IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert Ackre,	)	
	)	
Plaintiff and Appellant,	)	Supreme Court No. 20100044
	)	
vs.	)	Rolette County Civil No. 40-9-C-155
	)	
Chapman & Chapman, P.C.,	)	
	)	
Defendant and Appellee.	)	

APPELLEE'S BRIEF

APPEAL FROM THE DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
ROLETTE COUNTY, NORTH DAKOTA
THE HONORABLE MICHAEL G. STURDEVANT

PEARCE & DURICK
PATRICK W. DURICK, ND #03141
ZACHARY E. PELHAM, ND #05904
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Chapman & Chapman, P.C.

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STATEMENT OF ISSUES

1. Whether the District Court erred in holding that Mr. Ackre was not a protected party or third party beneficiary entitled to the protection offered by § 27-13-08, N.D.C.C.

   a. Whether Mr. Ackre's arguments concerning Medicare were presented in the Court below and should be considered by this Court.

2. Whether the District Court erred in holding that the Chapman law firm did not commit any unlawful sales practices under §§51-15-02 and 51-15-09, N.D.C.C.

3. Assuming *arguendo,* Chapman & Chapman's liability for reimbursement of medical expenses, whether Mr. Ackre can prove any damages.

STATEMENT OF THE CASE

¶1 With the additional information presented below, Appellee accepts Mr. Ackre's STATEMENT OF THE CASE:

¶2 There is no allegation or argument in the Court below of Medicare as having any relevancy to this case. There is not even a mention in any of the pleadings in the proceedings below of facts to suggest that Medicare had anything whatsoever to do with this case. To the contrary, the evidence presented by Mr. Ackre was that the Indian Health Service paid Mr. Malaterre's medical bills. The interjection of facts or arguments concerning Medicare is completely new in filings in this appeal. Neither counsel nor the court below had the opportunity to respond to facts or allegations concerning Medicare in the prior proceedings.

¶3 Appeal is from the judgment of the District Court below.

STANDARD OF REVIEW

¶4 Summary Judgment Standard

This Court has outlined the standard for review of summary judgment:

> Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result. A party moving for summary judgment has the burden of proving there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, a court must view the evidence in the light most favorable to the party opposing the motion and must give that party the benefit of all favorable inferences that reasonably can be drawn from the evidence. Whether a district court properly granted summary judgment is a question of law that we review de novo on the record.

¶5 *Grinnell Mut. Reinsurance Co. v. Thies*, 2008 ND 164, ¶ 5, 755 N.W.2d 852 (internal citations omitted). The Court reviews summary judgment by viewing "the evidence in the light most favorable to the non-moving party and then determin[ing] if the trial court properly granted summary judgment as a matter of law." *Hovland v. City of Grand Forks*, 1997 ND 95, ¶ 5, 563 N.W.2d 384. Here, the appeal involves a legal determination of the scope of N.D.C.C. § 27-13-08, the attorney misconduct statute and N.D.C.C. § 51-15-02, an unfair trade practices statute, to an agreed upon factual situation; to the legal determination of whether the issue of the applicability of Medicare to the case has been preserved for appeal; and the legal determination of the measure of damages and whether the alleged damages are speculative.

FACTS

¶6 Appellant Robert Ackre ("Mr. Ackre") and Appellee Chapman & Chapman, P.C. ("Chapman & Chapman") are law firms engaged in "personal injury" litigation. (App. *4*, ¶ 3). Both parties provide legal representation for personal injury victims who are

enrolled members of federally recognized American Indian Tribes and as such compete for the business of representing these victims. (App. *4*, ¶ 4 and ¶ 5).

¶7 Mr. Ackre's complaint contains many paragraphs of information that are irrelevant to his claim. However, a fair reading of the complaint suggests the following: 1) that Mr. Ackre is alleging that he is in competition with the Chapman firm for Native American victims of personal injury accidents and 2) that the Chapman firm has settled personal injury lawsuits for Native Americans without requiring the Native American victims to reimburse the federal government for medical costs that the government has paid to medical providers that rendered services to the Native American victims.

¶8 Specifically, Mr. Malaterre. a Native American was injured in an automobile accident caused by a third party tortfeasor. (App. 24-25) Mr. Malaterre was treated by Trinity Hospital in Minot. The billed charges for this treatment were $46,481.26. The billing statement for the treatment listed IHS – Belcourt and not Medicare Part B as the Insurance Company covering the medical treatment. (App. 26-36) Pursuant to an agreement between Trinity Hospital and the Indian Health Service ("IHS"), Trinity Hospital accepted less than the billed charges as full payment for the treatment of Mr. Malaterre. (App. 14) Trinity hospital does not have and has not claimed a hospital lien since it has been paid in full for the treatment of Mr. Malaterre.

¶9 Mr. Malaterre retained Chapman & Chapman to pursue a claim against the tortfeasor. The tortfeasor was covered by a liability policy with Progressive Insurance Company with limits of $50,000. The lawsuit was settled for the policy limits. the limits were paid, a Full Release Of All Claims with indemnification provisions was executed by

Mr. Malaterre and the proceeds of the settlement less fees and expenses were distributed to Mr. Malaterre. (App. pp. 37-45)

¶10 The only paragraph in the Complaint that alleges specific conduct by Chapman & Chapman is paragraph 18 which alleges that Chapman & Chapman failed to reimburse the federal government out of the proceeds of the settlement for government paid medical expenses incurred on behalf of a Native American client. It is only medical expenses paid by the government that the Complaint addresses. (*App.* 5-7, ¶ 10, ¶ 11, ¶ 12 and ¶ 18) The IHS cannot collect its payment from Mr. Malaterre. (App. 14)

ARGUMENT

I.

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT MR. ACKRE WAS NOT A PROTECTED PARTY OR THIRD PARTY BENEFICIARY ENTITLED TO THE PROTECTION OFFERED BY § 27-13-08, N.D.C.C.

¶11 § 27-13-08, N.C.C.C. provides in relevant part that:

> Every attorney who: 1) Is Guilty of any deceit or collusion or consents to any deceit or collusion with intent to deceive the court or any party; . . . . forfeits to the party injured treble damages to be recovered in a civil action.

¶12 Mr. Ackre alleges that Chapman & Chapman had a duty to reimburse the federal government and/or Trinity Hospital for the medical expense of treating Mr. Malaterre and that failure to so reimburse those entities for those expenses was a deceitful action entitling Mr. Ackre to damages. Without reaching the question of whether the alleged conduct by Chapman & Chapman was deceitful, the Court below observed:

> "The Court just doesn't get it." (App. 17)

¶13 The Court found that Mr. Ackre was not a person entitled to protection under the statute:

> § 27-13-08 (sic) is clearly a statute intended to protect clients, courts and those directly dealing with the attorney in question. This court cannot perceive Mr. Ackre as an intended third party beneficiary of this statute. (App. 17)

¶14 Mr. Ackre provides no case law or compelling argument indicating that contrary to the court's holdings he is entitled to protection by the statute. Mr. Ackre's citation to footnote 3 in Olson vs. Frasse, 421 N.W.2d 820, 827 (N.D. 1988) as authority for the proposition that he is one of the protected persons under § 27-13-08 is completely inapposite. Olson was a malpractice action in which the Supreme Court reversed the trial court's award of nominal damages awarded to the client under § 27-13-08. The Supreme Court held that one must prove actual damages in order to recover under the statute. The plaintiff in Olson was a client of the defending lawyer, not another lawyer in competition with the defending lawyer as is the case here. The case supports the Court's reading of the statute and not Mr. Ackre's strained interpretation.

¶15 Ackre cannot claim under N.D.D.C.C. § 27-13-08, under any facts, for at least two reasons. First, Ackre has no cause for action for actions alleged to have been taken in a case in which he was not involved. In a case entitled In re Brosnahan, 376 B.R. 387 (U.S. Bktcy Ct, W.D. N.Y. 2007), a judgment creditor claimed that the debtor's attorney was guilty of deceit and collusion in failing to disclose an unrecorded mortgage to a bank, thus allowing the debtor to obtain a mortgage from the bank, and in failing to list certain debts on the bankruptcy schedules. In construing a New York statute, almost identical to the North Dakota statute on attorney deceit and collusion, the bankruptcy judge dismissed the claim, holding that:

> We need not now decide whether some form of deceit or collusion may have occurred in the present instance. Rather, it suffices to note that if a cause of action exists, it belongs to an entity other than Williams [the judgment creditor]. Only Key Bank can assert a claim for misrepresentations made to induce an extension

> of credit by Key Bank. Similarly, any breach of a mortgage covenant will give rise to a cause of action by the mortgagee only, and not by any third party like Daniel Williams.

Id at ¶ 3.

¶16 Likewise, in assessing the claim that the debtor's attorney had made misrepresentations on the bankruptcy schedules, the bankruptcy judge concluded that, "In seeking to recover for the alleged deceit and collusion of Mr. Fink, Williams asserts a cause of action that belongs not to him, but to the bankruptcy estate. Id. at ¶3.

¶17 Second, Ackre misconstrues N.D.C.C. § 27-13-08 as creating a separate cause of action; it does not. Instead, courts have generally construed substantially identical laws to offer a means to enhance the damage awards in provable deceit cases. For example, in Loomis v. Ameritech Corp, 764 N.E.2d 658 (Ct App Ind 2002), the appellate court rejected a claim made by a injured motorist for deceit under a statute, similar to § 27-13-08, against the lawyers for another motorist. The Indiana Court held that "the attorney deceit statute 'does not create a new cause of action but, instead, trebles the damages recoverable in an action for deceit.'" Id. at ¶ 13. See also Bennett v. Jones, Waldo, Holbrook, & McDonough, 70 P.3d 470, 2003 UT 9, ¶¶ 27-29 (Utah's almost identical statute "does not create a separate and distinct cause of action, but rather merely provides for recovery of treble damages for a cause of action for the common law tort of deceit in a civil action," and thus requires, among the elements of deceit, "justifiable reliance by plaintiff" upon a "false representation of fact"). Under any set of facts, Chapman & Chapman made no representation to Ackre, who thus has no claim for common law deceit; in the absence of such an underlying claim, Ackre cannot claim the benefit of the statute.

¶18 Mr. Ackre is not one directly affected by any alleged attorney misconduct in this case and he is not entitled to protection of the statute.

A.

MR. ACKRE'S ARUGMENTS CONCERING MEDICARE WERE NOT PRESENTED IN THE COURT BELOW AND SHOULD NOT BE CONSIDERED BY THIS COURT

¶19 In the court below the Federal Medical Recovery Act, 42 U.S.C. §§ 2651-2645 ("the Act") was the linchpin for Mr. Ackre's argument that Chapman & Chapman was under a duty to reimburse the federal government out of the proceeds of the settlement of a civil action against a third party tortfeasor for Mr. Malaterre's medical expenses. The court below rejected this argument and noted that the federal government had an independent right to pursue the third party tortfeasor for those medical expenses and that nothing in the Act suggested that the United States had a right to compel Mr. Malaterre to reimburse the federal government for those expenses. (App. 12-13) See also 25 U.S.C. §1682 (this section, which is specific to the IHS, does not impose a duty of reimbursement upon a recipient of IHS services but, instead, says that IHS "may" seek subrogation of claims).

¶20 Mr. Ackre does not argue against these findings of the court below concerning the applicability of the Act in this appeal. Instead, Mr. Ackre switches horses and now argues that instead of the Federal Medical Recovery Act requiring Chapman & Chapman to reimburse the federal government from the proceeds of the settlement with the third party tortfeasor, it is Medicare that is involved and that under Medicare the federal government has the right to reimbursement of the subject medical expenses from Chapman & Chapman as representatives of the primary insurance carrier for the third party tortfeasor.

¶21 This argument should be rejected out of hand by this Court since the argument was not presented to nor considered by the trial court in the proceedings below. There was no mention of Medicare in the proceedings below. Further, there was no mention of facts or argument suggesting that Medicare was involved in a resolution of this matter in the court below. Arguments not raised in the court below are not preserved for and cannot be presented on appeal. See Rutherford v.BNSF Railway Company, 2009 ND 88, ¶ ¶ 12 & 13, 765 N.W.2d 705 (ND 2009).

¶22 It should also be noted that in this appeal Mr. Ackre presents no evidence or cites to no authority that Medicare is involved in the payment of the medical expenses of Mr. Malaterre. The statement from Trinity Hospital lists "IHS – Belcourt" as the insurance company involved. Further, a letter from The Department of Health and Human Services dated June 4, 2007, addressed to Mr. Ackre and presented to the court below as an attachment to Mr. Ackre's brief resisting the Rule 12(b) motion to dismiss states that Trinity Hospital was paid by the IHS. (Doc. No. 21) The evidence in the court below was that Mr. Malaterre's medical treatment was paid by IHS. There is no evidence in the record that Mr. Malaterre's medical treatment in this case was covered by Medicare.

¶23 In Section V of his brief, Mr. Ackre attempts to circumvent the trial court's finding that the Act did not apply, because the federal government has an independent cause of action by relying on a circuitous lien/subrogation/estoppel/constructive trust theory. As the undersigned understands this theory, the federal government is subrogated to Mr. Malaterre's rights against the tortfeasor's insurance company and the resulting settlement funds, Chapman & Chapman by reason of the settlement agreement is estopped to deny that the settlement funds are for medical expenses and therefore holds

the funds as a trustee for the federal government/hospital. No explanation is given for how this circuitous theory adds anything to the mix. The trial court's holding is that the Act did not apply, because the federal government had an independent action against the third person tortfeasor and the tortfeasor's insurer. Nothing has changed. The federal government does not need to rely on Mr. Ackre's lien/subrogation/estoppel/constructive trust theory as the federal government still has an independent cause of action against the tortfeasor and the tortfeasor's insurance company.

¶24 Facts or argument concerning Medicare were not presented to the court below. Medicare is not relevant to this matter, and the court should disregard any references to Medicare.

II.

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE CHAPMAN LAW FIRM DID NOT COMMIT ANY UNLAWFUL SALES PRACTICES UNDER §§ 51-15-02 and 51-15-09, N.D.C.C.

¶25 As in the analysis above, Mr. Ackre complains that Chapman & Chapman's conduct in not requiring Mr. Malaterre to reimburse the federal government from proceeds of a settlement with a third party tortfeasor for medical expenses incurred as the result of actions of the third party tortfeasor is unlawful as an unfair trade practice. To the contrary, the court below found that the alleged conduct of Chapman & Chapman was neither deceptive nor fraudulent:

> This Court cannot perceive the conduct of the Chapman Firm to be deceptive or fraudulent – especially when the statute requires a showing of intent. (App. 18)

¶26 The court below further found that even if the conduct was deceptive or fraudulent, the person harmed by such conduct would be Mr. Malaterre, Chapman & Chapman's client and not Mr. Ackre. (App. 18)

¶27 Mr. Ackre acknowledges that there is no good response to the lower court's finding that the alleged conduct of Chapman & Chapman was not deceptive or fraudulent by not addressing that finding in this appeal. Instead, Mr. Ackre cites a number of cases for the proposition that false and fraudulent conduct by lawyers may be subject to unfair trade practices statutes, a legal point completely irrelevant to the lower court's analysis.

¶28 Moreover, none of the cases cited by Mr. Ackre involving unfair trade practices have any relevance to the issues in the case at bar. Sears, Roebuck & Co. vs. Goldstone & Sudalter, 128 F.3d 10 (1st Cir. 1997); Brown vs. Gerstein, 460 N.E.2d 1043 (Mass. App. Ct. 1984); and Pucci v. Litwin, 828 F.Supp. 1285 (N.D. Ill. 1993); are cases involving clients suing their lawyers for malpractice and violations of unfair trade practice actions, not the factual situation involved in this case as pointed out be the trial court. St. Paul Fire & Marine Ins. Co. v. Ellis & Ellis, 262 F. 3d 53 (1st Cir. 2001). involved a claim by a workmen's compensation insurer who was allegedly injured by fraudulent acts of attorneys representing a claimant under a workman's compensation policy issued by the company and Heslin vs. Connecticut Law Clinic of Trantolo & Trantolo, 190 Conn. 510, 461 A.2d 938 (1983), a case concerning the question of whether the Connecticut Unfair Trade Practices Act, as applied to attorney conduct, violated the doctrine of separation of powers contained in Connecticut constitution.

¶29 The North Dakota statute requires a plaintiff, prior to imposition of liability, to show "the act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby." Section 51-15-02. Mr.

Ackre presented no evidence to the trial court that Chapman & Chapman is using any deception, false pretense or promises. or misrepresentations in the sale or advertising of services. Instead, Mr. Ackre's evidence only claimed that, in a single case. IHS had not been reimbursed for medical expenses from a personal injury settlement. No other admissible evidence was presented to the trial court in opposition to the summary judgment proceeding. Mr. Ackre cannot use a single transaction between Chapman & Chapman and its client. and transform that single transaction into a sales or advertising practice.

¶30 Further, as pointed out above, the premise that Chapman & Chapman was obligated to reimburse the federal government for Mr. Malaterre's medical expenses is flawed. Chapman & Chapman was under no duty to reimburse the federal government for Mr. Malaterre's medical expenses. The Federal Medical Recovery Act does not require such reimbursement, Trinity Hospital has been paid in full and does not have a lien for any medical expenses, Mr. Ackre's arguments involving Medicare were not presented to the trial court and cannot be raised on appeal and even if the arguments could be raised the evidence presented by Mr. Malaterre to the court below is that Medicare did not cover the medical expenses involved in the case at bar.

¶31 Mr. Ackre's contention that Chapman & Chapman's actions comprised an unfair trade practice fails for all of these reasons.

III.

ASSUMING *ARGUENDO* CHAPMAN & CHAPMAN'S LIABILITY FOR REIMBURSEMENT OF MEDICAL EXPENSES MR. ACKRE CANNOT PROVE ANY DAMAGES

¶32 The trial court found that even assuming *arguendo* that Chapman & Chapman's theories of liability to be correct, Mr. Ackre could not prove any damages. The trial court points out that in the case of Mr. Malaterre there were priority claims of $54,000 and a liability policy of $50,000. After paying priority claims there would be no money left for either Mr. Malaterre or his lawyer. While the trial court's analysis may be subject to certain rounding errors in that the priority claims were less than $50,000, the point is well taken. As the trial court points out, Mr. Ackre's claim of damages is purely speculative and the law does not allow damages based on speculation and conjecture. (App. 19)

¶33 Mr. Ackre does little to address the trial court's finding on damages. Without citation to authority, Mr. Ackre suggests that the measure of damages is the wrongful enrichment of the defendant rather than detriment to the plaintiff. This is not correct.

¶34 This Court addressed the question of damages in a comparable case in Olson vs. Fraase, 421 N.W.2d 820 (N.D. 1988). Olson involved Misconduct of an Attorney under N.D.C.C. § 27-13-08 and the court held that, "This court, like others, has placed fraud in this category, ruling that in order to support a legal action or defense, fraud must have produced actual damages." (Citations omitted).

¶35 Olson at page 827

> Likewise the unfair trade practices statute requires proof of actual damages: . . . If the court finds the defendant knowingly committed the conduct, the court may order that the person commencing the action recover up to three times the actual damages proven and the court must order that the person commencing the action recover costs, disbursements, and actual reasonable attorney's fees incurred in the action. (Emphasis supplied) N.D.C.C. § 51-15-09.

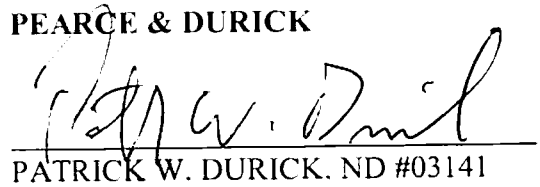
¶36 Mr. Ackre's claim of damages fails as being purely speculative.

CONCLUSION

¶37 For the above and foregoing reasons it is respectfully requested the Judgment of the court below should be affirmed.

Dated this 12th day of April, 2010.

PEARCE & DURICK



PATRICK W. DURICK, ND #03141
ZACHARY E. PELHAM, ND #05904
314 East Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
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AFFIDAVIT OF MAILING

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Cari Timmons, being first duly sworn, deposes and says that on the 12th day of April, 2010, she mailed a copy of the foregoing APPELLEE'S BRIEF, by placing a true and correct copy thereof in an envelope, addressed to the following:

Larry M. Baer
Attorney at Law
1550 South Deer Road
West Des Moines, IA 50266

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Cari Timmons
Cari Timmons

Subscribed and sworn to before me this 12 day of April, 2010.

ANNETTE KIRSCHENHEITER
Notary Public
State of North Dakota
My Commission Expires April 18, 2014

Annette Kirschenheiter
Notary Public