

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SAMI ABU FARHA,

Plaintiff-Appellant/Cross-Appellee,

v

BEN NAKASH,

Defendant-Appellee/Cross-Appellant.<sup>1</sup>

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UNPUBLISHED

August 31, 2010

No. 288754

Wayne Circuit Court

LC No. 04-421307-CH

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

This case has a long and convoluted history, including three trials, one of which ended in a mistrial, and multiple applications for leave to this court. The dispute arises out of the parties' interest in a parcel of property on Oakman Boulevard in Dearborn, which houses a pharmacy, a physical therapy practice, and physician offices. Plaintiff appeals as of right from the trial court's final order of October 24, 2008. Specifically, plaintiff appeals the trial court's (1) August 31, 2006 judgment that, among other things, quieted title to certain property in defendant, (2) its October 24, 2006 order that denied plaintiff's motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial on plaintiff's quiet title claim, (3) another October 24, 2006 order that granted defendant's motion for a new trial on plaintiff's breach of contract claim, (4) its October 24, 2008 order denying plaintiff's motion for a new trial or JNOV, (5) its October 7, 2008 order granting case evaluation sanctions to defendant, and (6) its June 23, 2006 order denying plaintiff's motion to allow filing of second amended complaint. Defendant's cross-appeal is from the trial court's October 24, 2006 denial of its motion for JNOV or new trial on defendant's counterclaim of unjust enrichment. As more fully set forth below, we vacate the trial court's order only insofar as it relates to the amount of the attorney fees awarded and remand for correction of that amount. In all other respects, we affirm.

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<sup>1</sup> Although Oakman Investments, LLC and N&A Oakman, Inc. were originally defendants in this case, at some point, according to a letter from plaintiff's counsel to this Court's Clerk on February 25, 2008, they were both "dropped from the caption and the new trial is only between the individuals," meaning Farha and Nakash. The use of defendant in the singular form shall refer solely to Nakash.

## I. BACKGROUND

On September 23, 2003, plaintiff, a licensed physician, and defendant, who is trained as a physician but not licensed to practice medicine and makes a living as a real estate investor, agreed to purchase the property for \$550,000, with each party contributing \$275,000 to the purchase price. The medical office building had previously been owned by a physician who fled the county and was later incarcerated. By purchasing the property, the parties were also purchasing the prior owner's medical files that had been left behind. Under the parties' agreement, plaintiff was to move his medical practice to the building.

In furtherance of the parties' agreement, the parties went to Lansing and incorporated two entities: N&A Oakman, Inc., to hold title to the building, and Oakman Medical Center, for the medical practice. N&A Oakman, Inc. was owned equally by both parties; but defendant was not permitted to sign to be an equal owner of Oakman Medical Center. Nevertheless, defendant believed he had an interest in Oakman Medical Center and was never told that sharing profits of a medical PC with an unlicensed person was illegal.

According to defendant, shortly after the papers were filed, plaintiff discovered that the insurance companies with whom he worked would not permit him to move his practice. The parties then agreed to dissolve both N&A Oakman, Inc. and Oakman Medical Center, and that defendant would pay back plaintiff's \$275,000 investment at 6.5 percent interest. The agreement was that defendant would pay plaintiff \$100,000 down and then \$5,000 per month for 36 months, with a balloon payment at the end to cover the remainder. After N&A Oakman, Inc was dissolved, the property was foreclosed on and Oakman Investments, LLC, a company formed and solely-owned by defendant, purchased the property at a sheriff's sale.

In December 2003, plaintiff approached defendant about moving back into the building because plaintiff needed a new location to practice. Plaintiff, defendant and one Dr. Bitar entered into an agreement where defendant subleased space from Dr. Bitar. Pursuant to the sublease, plaintiff would sublease 1,500 square feet of space; plaintiff was to be paid \$17,000 per month from his practice's revenue; plaintiff was to pay a \$2,000 deposit and for all his utilities, office supplies, the salary of all of his workers, and repairs to equipment he used; plaintiff was to carry his own insurance; and plaintiff was to provide defendant "a copy of all the billings from his work." Plaintiff moved into the building sometime in December 2003, but never shared any profits and never paid any utilities or maintenance as required under the sublease agreement.

In July 2004, plaintiff filed the instant action in circuit court, asserting claims of quiet title, breach of contract, fraud and misrepresentation. Plaintiff claimed that he was unaware he no longer had any interest in the building until May 2004 when he discovered defendant has incorporated Oakman Investments, LLC and defendant showed him the sheriff's deed that conveyed the building to Oakman Investments, LLC. Plaintiff did not dispute that the corporation was dissolved, but claimed it was done so without his knowledge and that the monies he received from defendant were for an unrelated real estate venture and for plaintiff's portion of the rents for the building.

Just 10 days after suit was filed, on July 23, 2004, before defendant was represented by counsel, defendant visited plaintiff's counsel in an attempt to resolve the litigation, offering two possible settlements. Plaintiff's counsel advised plaintiff that defendant had tried to settle the

lawsuit and had proposed two alternatives: (1) defendant would give plaintiff \$175,000 and plaintiff would begin paying \$5,000 per month in rent, with defendant being the sole owner of the building and plaintiff being a tenant; or (2) that plaintiff would buy out defendant's interest in the building by giving defendant \$640,000. Plaintiff did not accept either of these proposals and, instead, met with defendant on July 28, 2004.

During that meeting, plaintiff drafted a document that was signed by both plaintiff and defendant. The handwritten agreement, provides:

This is a binding agreement between Dr. Ben Nakkash and Abu Farha

1 5237 Oakman building is equally divided between Abu Farha & Ben Nakkash 50/50 address: 5237 Oakman Blvd Dearborn MI 48126

2 Abu Farha will pay 5000 \$ rent for first 3 years then 6000 \$ for next 3 years

3 all expenses of the building will be shared fifty / fifty from day of purchase

4 all rents will be divided fifty / fifty

5 Dr. Nakkash [defendant] has the right for access to the building any time.

6 last two rooms can be accessed by Dr. Nakkash [defendant] as an office for him

For defendant, the agreement was an attempt to resolve not only the lawsuit, but "everything," and was not a final agreement, but notes that were to be formalized into an agreement after attorney review and advice. According to plaintiff, the document represented an agreement that he held a 50 percent ownership interest in the building and it was intended to be a binding agreement. Plaintiff did admit on direct examination that the day after the document was signed, defendant said "let's go to your attorney to . . . finalize on this," but plaintiff characterized this as defendant failing to perform because defendant did not want to give plaintiff half of the building. Ultimately, the only result of the July 28, 2004 agreement was plaintiff's amendment of his complaint to include defendant's alleged breach of the agreement for failure to transfer a 50 percent interest in the building to plaintiff.

In response to plaintiff's amended complaint including the alleged "settlement" agreement breach, on February 18, 2005, defendants filed a counter complaint, alleging that the contract sublease agreement was terminated during the foreclosure proceedings and, therefore, unenforceable by plaintiff; requesting that the trial court declare that plaintiff's medical practice was a partnership with defendant, award defendant damages based on plaintiff failing to permit defendant's participation and profit-sharing, and order an accounting of the practice; alleging plaintiff breached his fiduciary duty to defendant by breaching the partnership and refusing to perform an accounting; requesting a constructive trust over plaintiff's medical practice; and alleging claims of promissory estoppel, fraud, silent fraud, innocent misrepresentation, rescission, and unjust enrichment. The gist of the complaint was that plaintiff knew or should

have known that a non-doctor could not share in the ownership and revenues of a medical practice (as was contemplated by both the initial business venture and the contract sublease agreement), and that defendant entered into the partnership and loan agreements without this knowledge.

In response to a motion for summary disposition as to defendant's counterclaims filed by plaintiff, the trial court determined that the sublease, which permitted defendant to acquire proceeds from plaintiff's medical practice was void *ab initio*,<sup>2</sup> in its entirety, such that defendant was not entitled to profits and plaintiff could not enforce the terms that permitted him to stay in the building. The trial court granted dismissed defendant's claims without prejudice, but ordered that defendant could file an amended counter complaint that did "not seek damages from plaintiff[s] medical practice as those claims have been dismissed . . . . However, [they] may seek damages under other legal theories that they have for damages."

Defendant's first amended counter complaint asserted claims for rescission of the sublease due to fraudulent representation, quiet title, fraud, fraudulent misrepresentation, innocent misrepresentation, silent fraud, breach of implied contract, breach of quasi contract, quantum meruit, unjust enrichment, promissory estoppel, and restitution, damages, and equity. Plaintiff again sought summary disposition, claiming that the complaint continued to seek damages for an alleged agreement, contrary to law, to allow a non-licensed physician an ownership interest in a medical practice owned and operated by plaintiff. Defendant also filed a motion for summary disposition, seeking dismissal of plaintiff's claims.

The trial court held a hearing on both motions on November 22, 2005. After extensive arguments, the trial court held that the July 28, 2004 agreement did not support plaintiff's position that the parties had agreed plaintiff had a 50 percent interest in the building. The trial court concluded the document was unambiguous and that it was dividing up space, not title, as evidenced by the fact that plaintiff was to pay rent according to subsequent paragraphs. It further concluded that the document failed to satisfy the statute of frauds to convey an interest in real estate. The trial court denied plaintiff's motion for summary disposition related to the amended counter complaint, finding that the counter complaint stated claims upon which relief could be granted. It granted defendant's motion on plaintiff's fraud, misrepresentation, conversion, unjust enrichment and promissory estoppel claims, but denied as to plaintiff's remaining claims.

In February 2006, plaintiff filed two applications for leave with this Court related to the trial court's summary disposition orders, both of which were denied for failure to persuade of the need for immediate review. *Farha v Nakash*, unpublished order of the Court of Appeals, entered September 14, 2006 (Docket No. 268134); *Farha v Nakash*, unpublished order of the Court of Appeals, entered September 14, 2006 (Docket No. 268135).

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<sup>2</sup> See MCL 450.222 and 450.224(3).

On February 2, 2006, plaintiff moved to file a second amended complaint, which sought to reintroduce the dismissed claims of fraud, innocent misrepresentation, and intentional misrepresentation. The trial court denied plaintiff's motion.<sup>3</sup>

The first jury trial began on June 26, 2006. All matters except the quiet title claim were presented. The jury rendered the following verdicts: (1) Defendant did not breach the September 23, 2003 agreement to jointly purchase the building and plaintiff suffered no damages as a result; (2) the July 28, 2004 agreement was intended to be a final and binding agreement between the parties; (3) defendant breached the July 28, 2004 agreement resulting in plaintiff suffering \$262,226 in damages; (4) defendant was not liable to plaintiff for innocent misrepresentation; (5) plaintiff voluntarily relinquished his interests by signing the certificates of dissolution for Oakman Medical Center and N&A Oakman, Inc., the written consent agreement of the shareholders of both entities, the mutual settlement of all claims, and the assignment and bill of sale; (6) plaintiff received the \$100,000 check and the subsequent \$5,000 checks as part of the mutual settlement and release; (7) plaintiff was not liable to defendant for fraud and misrepresentation, silent fraud, innocent misrepresentation, promissory estoppel, or unjust enrichment.

On August 3, 2006, the trial court entered its verdict on plaintiff's quiet title claim, quieting title exclusively in defendant. The trial court issued a judgment on August 31, 2006 awarding plaintiff damages of \$262,226, plus statutory interest, and awarding title to the property to defendants. Both parties moved for JNOV or new trial; defendants claimed error on the ground that the trial court improperly instructed the jury, at plaintiff's request, on repudiation as well as the jury's finding of no cause of action on the unjust enrichment claim; plaintiff claimed error on the equitable title claim and also moved for mediation sanctions and interest on the judgment.

The trial court agreed with defendant's argument that a new trial was required because the trial court improperly instructed the jury on repudiation,<sup>4</sup> but denied the motion as to the unjust enrichment claim. The trial court denied plaintiff's request for interest for failure to "attach [his] calculation or the authority for the request for the Order," but permitted plaintiff to "bring it up again." The trial court also granted plaintiff's motion for mediation sanctions. However, these rulings became moot when the trial court ordered the new trial.

The trial court denied plaintiff's motion for new trial on the equitable title claim, noting that its decision to quiet title in defendant had not been based solely on the jury's award of damages, but on the jury findings that plaintiff had signed away all of his rights, title and interest in the building; that plaintiff had collected \$100,000 plus multiple \$5,000 payments toward his original \$275,00 investment, as well as the evidence presented, including that the parties purchased not just the building, but also the abandoned medical files for which only plaintiff received a benefit, i.e. a growing medical practice. The trial court entered three orders on

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<sup>3</sup> The grounds for this denial are more fully discussed below.

<sup>4</sup> The trial court's ruling in this regard will be discussed in more detail below.

October 24, 2006; one denying plaintiff's motion for JNOV or new trial on the quiet title claim, one granting in part and denying in part defendant's motion for JNOV of new trial, and one denying plaintiff's motion for interest on the judgment.

On November 9, 2006 and November 13, 2006, plaintiff filed two appeals with this Court; one claiming an appeal as of right of the August 31, 2006 quiet title judgment and the October 24, 2006 order denying plaintiff's motion for JNOV or new trial on the quiet title claim, and the other seeking leave to appeal the three October 24, 2006 orders. This Court denied leave to appeal for failure to persuade the Court of the need for immediate appellate review, *Farha v Nakash*, unpublished order of the Court of Appeals, entered March 28, 2007 (Docket No. 274300), and dismissed the other appeal for lack of jurisdiction because the trial court's grant of a new trial precluded the finality of either of the orders being appealed. *Farha v Nakash*, unpublished order of the Court of Appeals, entered March 28, 2007 (Docket No. 274331).

The second trial commenced on November 5, 2007. Only the contract claim related to the settlement agreement was at issue. During opening statements, outside the presence of the jury, the trial court ruled:

I already told you in your motions in limine that [plaintiff's counsel] could show the relationship of the parties and to some extent he could do the history. So he can determine how he wants to bring his case in. *You're free to cross-examine the witness and say, we litigated that issue. Yet, you los[t] on that issue, right. So the jury decided, they didn't—in your favor so you los[t] it. Whatever you want to say. You can cross any way you feel like it. And you can ask him that.*

It's his decision to decide what history he wanted to bring in so he can show the relationship so they can see what the intent of the parties was and whether or not there was offer and acceptance.

*You can cross on, you los[t] on this point didn't you. Whatever. . . .*

*Defendant's Counsel:* I just don't want to be set up for the witness to blurt out, because obviously he los[t] on those issues, I don't want him to blurt out, yes, I los[t] on this issue, yes, I los[t] on that issue, but I won a \$175,000.

*The Court:* Didn't I already prevent that?

*Defendant's Counsel:* That's right.

*The Court:* *You know, [plaintiff], that you cannot tell the jury about the prior verdict because it stops them from making an independent verdict today.*

*Do you understand that?*

*Plaintiff:* But he told me. [Defendant's counsel] told them about the verdict.

*The Court:* I don't care, but, I am telling you what to do now. [Emphasis added.]

Thus, the trial court explicitly permitted defendant's counsel to reference the prior jury verdicts that remained intact and explicitly told plaintiff not to mention the prior jury verdict for damages, which had been overturned by the grant of a new trial. However, when defense counsel began his cross-examination, the exact thing he feared occurred:

*Q.* Now, you went through this morning a lot of information before this jury about how [defendant] bought the building and how it was transferred to another company, and how you didn't know anything about the transfer into this other company. And how you didn't know anything about what was happening to you, and that he somehow took the building from you. Do you remember all of that?

*A.* Yes, I do. . . .

*Q.* You also remember that you litigated that already, didn't you?

*A.* Yes.

*Q.* You've been to Court on that already, right?

*A.* Yes.

*Q.* And another jury was sitting there, right?

*A.* Yes.

\* \* \*

*Q.* Another jury has already decided that, right?

*A.* And they awarded me money.

At this point, the trial court excused the jury and questioned plaintiff as to why he had just done exactly what she had ordered him not to do. Defendant moved for a mistrial, which the trial court granted based on plaintiff's violation of the court's order in the court's presence. The trial court concluded that plaintiff's behavior was "egregious" and ordered him to pay a \$250 fine, and spend a day in jail.

On December 7, 2007, the trial court heard oral arguments on defendant's motion for costs and attorney fees based on the mistrial and ultimately awarded defendant \$10,000 in attorney fees as sanctions. On February 15, 2008, plaintiff filed another application for leave to appeal with this Court, this time appealing, among other things, the trial court's December 7, 2007 order granting a mistrial and finding plaintiff in contempt and the trial court's January 31, 2008 order granting sanctions against plaintiff. This Court reversed the trial court's December 7, 2007 order that assessed a one-day jail stay for plaintiff, but otherwise denied leave for failure to persuade the Court of the need for immediate review. *Farha v Nakash*, unpublished order of the Court of Appeals, entered February 28, 2008 (Docket No. 283715).

The third trial commenced on April 28, 2008 and lasted until May 1, 2008. As with the second trial, the sole issue at trial was plaintiff's breach of contract claim related to the July 28,

2004 “settlement” agreement. At the close of proofs, plaintiff requested that the trial court instruct the jury on waiver by giving M Civ JI 142.41. The trial court denied the request, concluding that the instruction was “not supported by the evidence.”<sup>5</sup>

As did the first jury, the third jury concluded that the July 28, 2004 agreement was intended to be a binding agreement between the parties, but unlike the first jury, it concluded that plaintiff had breached the agreement, presumably by failing to pay rent and utilities. Based on the jury’s conclusion that plaintiff breached the agreement, it did not consider the remainder of the questions on the verdict form.

The trial court entered an amended judgment on June 28, 2008, setting forth the background of the case and the ultimate the resolution of all of the claims and counterclaims, and included the language that it was a final order. Defendant then moved for case evaluation sanctions. Plaintiff objected to any fees occurring prior to the January 31, 2008 order declaring a mistrial because plaintiff “won” the first trial and plaintiff had already paid \$10,000 in attorney fee sanctions for the mistrial. The parties agreed to confer on the issue and come back another time. At the continued hearing, the trial court considered plaintiff’s specific objections to the bill and rejected the majority of them. The trial court denied certain appellate costs based on a stipulation and for transcripts that were not filed and made certain the \$10,000 sanction amount had been deducted. It reduced the rate for one of the three attorneys to \$150 per hour and sustained an objection to six and a half hours on October 11, 2005 and for three hours related to a damage assessment of the building. It otherwise found the charges and the rates reasonable. Subsequently, the trial court entered an order granting defendant case evaluation sanctions in the amount of \$238,951.20, which included interest through September 26, 2008.

Plaintiff filed a motion for new trial or JNOV in July 2008. Plaintiff first requested the trial court to reconsider its ruling on the quiet title action, arguing that equity required a different result after the third jury trial. The trial court held that the third jury trial and verdict had no impact on the equity determination made in quieting title. It further found no grounds to reconsider the ruling because the previous ruling was not grossly inadequate, excessive, contrary to law, or against the great weight of the evidence, and there had been no newly discovered evidence. The trial court then addressed plaintiff’s argument regarding the failure to provide an instruction on waiver, noted that plaintiff had failed to support his position with evidence or explain why the decision was incorrect, and denied the motion plaintiff’s motion.

Plaintiff now appeals by right.

## II. GRANTING A NEW TRIAL

Plaintiff’s first claim on appeal is that the trial court erred in granting defendant’s motion for a new trial based on the repudiation instruction. We review a trial court’s decision to grant a new trial for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472

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<sup>5</sup> The language of the instruction requested and the instructions actually given will be discussed more fully below.

(2007). An abuse of discretion occurs when a trial court makes a decision resulting in an outcome that falls outside the range of reasonable and principled outcomes. *Id.* In this case, the trial court granted defendant's motion for new trial because it had given an erroneous instruction. "The determination whether a jury instruction is applicable and accurately states the law is within the discretion of the trial court." *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993) (internal quotation and citation omitted).

During the first trial, after the close of proofs, but before closing arguments, plaintiff requested a jury instruction on repudiation. The trial court initially requested both the law and the evidence that supported the request for the repudiation instruction. The trial court then reviewed its notes of plaintiff's testimony, as well as case law provided by plaintiff, and concluded that it would not provide the instruction. However, after closing arguments were given, and immediately after the trial court instructed the jury, a sidebar was called regarding the jury instructions. After the sidebar was concluded, the trial court gave the repudiation instruction and excused the jury for deliberations, without further comment. The instruction given was, "If a party to a contract, before performance, unequivocally declares his or her intent not to perform, the non-breaching party is excused from performance."

MCR 2.611(A)(1)(a) provides that a new trial may be granted "on all or some of the issues, whenever [a party's] substantial rights are materially affected" because of an "[i]rregularity in the proceedings of the court, jury, or prevailing party, or an order of the court of abuse of discretion which denied the moving party a fair trial." In granting defendant's motion for new trial on the basis of the repudiation instruction, the trial court ruled:

I agree. I think that I ordered that you couldn't have the instruction on repudiation.

And I'll be honest with you, I was so sure you were going to lose, I thought I'd give you the instruction on repudiation so when you lost, you wouldn't be able to cite that as a reason.

\* \* \*

But did I make a[n] error when I gave that instruction after I clearly analyzed it and ruled and said I wouldn't? Yes; I did. I remember doing it. I do not remember why I did it.

We agree with the trial court that it erred.

The actions by the trial court in this case violated MCR 2.516(A)(4), which provides that "[t]he court shall inform the attorneys of its proposed action on the requests [for jury instructions] *before* their arguments to the jury (emphasis added)." Our Supreme Court has held that the purpose of the rule "is, of course, to enable counsel to tailor the closing argument to the facts of the case in the context of the law that the court will advise the jury is applicable." *Moody v Pulte Homes, Inc*, 423 Mich 150, 157; 378 NW2d 319 (1985). Thus, the trial court's actions precluded defendant's counsel from tailoring his arguments to the applicable law provided to the jury.

Plaintiff argues that the repudiation instruction was proper based on the facts of the case. However, even assuming that the facts justified giving such an instruction, the trial court's violation of MCR 2.516(A)(4) was sufficient to constitute a substantial irregularity requiring a new trial because defendant was denied the opportunity to argue the facts to address repudiation. We also cannot agree with plaintiff that this error is harmless. By requesting the repudiation instruction, plaintiff essentially admitted that he did not perform his duties under the contract. However, the jury found in favor of plaintiff on the breach of contract claim. Logically, the jury could have only done so by concluding that plaintiff's essentially admitted breach was excused by the doctrine of repudiation. Thus, the giving of the instruction cannot be considered harmless. Under these circumstances, we do not believe that the decision to grant a new trial fell outside the range of reasonable and principled outcomes and, therefore, conclude that it was not an abuse of discretion. *Barnett*, 478 Mich at 158.

### III. QUIETING TITLE IN DEFENDANT

Plaintiff next contends that the trial court erred in quieting title in defendant. We review de novo equitable actions, such as those to quiet title, but review a trial court's findings of fact for clear error. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). "[T]he plaintiff in a quiet title action has the initial burden of establishing a prima facie case of title." *Special Prop VI, LLC v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007).

Although plaintiff originally held an interest in the building when he owned 50 percent of N&A Oakman, Inc., which owned the building, plaintiff subsequently entered into an agreement with defendant to dissolve the partnership and reimburse plaintiff his initial \$275,000 investment. Although plaintiff alleged that he did not knowingly and voluntarily sign these documents, the jury from the first trial concluded that he did, and plaintiff has not appealed those rulings. Thus, plaintiff no longer had any interest in the building. Furthermore, plaintiff has maintained that defendant never gave him 50 percent ownership of the building even when he owned 50 percent of N&A Oakman, Inc. Plaintiff has never asserted that he had an ownership interest in the building pursuant to the deed naming N&A Oakman, Inc. Thus, the fact that plaintiff previously had an interest in the property does not relate to his claim to quiet title.

Plaintiff alleges that his interest in the building stems from the July 28, 2004 agreement, which provided, in part, "5237 Oakman building is equally divided between Abu Farha & Ben Nakkash [sic] 50/50." However, the trial court specifically held that the July 28, 2004 agreement did not operate under the statute of frauds to convey an interest in the building and could not be considered as a document that transferred title:

If you're referring to this document dated July 28, 2004, I do not find that this document upholds your position that the parties agreed that the plaintiff would have a 50/50 ownership interest in the Oakman property. [¶] This is nothing but an agreement about what to do now that in December '03 and January '04, the doctor once again became a tenant and had to move in.

All this is, is something that the parties did to figure since the defendant owed the plaintiff money, and now the plaintiff was a tenant of defendant's, should the defendant continue to make these \$5,000 payments? And if not, how was the plaintiff going to be paid? That's all this is.

This is the two men saying, Why should I pay you rent when you owe me money? Okay. Well, let's work it this way. And then, they re-worked their installment agreement after the buyout.

Rather, the trial court found that it was simply a settlement of a dispute over rent and not a division of the building or a release of claims. The trial court further held that the document “does not operate under the statute of frauds to amount to a conveyance of real property” and reiterated that it “cannot be considered as a document that transferred title to real estate.” The trial court later reiterated these holdings during the first trial: “I agree, Mr. Walker, that it will not suffice to convey an interest in land;” and “I decided that there's no statute of—that this document does not constitute a conveyance, it's too vague for that.”

Plaintiff has not appealed these rulings. Plaintiff does argue that the July 28, 2004 agreement does not violate the statute of frauds, but only in his reply brief. This is insufficient to constitute an appeal of the trial court's decision. MCR 7.212(G); *Maxwell v DEQ*, 264 Mich App 567, 576; 692 NW2d 68 (2004). Plaintiff also did not include this argument in his questions presented, in the specific orders he indicated he was appealing, or in his brief on appeal. Ordinarily, no issue will be considered that is not set forth in the statement of questions presented. *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008). Finally, plaintiff also failed to provide the November 22, 2005 transcript, which contained this ruling of the trial court. It was plaintiff's responsibility as the appellant to file all the appropriate transcripts with this Court. MCR 7.210(B)(1)(a). The obligation to produce the transcripts applies regardless whether the transcript is directly relevant to the issues on appeal, *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 416; 425 NW2d 797 (1988), and this Court will not consider issues for which the appellant failed to produce the transcript. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006). Accordingly, plaintiff is bound by the trial court's ruling that the July 28, 2004 agreement does not transfer an interest in the building.

Without any document evidencing a transfer of an interest in the building, we conclude that plaintiff never established a prima facie case of title. Accordingly, regardless of the trial court's references to the initial jury verdict, plaintiff's alleged “windfall,” or anything else in the opinion, the trial court properly quieted title in the building in favor of defendants. See *Woodruff*, 273 Mich App at 590. There is no error.

#### IV. FAILING TO GRANT A NEW TRIAL

Plaintiff next argues that the trial court erred in failing to grant his motion for a new trial or JNOV after the third trial because the verdict was against the great weight of the evidence. As before, we review the trial court's decision for an abuse of discretion, which occurs when a trial court makes a decision resulting in an outcome that falls outside the range of reasonable and principled outcomes. *Barnett*, 478 Mich at 158.

A trial court may grant a new trial where a verdict is against the great weight of the evidence, MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990), but should only do so where the evidence heavily preponderates against the verdict and a serious miscarriage of justice would otherwise occur. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). “The trial court cannot substitute its judgment for that of the factfinder,

and the jury's verdict should not be set aside if there is competent evidence to support it." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Where there is conflicting evidence, the question of credibility is left to the factfinder. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 519; 679 NW2d 106 (2004).

As an initial matter, given our conclusion that plaintiff never made a prima facie case of title, we find no merit in plaintiff's claim that the trial court should have granted a new trial on the equitable quiet title issue. Additionally, we note that plaintiff has failed to provide this Court with the trial court's basis for denying the motion for new trial or JNOV. This alone is sufficient to reject plaintiff's claim on appeal. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) ("When an appellant fails to dispute the basis of the trial court's ruling, this Court . . . need not even consider granting plaintiffs the relief they seek [quotation marks and citation omitted].").

Further, considering the basis of the trial court's ruling, we find no abuse of discretion. In denying plaintiff's request for a new trial based on the waiver instruction, the trial court held:

In your brief you did not attach the transcripts or anything to show that there was some evidence to support [a waiver instruction] or to place the matter into context so that I would be able to say here's our record and here's the basis of the decision.

So the record stands. It wasn't attached to the motion, and I certainly so not have a memory that would allow me to recite verbatim what happened in the trial at that time. But as always, I'm sure we had a full blown discussion of what the jury instructions would be. If you argued waiver and I denied that instruction, there is a record about why. . . . I have no basis for which to grant your request under 2.611. That's denied.

It can hardly be an abuse of discretion to deny a motion because plaintiff failed to provide the record or any factual support for his position.

Nevertheless, even considering the merits of plaintiff's claim, we find no error. The verdict form in the third trial provided:

[Q]uestion one: "Did plaintiff and defendant intend that the document[] dated July 28<sup>th</sup>, '04, be a binding agreement between the parties?:["] Yes. No. If no, don't answer. Two: "Did plaintiff perform his obligations contained in the document dated July 28<sup>th</sup>, '04?" Yes. No. If no, don't answer. Three: "Did defendant fail to perform, breach his obligations contained in the document dated July 28<sup>th</sup>?" Yes. No. If no, don't answer. Four. "Did the plaintiff suffer damages as a result of defendant's failure to perform, breach his obligations contained in the document?" If the answer is no, don't answer. Five: "Is defendant entitled to set-off?"

The jury determined that the agreement was a binding agreement, but that plaintiff did not perform his obligations. These holdings are not against the great weight of the evidence. Obviously, plaintiff does not argue with the jury's first holding that the agreement was valid.

Therefore, plaintiff's only complaint about the jury verdict would be that it improperly concluded that plaintiff had not performed his obligations in the July 28, 2004 agreement.

A review of the record supports the jury's verdict. Under the July 28, 2004 agreement, plaintiff was to pay \$5,000 per month in rent for three years and \$6,000 in rent for the next three years. Although plaintiff claimed that he proffered a \$10,000 check to defendant in payment of two month's rent,<sup>6</sup> defendant testified that plaintiff never did so, and the evidence showed that plaintiff only paid defendant \$2,000 in rent per month which was pursuant to a court order. To the extent that plaintiff and defendant's testimony conflicted, it was up to the jury to decide who was telling the truth. *Shuler*, 260 Mich App at 519. Furthermore, the agreement also required plaintiff to share 50/50 all the expenses from the building "from day of purchase." Although plaintiff testified that he paid all of the electric bills for a few years, there was no evidence in the record that plaintiff ever came close to sharing the expenses for the building 50/50 for any period of time, let alone from the date the building was purchased. Thus, there was more than enough evidence in the record to support the jury's determination that plaintiff breached the July 28, 2004 agreement.<sup>7</sup>

Because there is adequate record support for the jury's findings, the verdict was not against the great weight of the evidence, *Ellsworth*, 236 Mich App at 194, such that the trial court denial of plaintiff's request for a new trial or JNOV did not fall outside the range of reasonable and principled outcomes. *Barnett*, 478 Mich at 158.

#### V. WAIVER INSTRUCTION

Plaintiff next argues that the trial court erred in failing to give his requested waiver instruction during the third trial.

During the third trial, plaintiff requested that the trial court instruct the jury on waiver by giving M Civ JI 142.41, which provides:<sup>8</sup>

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<sup>6</sup> We note that plaintiff's testimony in this regard changed between trials. At the first trial, plaintiff admitted that he never paid the \$5,000 per month rent or half of the utilities, claiming it was because defendant never gave him half of the building. It was not until the third trial that plaintiff testified that he had, in fact, tendered a \$10,000 check to defendant representing two months rent, but that defendant refused to cash it. Plaintiff also testified that, because he was now a half-owner of the building, the \$5,000 rent provision really was only \$2,500 because he was entitled to half of the rents.

<sup>7</sup> As defendant points out, this determination precludes any further relief to plaintiff, as under Michigan law, plaintiff may not enforce a contract that he himself breached. See *Ehlinger v Bodi Lake Lumber Co*, 324 Mich 77, 89; 36 NW2d 311 (1949); *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007).

<sup>8</sup> We have provided the instruction as it would have been given, with the appropriate party designations inserted where applicable.

Plaintiff claims that his failure to execute the promise was excused because defendant waived his performance. To excuse nonperformance, plaintiff must prove that defendant voluntarily and knowingly gave up his right to insist on performance of payment of \$5,000 rent and one half of the utilities. In other words, defendant must have known that he had the right to insist on completion of the payment of rent and utilities by plaintiff, but nevertheless agreed to give up this right. A waiver may be expressly stated or it may be implied by acts or conduct, indicating an intent not to enforce the contractual right such that a reasonable person would think that performance was no longer required. A waiver of a substantial right requires consideration.

The trial court declined to give it, finding that the instruction was not supported by the evidence.

Assuming, without deciding, that the trial court erred in failing to give the waiver instruction, the failure was harmless. Instructions do not create reversible error as long as, “on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

First, although plaintiff argued performance, he still argued waiver in his closing arguments:

And now, they’re going to say, well, hey. You didn’t pay the rent. You didn’t pay the utilities. Let’s deal with that for a moment. They refused to accept the rent. And they ousted him from the premises.

Now, you cannot say you have an obligation and when you try to perform your obligation, I’m going to refuse to accept it and say you didn’t perform. And that’s essentially what they said.

[Plaintiff] said, I gave him ten thousand dollars. He carried it around in his pocket for two weeks, then he decided he didn’t want to do it. So, what they did was say, we’re not going to accept this because we’re not going to abide by the contract. And then we’re going to argue that you didn’t perform. And that is, on its face, incorrect and improper.

Thus, plaintiff was not deprived of the opportunity to argue his chosen theory of waiver to the jury.

Second, the jury was given the following instructions:

Defendant claims he did not have to perform his part of the contract unless plaintiff paid monthly rent in the amount of five thousand dollars for the first three years of the tenancy and to pay his shares of the expenses. Such requirements are called condition precedents. A condition precedent is a fact or event that the parties intend must take place before there is a right to performance.

Plaintiff denied that these conditions were part of the contract. And defendant denies that the—*Plaintiff claims that he and the defendant agreed that*

*plaintiff did not have to perform his part of the contract if defendant did not transfer one half of the property to him. And defendant denies that these conditions are part of the contract.*

Whether a provision in a contract is a condition precedent which excuses performance depends on the intent of the parties. A party's intent is to be ascertained from a fair and reasonable construction of the language used in light of the surrounding circumstances when they execute the contract.

*If you find that these conditions were part of the contract, you must decide whether the event occurred. If you decide that the conditions occurred, then defendant was required to perform his part of the contract. If you decide that the conditions did not occur, then defendant was not required to perform his part of the contract.*

*If you decide that the condition precedent plaintiff claims had to occur before he was required to perform, then plaintiff did not have to perform his part of the contract.*

*Plaintiff has the burden of proof that the condition precedents occurred.*  
[Emphasis added.]

These instructions specifically let the jury determine whether, as plaintiff argued, under the agreement, plaintiff was not required to pay rent because defendant never gave him a half-interest in the building. This is precisely the substance of the waiver instruction to which plaintiff alleges he was entitled.

As noted by our Supreme Court:

Merely because the evidence in a case may include the subject matter of an SJI, it does not mean that the court, upon request of counsel, is automatically required to read every SJI which might tangentially touch on the subject matter. . . . It is conceivable, for example, that a given SJI would accurately state the law and be applicable, in the theoretical sense that the evidence in a case included reference to the subject matter of that SJI, but that a wise and experienced trial judge, in the exercise of informed discretion, would determine that reading the SJI would confuse the jurors or unnecessarily distract them from the material issues in the case, or extend the jury instruction process out of all proportion to the educational benefit to the jurors and fairness to the litigants, or unduly emphasize a potentially prejudicial aspect of the evidence, or simply add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jurors to decide the case intelligently, fairly, and impartially. [*Johnson v Corbet*, 423 Mich 304, 326-327; 377 NW2d 713 (1985).]

Here, where plaintiff was permitted to argue waiver and the substance of plaintiff's legal argument was provided in the jury instruction involving conditions precedent, we hold that, at most, there was only harmless error not requiring reversal.

## VI. CASE EVALUATION SANCTIONS

Plaintiff argues that the trial court erred in granting defendant \$238,951.20 in case evaluation sanctions after the third trial because plaintiff won at the first trial; the trial court already imposed costs and fees of \$10,000 for the second trial; defendant was not entitled to fees and costs related to counterclaims because they were not mediated by case evaluation; and defendant's fees and costs were clearly excessive and unreasonable. We review de novo a trial court's decision to grant case evaluation sanctions under MCR 2.403(O) as a question of law, but review for an abuse of discretion the award of attorney fees and costs. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

Plaintiff's first contention is that defendant is not entitled to attorney fees from October 2005 to October 2006 (the time for the first trial) because plaintiff was the prevailing party. It is true that MCR 2.403(O)(1) provides that "a party is entitled to costs if the verdict is more favorable to that party than the case evaluation" and section (2)(1) provides that a "verdict" includes "a jury verdict." However, what plaintiff fails to consider is that the trial court vacated the portion of the jury verdict from the first trial that was favorable to plaintiff when it ordered the new trial. It is axiomatic that whether a party has received a verdict that is more favorable than a case evaluation cannot be determined until the conclusion of all claims between those parties. Accordingly, until the conclusion of the third trial, it could not be determined whether plaintiff or defendant was the prevailing party and which, if either, received an award that was more favorable than the case evaluation.

In addition, in *Severn v Sperry Corp*, 212 Mich App 406, 416-417; 538 NW2d 50(1995), we held that a prevailing party was entitled to case evaluation sanctions for both the first trial, which was later reversed, as well as the retrial. We concluded that, because the "fees generated in connection with both trials were 'necessitated by the rejection' of the mediation evaluation because they arose after the rejection," "the ultimate result of the case was in plaintiffs' favor," and the purpose of the court rule "is to impose the burden of litigation costs upon the rejecting party," "[t]he cost of two trials was part of the risk assumed by defendant when it rejected the mediation evaluation." *Id.* Applying this reasoning to the present case, we conclude that defendant is entitled to his attorney fees dating back to plaintiff's rejection of the case evaluation.

Plaintiff next argues that awarding fees from October 2006 to November 2007 (the period of the second trial) was duplicative because defendant was already awarded \$10,000 in attorney fees for that time period. We agree, in part.

The \$10,000 in attorney fees was awarded based on plaintiff's actions that resulted in a mistrial. Although the trial court later explained that the \$10,000 "was the assessment in day we spent in jury selection, and the second day of putting the witness on the stand so we had to go back and get another jury," such that the \$10,000 was designed to compensate defendant only for trial days, that intent is not reflected in the record. After the mistrial, defendant submitted an itemized statement of actual costs and attorney fees to the trial court requesting \$25,178.25 in sanctions for the mistrial. This amount included \$97 in costs, \$12,937.50 for Walker's attorney fees from September 4, 2007 through November 8, 2007, and \$12,143.75 for attorney fees for Yono & Associates, from September 17, 2007 through November 7, 2007.

At the hearing, the following discussion took place:

*The Court:* And while his request is for \$12,937.50, and these attorney fees I find to be reasonable, I will impose an entire sanction of \$10,000 and require that that money be paid—

*Plaintiff's counsel:* You're going to impose what?

*The Court:* \$10,000 sanction for the contempt and—

*Defendant's counsel:* You don't have all the fees, your honor.

*The Court:* It doesn't matter . . . what your itemization is, this is my discretion under my inherent powers of what I think is appropriate to the circumstances. And what I'm saying is appropriate to the circumstances is \$10,000.

*Defendant's counsel:* I understand.

*The Court:* That's the sanction, that the attorney fee. . . .

\* \* \*

*Defendant's counsel:* My co-counsel is not being compensated, his bill is right next to mine?

*Plaintiff's counsel:* Just so I'm understanding the Court's—

*The Court:* This is my sanctions for the act. Has nothing to do—it doesn't even have to be related—

*Defendant's counsel:* Okay.

*The Court:* I don't believe . . . that when I use my inherent powers, it necessarily has to be related to your actual costs and expenses. I assessed the situation. And in assessing the situation, this is my order.

There is nothing in the record to support that the \$10,000 was to cover all fees and costs associated with the time period of October 2006 to November 2007 as plaintiff asserts. However, we are inclined to conclude that the trial court did limit defendant's entitlement to the attorney fees previously submitted. Thus, to the extent that these same fees were resubmitted in the case evaluations sanctions, they should have been disallowed.

Plaintiff's third argument is that defendant may not recover any attorney fees and costs related to his counterclaims because those claims were not mediated. The record does not support plaintiff's contention. The "Notification of the Results of Case Evaluation" shows that there were two unanimous awards—one for plaintiff against defendants in the amount of \$225,000, which was rejected by all parties, and one for defendants against plaintiff in the amount of \$0.00, which was also rejected by all parties. The fact that there was an award for claims made by defendants against plaintiff automatically requires that defendants' counterclaims against plaintiff were evaluated—albeit at \$0. Thus, the record belies plaintiff's contention that defendant's counterclaims were not evaluated at mediation. For this reason,

plaintiff's additional argument regarding MCR 2.403(K) is also without merit, as it is based on the premise that there was no separate evaluation for defendant's claims. Accordingly, there is no limitation on defendant's ability to receive fees and costs related to his counterclaims.

Plaintiff's final claim is that the fees and costs requested were clearly excessive and unreasonable. Although plaintiff itemizes several specific examples, plaintiff failed to inform this Court that the trial court has already considered these exact objections and found them lacking. On September 26, 2008, the trial court held a hearing on all of plaintiff's specific objections to the attorney fees and costs, including rates and reasonableness. For example, plaintiff previously challenged the costs for the landlord/tenant case in the district court, which challenge the trial court rejected:

The challenges to the case for the ancillary proceedings because they were landlord-tenant matters, I have to uphold those [charges] as well because, as I recall, I made a determination that I would not take jurisdiction over that. Even though I certainly would have been entitled to and there was a request for me to, I deliberately sent them down to the lower court for the summary proceedings for the landlord-tenant matters. So, I find those ancillary matters to be related and have to be covered in this award.

Having reviewed the transcript of the hearing in its entirety, we find no support for plaintiff's contention that the request for sanctions was "frivolous and premature" or that its "primary purpose" was to "further harass, embarrass and severely injure" plaintiff. Indeed, having reviewed this entire case from start to finish, it is clear that plaintiff objected to any and everything he possibly could, increasing the costs of litigation at every step of the way, including filing multiple requests for leave to appeal with this Court. This is not to say that plaintiff was not entitled to do so, but we see no reason to penalize defendant for the fact that he was required to respond to everything that plaintiff instigated. Furthermore, the record indicates that plaintiff's counsel conceded that he did not dispute the rate charged for attorney Walker and the trial court reduced the rate for Joel Yono to \$150 per hour. There is simply no merit to any of plaintiff's claims that the award was excessive or unreasonable.

Thus, we affirm the trial court's decision to award case evaluation sanctions as well as all of its determinations with respect to rate and reasonableness, with the exception of the award for time from the second trial that was duplicative of the time that was previously sought for sanctions. We have not attempted to calculate what the difference is, however, because the rate for Joel Yono was reduced from \$175 to \$150 when the trial court calculated the case evaluation sanctions and the billing sheet for Yono & Associates is unclear as to which time was for Joel Yono. Thus, we cannot simply deduct the \$10,000 sanction award from the \$25,178.25 to reach the amount to be subtracted from the case evaluation award. Accordingly, we vacate the amount of the case evaluation award and remand to the trial court for calculation and correction of the

amount by subtracting out only the duplicate time for the second trial that was previously sought in the motion for sanctions.<sup>9</sup>

## VII. DENIAL OF MOTION TO AMEND COMPLAINT

Plaintiff next appeals the trial court's denial of his motion to amend his complaint to include claims of fraud and misrepresentation. We review a trial court's decision regarding a motion to amend a complaint for an abuse of discretion. *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). An abuse of discretion occurs when a trial court makes a decision resulting in an outcome that falls outside the range of reasonable and principled outcomes. *Barnett*, 478 Mich at 158.

Plaintiff originally sued for injunctive relief and a declaratory judgment from the trial court determining the plaintiff held a half interest in the building. On November 30, 2004, plaintiff moved to file an amended complaint to add counts of breach of contract, promissory estoppel, fraud, unjust enrichment, conversion, intentional misrepresentation, innocent misrepresentation and breach of settlement agreement. On January 26, 2005, the trial court granted plaintiff's motion. Defendant filed a motion for summary disposition seeking dismissal of plaintiff's claims. The trial court held a hearing on November 22, 2005. At the conclusion of the hearing, the trial court granted defendant's (C)(8) motion on plaintiff's fraud and misrepresentation counts. On November 30, 2005, the trial court entered an order that granted defendant's motion for summary disposition in part, including that the fraud and misrepresentation claims were granted under (C)(8).

On February 2, 2006, plaintiff moved to file a second amended complaint, which sought to reintroduce claims of fraud, innocent misrepresentation, and intentional misrepresentation. Defendant responded, arguing that the second amended complaint should not be permitted based on undue delay, bad faith, plaintiff's repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, and futility in the amendment. After hearing oral arguments, the trial court issued a written opinion:

[T]he Court, upon considering the motion and the motion and the attached proposed amended pleading, *instructed Plaintiff's counsel to revise the proposed second amended complaint that was attached to the motion in accordance with the Court's ruling and to submit same to the Court for its review under a proposed order allowing the amended pleading, and Plaintiff's counsel having failed to submit the proposed amended pleading until more than 3 months after the Court's ruling; and the Court having reviewed the proposed Second Amended Complaint and finding that it did not comport with the Court's instructions and the Court being fully advised in the premises;*

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<sup>9</sup> Because the \$10,000 sanction has already been subtracted from the total, the reduction is limited to the difference between the \$10,000 sanction and what was requested, with the total requested being calculated at the rates approved of by the trial court at the case evaluations hearing, not the rates provided in the billings provided at the time of the sanction request.

IT IS HEREBY ORDERED and ADJUDGED that Plaintiff's Motion to Allow the Filing of a Second Amended Complaint be and is hereby DENIED. [Emphasis added.]

Setting aside plaintiff's waiver of this argument on appeal by failing to provide this Court with a copy of the transcript from the hearing where the trial court ruled on this issue, *PT Today*, 270 Mich App at 151-152, and failing to address the substance of trial court's actual ruling, *Derderian*, 263 Mich App at 381, we find no abuse of discretion.

The trial court informed plaintiff that he needed to revise and resubmit his second amended complaint and plaintiff failed to do so for three months following the trial court's ruling. When plaintiff did finally submit the revised complaint to the court, the filing did not "comport with the Court's instructions." A denial for failure to follow a trial court's instructions is hardly an abuse of discretion.

#### VIII. DENIAL OF MOTION FOR NEW TRIAL ON UNJUST ENRICHMENT

Defendant cross-appeals, complaining that the trial court erred when it denied defendant's motion for JNOV or a new trial after the first jury trial on defendant's counterclaim of unjust enrichment. We find no abuse of discretion. See *Barnett*, 478 Mich at 158.

Defendant argues that the jury verdict in the first trial finding no cause of action for defendant's unjust enrichment claim was against the great weight of the evidence. A trial court may grant a new trial where a verdict is against the great weight of the evidence, MCR 2.611(A)(1)(e); *Domako*, 184 Mich App at 144, but should only do so where the evidence heavily preponderates against the verdict and a serious miscarriage of justice would otherwise occur. *Unger*, 278 Mich App at 232. "The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it." *Ellsworth*, 236 Mich App at 194. Where there is conflicting evidence, the question of credibility is left to the factfinder. *Shuler*, 260 Mich App at 519.

In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). If this is established, the law will imply a contract in order to prevent unjust enrichment. *Martin v East Lansing School District*, 193 Mich App 166, 177; 483 NW2d 656 (1992). However, a contract will be implied only if there is no express contract covering the same subject matter. *Id.* [*Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).]

The juries in both the first and third trials both concluded that the July 28, 2004 document was a final, binding agreement between the plaintiff and defendant. The July 28, 2004 agreement expressly provided rent provisions. Thus, the existence of an express contract covering rent would appear to preclude any claim of unjust enrichment on that issue. *Id.*

Defendant argues that plaintiff clearly intended to dupe defendant out of his share of the profits from the medical practice and that plaintiff was clearly unjustly enriched through his

structuring of the illegal transaction with defendant, as evidenced by plaintiff's increased profits from this practice, made possible by the files left at the building, defendant's providing a fully-equipped practice including expensive medical equipment, plaintiff's failure to pay any utilities or taxes, while paying lower rent than any other building tenants, and precluding defendant from being able to rent that space to someone else.

We agree with defendant that there was certainly evidence of each of these alleged benefits. However, plaintiff testified that defendant was aware that he could not share profits in a medical practice before any agreements were entered into, such that defendant was not "duped" into anything, and that he never intended to share the proceeds from his business. He testified that his practice at the building was more successful because of his own hard work and that his wife managed his practice. Plaintiff expected to compensate defendant if defendant "does any management," but defendant never did. He disputed that defendant ever provided any equipment to plaintiff's practice, and testified that he brought his own equipment, although he agreed that it was another physician who brought the cardio and ultrasound equipment. Plaintiff agreed that there were medical files in the building, but testified that files follow patients, not doctors. He also testified that defendant "took a big chunk of them," and that the patients plaintiff was serving did not come from those files.

As for the utilities, defendant testified on cross-examination that as the landlord he was responsible for repairs and maintenance, although he also testified that plaintiff was supposed to pay the utilities, but did not. Defendant did admit that the utilities were in his name, not plaintiff's. Regarding the rent and plaintiff's use of space, defendant also testified that he did not mind not getting rent from some of the prior doctors because he just wanted a doctor in the space and he received a benefit from that. He also testified that a doctor paying some rent was better than a doctor paying no rent.

Although defendant disputed much of plaintiff's testimony, for example he testified that he provided all of the equipment and furniture for the building, ultimately it was a credibility question for the jury. Obviously, the jury found plaintiff less than credible on some issues, as it completely dismissed his testimony that he never signed the releases and dissolution papers for N&A Oakman, Inc. and Oakman Medical Center. Nevertheless, juries are permitted to conclude that only part of a witness's testimony is credible. *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976).

[W]hen testimony is in direct conflict and testimony supporting the verdict has been impeached, if "it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it," the credibility of witnesses is for the jury. [*People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998), quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).]

Under this standard, we conclude that defendant has not shown that the jury's no cause was against the great weight of the evidence. The record contained evidence that supported both plaintiff's and defendant's positions and the jury resolved the credibility issue, at least as to the unjust enrichment claim, in plaintiff's favor. We will not engage in second-guessing the jury's determination of witness credibility in this case. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other ground 441 Mich 1201 (1992).

Because there is enough evidence in the record to support the jury's decision to no cause defendant's unjust enrichment claim, the verdict was not against the great weight of the evidence and the trial court did not abuse its discretion in denying defendant's request for a new trial on his unjust enrichment claim.

#### IX. CONCLUSION

We affirm all of the trial court's orders, with the exception of the amount of attorney fees awarded in its October 7, 2008 order. The amount is vacated and, on remand, should be recalculated to reflect the trial court's disallowance of anything above the \$10,000 sanction for the second trial. No costs, neither party having prevailed in full. MCR 7.219(A). We do not retain jurisdiction.

/s/ Douglas B. Shapiro  
/s/ Henry William Saad  
/s/ Deborah A. Servitto