necessary for your claim.
- * Careful consideration should be made as to which cost containment program if any is appropriate on a claim by claim basis. Log Notes should identify the thought process on the implementation of any cost containment effort; and, equally for those claims which cost containment efforts are not required, or may create some conflict in the claim handling process.
- * See the Cost Containment Page for available vendors.

Evaluation:

Reserving of Claim Files:

- * Loss Reserve Policy
- * 2010 Reserving Estimated Costs and Disability Guidelines

1 \$1,620.52, that's not usual and customary for that type
2 of surgery? Can we agree to that?

3 **A.** I don't know.

4 **Q.** Based on your personal experience knowing
5 people -- you know people who have had neck surgery
6 before, correct?

7 **A.** Yes.

8 **Q.** Based on your personal experience outside of
9 working for a worker's compensation insurance company
10 for 19 years, can we agree that \$1,620.52, that's a
11 little low?

12 **A.** I don't know.

13 **Q.** Before you signed Plaintiff's Exhibits 2A and
14 2B, you knew that you would be sending it to a bill
15 review company, yes?

16 **A.** Yes.

17 **Q.** But you never communicated the fact that you
18 were going to send it to a bill review company to
19 Dr. Milas, true?

20 **A.** True.

21 **Q.** You never told Dr. Milas that you intended on
22 negotiating his fees, true?

23 **A.** True.

24 **Q.** The way that you treated Dr. Milas, is that
25 the way you treat all authorized doctors?

1 correct? The charges to Health Systems International
2 before signing off on Plaintiff's Exhibits 2A and 2B,
3 correct?

4 **A.** I don't understand your question.

5 **Q.** Sure. Just so it's clear, we can agree that
6 you could have had Dr. Milas's fees audited before you
7 signed Plaintiff's Exhibit 2A?

8 **A.** Yes.

9 **Q.** Ms. Bonlander, in 2013 as an employee of
10 Society Insurance were you eligible for a bonus?

11 **A.** Yes.

12 **Q.** Was that bonus in part decided on the direct
13 loss ratio of the worker's compensation claim
14 department?

15 **A.** I'm not sure.

16 **Q.** Who determined whether you received a bonus
17 in 2013?

18 **A.** I believe it was my supervisor and Mike
19 Zajicek.

20 **Q.** When would you have met with your supervisor,
21 Shawn Kelderman, and the vice president of worker's
22 compensation at Society Insurance, Michael Zajicek, to
23 decide whether you would receive a bonus?

24 **A.** I didn't meet with Mike, just Shawn.

25 **Q.** And in 2013 did you meet with Shawn Kelderman

1 counsel, to assist her with your question.

2 **A.** Oh, sorry. Yeah, there is. Yes.

3 **Q.** Now, a lot of those bills relate to a nurse
4 case manager hired by Society, don't they?

5 **A.** Some do.

6 **Q.** Well, and I could be wrong, I think
7 between -- and there are different names there, it's
8 about \$50,000 just on nurse case managers, people hired
9 by Society to follow the injured worker to the doctor's
10 office.

11 **A.** It's not separated out, so I can't answer
12 that yes or no.

13 **Q.** Okay. The estimate represented
14 preauthorization, did it not, on what Dr. Milas was
15 going to charge?

16 **A.** Yes.

17 **Q.** Okay. And as we discussed, it was signed by
18 Angie Bonlander after talking to you?

19 **A.** Yes.

20 **Q.** Now, there was mention made about a voluntary
21 informal process that Dr. Milas could have become
22 involved with with the Iowa Worker's Compensation
23 Commissioner, correct?

24 **A.** Yes.

25 **Q.** Now, that process was not suggested to