

NOTICE  
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2015 IL App (5th) 130041-U

NO. 5-13-0041

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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MULTICARE SPECIALISTS, SC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee and Cross-Appellant,	)	Madison County.
	)	
v.	)	No. 08-LM-1099
	)	
JOSEPH POOLE and AAA INSURANCE	)	
COMPANY,	)	Honorable
	)	Thomas W. Chapman,
Defendants-Appellants and Cross-Appellees.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justices Schwarm and Moore\* concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's decision in a bench trial that the plaintiff proved it was entitled to damages on a contract or conversion theory, and that the defendants had not proved their affirmative defense of estoppel, was not against the manifest weight of the evidence. Defendant Poole failed to preserve his claim of error regarding the circuit court's entry of summary judgment on his counterclaim when he failed to include the summary judgment order in the notice of appeal. The circuit court did not err by failing to award the plaintiff prejudgment interest or punitive damages. The

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\*Justice Spomer was originally assigned to participate in this case. Justice Moore was substituted on the panel subsequent to Justice Spomer's retirement and has read the briefs and listened to the tape of oral argument.

circuit court did err by reducing the plaintiff's damages under the common fund doctrine.

¶ 2 At its core, this is a collection action in which the plaintiff, Multicare Specialists, SC (Multicare), seeks to collect an unpaid bill for medical services. Multicare is an Illinois corporation which provides primary medical care, chiropractic treatment, and physical therapy services. Multicare brought this action in contract and conversion to recover the unpaid balance of its charges for medical services provided to defendant Joseph Poole after he was injured in an automobile accident with at-fault driver Lauren Houba, who was insured by defendant AAA Insurance Company (AAA). Shortly after Poole's medical treatment commenced, Multicare served a claim for lien under the Health Care Services Lien Act (770 ILCS 23/1 *et seq.* (West 2006)) upon AAA and Poole's automobile insurer, State Farm Insurance Company (State Farm), but did not serve the lien on Poole, or his attorney, Alan Mandel. At the beginning of Poole's treatment, Multicare's billing agent, Medical Billing Solutions, Inc. (Medical Billing), submitted the bills for Poole's treatment to his health insurer, United Healthcare (UHC). However, when Medical Billing determined that Poole's treatment stemmed from an automobile accident, it quit billing UHC and began billing AAA. Poole's personal injury claim was settled by Mandel with AAA for \$150,000. At that time, Poole had completed his treatment at Multicare, which claimed an unpaid balance of \$14,990.50. Prior to completion of the settlement, AAA advised Mandel that Multicare claimed a lien for its services. Mandel had received a subrogation claim from UHC which he assumed, without further investigation, included the bills for all of Poole's treatment at Multicare.

Mandel advised AAA that all liens had been "resolved," and AAA, without further investigation, did not include Multicare as a payee on the settlement check. Mandel distributed the settlement to Poole without paying the claimed balance due to Multicare. Prior to trial, Poole filed a purported class action counterclaim asserting that Multicare had engaged in consumer fraud by billing AAA rather than Poole's health insurer, UHC. The circuit court granted summary judgment in favor of Multicare on Poole's counterclaim. Poole then asserted the same claim as an affirmative defense of estoppel. After a bench trial, the circuit court found in favor of Multicare and awarded damages in the amount of \$9,994. The court rejected the defendants' affirmative defense that Multicare should be estopped from collecting its bill because it failed to bill Poole's health insurer. The court also rejected Multicare's claim for prejudgment interest and its claim for punitive damages against AAA. However, the court reduced Multicare's claim by one-third, applying the common fund doctrine. Poole and AAA appeal, asserting that the circuit court's decision is against the manifest weight of the evidence, and that the circuit court erred in granting summary judgment on Poole's counterclaim. Multicare cross-appeals claiming the circuit court erred in failing to award prejudgment interest or punitive damages, and in applying the common fund doctrine. We agree that the circuit court erred in applying the common fund doctrine and increase the award to \$14,990.50, but affirm the judgment in all other respects.

¶ 3

### BACKGROUND

¶ 4 On September 24, 2008, Multicare filed a three-count complaint against Poole and AAA in the circuit court of Madison County seeking recovery of an alleged unpaid bill

for medical services rendered to Poole in the amount of \$14,990.50. Count I alleged breach of contract against Poole and claimed the balance due plus prejudgment interest. In count II, alleging conversion against Poole, Multicare asserted that it acquired a lien upon Poole's personal injury settlement under section 10 of the Health Care Services Lien Act (770 ILCS 23/10 (West 2006)), that Poole had converted the funds subject to the lien by failing to pay the unpaid balance from the settlement, and prayed for the balance due plus prejudgment interest and punitive damages. In count III, alleging conversion against AAA, Multicare asserted that AAA had converted the funds subject to the claimed lien by paying the full amount of the settlement to Poole without protecting its lien, and prayed for the balance due plus prejudgment interest and punitive damages. Poole and AAA filed an answer in which they denied the material allegations of the complaint.

¶ 5 On July 21, 2009, Poole, on his own behalf, and on behalf of all others similarly situated, filed a counterclaim against Multicare. The gist of the counterclaim was that Multicare had violated the Illinois Consumer Fraud and Deceptive Business Practices Act (Illinois Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2006)), and had been unjustly enriched, because it had submitted its bills for Poole's medical services to AAA rather than to UHC. In essence, Poole alleged that Multicare's practice of billing the at-fault driver's automobile insurer for the cost of medical treatment resulting from injuries sustained in an accident deprived him of discounts to which he was entitled if his health insurer had been billed. On October 27, 2010, after substantial pretrial litigation pertaining to the counterclaim, the circuit court granted summary judgment in favor of Multicare and against Poole on the counterclaim. Thereafter, Poole filed an affirmative

defense of estoppel, alleging that Multicare should be barred from collecting any balance due for medical services provided to Poole, except copays and deductibles, because it had failed or refused to bill Poole's health insurer, UHC, for those services.

¶ 6 In further pretrial litigation, the circuit court granted the defendants' motion to strike Multicare's claims for punitive damages. However, Multicare filed a motion to reinstate its punitive damage claims, which was granted during the bench trial. Ultimately, Multicare withdrew its punitive damages claim against Poole, but continued to assert it was entitled to punitive damages from AAA.

¶ 7 On April 25, 2012, the case proceeded to a bench trial on Multicare's complaint and Poole's affirmative defense. The parties stipulated that the treatment rendered by Multicare was reasonable and necessary for the treatment of Poole's injuries and that its charges for its services were reasonable. The parties also stipulated to the admission into evidence of all 19 exhibits offered by Multicare. Those exhibits included partial transcripts of the discovery depositions of Poole and Mandel. The defendants marked one exhibit, a document entitled "PCHS Preferred Professional Agreement," as "Defendants' Exhibit 1." However, a close review of the record on appeal reveals that "Defendants' Exhibit 1" was never offered or admitted into evidence. Both parties offered the testimony of witnesses. The following factual recitation is taken from the evidence introduced at the bench trial.

¶ 8 On April 5, 2007, Poole was injured in an automobile accident in which the at-fault driver, Lauren Houba, was insured by AAA. Poole's automobile insurer was State Farm. Beginning on April 9, 2007, and continuing through November 15, 2007, Poole

was treated at Multicare for the injuries he sustained in the automobile accident. During this course of treatment, Poole initially saw Dr. Bell, a primary care physician, and was then treated by Dr. Eavenson, a chiropractor, and Corey Voss, a physical therapist.

¶ 9 All of the billing for Multicare's services was handled by Medical Billing. Since Poole had previously been a patient at Multicare, Medical Billing had previously billed Poole's health insurer, UHC, for services provided by Multicare. On Poole's first visit for medical care pertaining to the automobile accident, he presented his UHC insurance card and paid a copayment. In addition, Poole completed an "intake form" in which he verified that he was seeking treatment as a result of an automobile accident. On the intake form, Poole supplied Multicare with the date of his accident, the name of his automobile insurer (State Farm) and his policy number, the name of the at-fault driver (Houba), the name of her automobile insurer (AAA), and the claim number. On April 10, 2007, Multicare prepared lien notices pursuant to the Health Care Services Lien Act, which were served upon AAA and State Farm, by certified mail, a few days later. No lien notice was served upon Poole. In addition, when Poole later retained Mandel as his attorney, no lien notice was served upon Mandel.

¶ 10 Poole assumed that Multicare would continue to bill UHC, and it did continue to bill UHC during his initial treatment. By July of 2007, however, there was an unpaid balance of \$837.40 on Poole's account, which had not been paid by UHC. On July 30, 2007, Stacy Ensor, who was then a patient accounts manager for Medical Billing, telephoned Poole to discuss the account. She testified that the purpose of her call was to clarify whether the bills should be sent to AAA or UHC. She left a message requesting

that Poole return her call and advise her whether the medical treatment he was receiving at Multicare related to an automobile accident. She testified, and her notes reflected, that Poole returned her call on August 24, 2007, and advised her that the claims related to an automobile accident. She also testified that Poole told her to send the bill to AAA.

¶ 11 Ensor testified that once it was determined that Poole's treatment related to an automobile accident, all further billing was sent to AAA. She testified that individual providers determine whether to bill health insurance or automobile insurance, and Multicare had directed Medical Billing to bill automobile insurance in accident cases. Although she could not remember the exact content of her telephone conversation with Poole, Ensor testified that typically she would have told the patient that all further billing would be sent to the automobile insurer. Poole testified that he had a conversation with someone involved with billing for Multicare and confirmed that his medical treatment related to an accident claim. He denied that he told Medical Billing to bill AAA and denied that he was told that all future bills would be sent to AAA. He admitted, however, that he anticipated that the unpaid bill that prompted the telephone call would be paid by AAA. He testified that he believed that all of his bills would be paid by either UHC or AAA, and he "really didn't care" which one paid.

¶ 12 Dee Ann Billings testified that she is the operations manager at Medical Billing. She testified that Medical Billing handles all of the billing for Multicare and is paid 7% of all bills collected. Although Multicare employs individual medical providers, all bills are submitted to insurance companies through Multicare's corporate tax number. During the period of Poole's treatment, Multicare was not an in-network medical provider in the

UHC network. Of the individual medical providers who treated Poole, only Dr. Bell was in-network with UHC. The total billing for Dr. Bell's treatment was \$150.15, and that bill was submitted to UHC.

¶ 13 Billings testified that Medical Billing initially billed UHC by mistake because Poole's health insurance information was already in their system. Medical providers who bill through Medical Billing determine whether to bill health insurance or automobile insurance in accident cases. She testified that Multicare had directed Medical Billing to bill third-party automobile insurers in accident cases. She explained that health insurers often refuse to pay anyway when they learn that other insurance is available through an accident claim. She testified that since Multicare was not an in-network provider with UHC it had no obligation to discount its services. She testified that she did not know how much UHC would have paid if Poole's bills would have been submitted to it on an out-of-network basis. Once Medical Billing confirmed that Poole's treatment was related to an accident claim, all bills generated after the August 24, 2007, telephone call were submitted to AAA. Billings reviewed all charges submitted for Poole's treatment and confirmed that the unpaid balance was \$14,990.50.

¶ 14 Poole testified that at the time of his accident he was employed by Enterprise Leasing and his employer provided medical insurance through UHC. He had been treated at Multicare on previous occasions and had submitted his UHC card for payment. He expected to pay Multicare for its services and anticipated that Multicare's bills would be paid through a combination of payments by UHC and AAA. No one at Multicare told him that it was an in-network provider with UHC or that he would be entitled to any

discounts if the bills were submitted to UHC. He could not testify to the amount UHC would have paid if his medical bills would have been submitted to UHC. However, because Multicare had initially accepted his UHC card, he believed that Multicare was billing UHC for his medical care. He never told Multicare to stop billing UHC and no one at Multicare ever told him that the bills were being sent to AAA. He testified that when his personal injury claim was settled a portion of the settlement was used to repay UHC. He assumed that all bills had been submitted to UHC and that Multicare's bill had been paid in full.

¶ 15 As previously noted, Mandel's testimony was admitted, by stipulation, in the form of excerpts from his discovery deposition. Mandel testified that Poole's personal injury claim was settled with AAA during the early part of December 2007. He admitted that he was informed by the AAA adjuster during the settlement negotiations that Multicare had served a health care lien on AAA. Mandel had received a subrogation claim from UHC for repayment of any amount expended on Poole's behalf for medical treatment resulting from the automobile accident. Mandel testified that he assumed that the subrogation claim of UHC included all treatment provided by Multicare. However, he admitted that he did nothing to investigate whether Multicare claimed any outstanding balance that had not been paid by UHC. Poole also testified that he did nothing to investigate whether Multicare claimed an unpaid balance for his medical treatment prior to the settlement. Mandel acknowledged that, at his request, Multicare provided him with copies of its medical records and bills in September 2007 and that he used those documents in the negotiation of the settlement. On December 13, 2007, Mandel wrote

the claims adjuster for AAA a letter, which was introduced into evidence, confirming the terms of Poole's settlement. In the letter, Mandel stated: "I have resolved any liens and this firm will indemnify and protect you from any amounts claimed to be owing."

¶ 16 Billings testified that Mandel called Medical Billing on December 14, 2007, and spoke to one of its representatives. Medical Billing's transaction journal for that date, which was introduced into evidence, indicates that Mandel requested that UHC be billed for any outstanding claims that had not been paid. The transaction journal reflects that Mandel was told that Medical Billing would not bill UHC unless it received a letter from UHC confirming that it was aware that Poole's treatment stemmed from an accident and that UHC would not request reimbursement from Multicare. Billings explained that if health insurers discover that other insurance is available for medical treatment that results from an accident, they will often refuse payment or require reimbursement from the medical provider. Mandel testified that he had no recollection of a December 14, 2007, conversation in which he requested that any unpaid balance owed Multicare be submitted to UHC. He denied that he was ever told that the bill would only be submitted to UHC if Medical Billing received certain assurances from UHC.

¶ 17 In the latter part of December 2007, Mandel received the settlement check from AAA. When the settlement was distributed, he paid the subrogation claim of UHC but did not pay any portion of the settlement to Multicare. Mandel testified that he assumed, but did not confirm, that all of Multicare's charges were included in the UHC claim.

¶ 18 In May 2008, Medical Billing discovered that Poole's personal injury case had been settled and that Multicare's outstanding balance had not been paid. As a result,

Billings wrote a letter to Mandel, demanding payment. Mandel responded by letter that his office had not received a lien from Multicare. He noted that his office had advised Medical Billing to bill UHC, but it had failed to do so. He denied that either he or Poole was responsible to pay Multicare's outstanding balance and suggested again that the bill be submitted to UHC. As a result of this response, Billings referred the claim for legal proceedings.

¶ 19 At the conclusion of the bench trial, the court took the matter under advisement. On July 31, 2012, the court entered judgment in favor of Multicare and against Poole and AAA in the amount of \$9,994. The court found that Multicare had proved the amount claimed but reduced that amount by one-third under the common fund doctrine. Without explanation, no prejudgment interest or punitive damages were awarded. Both parties filed posttrial motions. Among other issues, Multicare specifically argued that the court had failed to consider its claim for punitive damages and requested that the court award both prejudgment interest and punitive damages. On December 26, 2012, the court denied both posttrial motions.

¶ 20 Poole and AAA timely filed a notice of appeal specifying that they were appealing the circuit court's orders entered on July 31, 2012, and December 26, 2012, and attached copies of those two orders. The notice of appeal contains no reference to the October 27, 2010, order granting summary judgment in favor of Multicare on Poole's counterclaim. Multicare timely filed a cross-appeal.

¶ 22 In their joint appeal, Poole and AAA raise various issues, which we restate as follows: (1) whether the circuit court's judgment finding in favor of Multicare on its complaint and against Poole on his affirmative defense was against the manifest weight of the evidence, and (2) whether the circuit court erred in granting summary judgment in favor of Multicare and against Poole on Poole's class action counterclaim. In its cross-appeal, Multicare raises the following issues: (1) whether it is entitled, as a matter of law, to statutory prejudgment interest, (2) whether the circuit court failed to properly consider its claim for punitive damages, and (3) whether the circuit court erred, as a matter of law, by reducing its damages pursuant to the common fund doctrine. We will first address the claims of the appellants and then consider the issues raised in the cross-appeal.

¶ 23 Poole and AAA argue, for various reasons, that the judgment of the circuit court is against the manifest weight of the evidence. "The standard of review of a trial court's judgment after a bench trial is whether that judgment is against the manifest weight of the evidence." *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 25. "A judgment is against the manifest weight of the evidence when it appears from the record that the judgment is arbitrary, unreasonable, not based on evidence, or the opposite conclusion is apparent." *Id.* "We will not disturb a trial court's judgment as long as there is evidence to support the judgment." *Id.*

¶ 24 Multicare's complaint alleged breach of contract by Poole and conversion by Poole and by AAA. As to Poole, the circuit court did not indicate in its order whether Multicare was entitled to recover on the breach of contract or the conversion claim, or

both. Where the judgment of the trial court is not accompanied by findings of fact, the presumption is that the trial court found all issues and uncontroverted facts in favor of the prevailing party. *Century 21 Castles by King, Ltd. v. First National Bank of Western Springs*, 170 Ill. App. 3d 544, 549 (1988).

¶ 25 Poole argues that Multicare failed to show the existence of a contract, and therefore there could be no breach of contract. However, even when there is no express contract, a contract can be implied in fact. The difference between an express contract and a contract implied in fact is that in an express contract the parties arrive at their agreement by words, either oral or written, while in a contract implied in fact, the agreement is arrived at by a consideration of the parties' acts and conduct. *Id.* at 548. "[A] contract implied in fact arises not by express agreement but, rather, by a promissory expression which may be inferred from the facts and circumstances which show an intent to be bound." *Id.* Even in the absence of any express statement of a specific agreement regarding the details of the contractual relationship, a contract implied in fact may be found by examining the acts of the parties. *Kohlenbrener v. North Suburban Clinic, Ltd.*, 356 Ill. App. 3d 414, 419 (2005). The mere fact that there was no specific agreement as to the amount to be paid for the services, or the time of payment, does not prevent the inference of a promise to pay for the services requested and performed. *Estate of Jesmer v. Rohlev*, 241 Ill. App. 3d 798, 804 (1993). To establish a contract implied in fact for services, the party seeking payment must show that the services were carried out under such a circumstance as to give the recipient reason to understand that they were not

performed for some other person and that they were not rendered gratuitously. *People ex rel. Hartigan v. Knecht Services, Inc.*, 216 Ill. App. 3d 843, 851 (1991).

¶ 26 In the instant case, Poole chose to be treated at Multicare and contacted it to arrange for treatment. Poole testified that he expected to be charged by Multicare for his treatment. He further testified that he expected to pay for his services and that Multicare would be entitled to the reasonable value of its services. He stated that he expected that his bills would be paid by AAA and UHC. A contract implied in fact can be established by proving circumstances which, according to the ordinary course of dealing and the common understanding of people, show a mutual intent to contract. *Id.* Here, the fact that Poole contacted Multicare for services and Multicare provided those services indicates, in the ordinary course of dealings, a mutual intent to contract. Further, Poole admitted that he intended that Multicare be paid for its services. Thus, there is sufficient evidence to support a contract implied in fact. Based on the foregoing, we cannot say that a judgment in favor of Multicare and against Poole on the count alleging breach of contract is against the manifest weight of the evidence.

¶ 27 Poole and AAA argue that the evidence was insufficient for Multicare to recover under its conversion counts. They assert that Multicare failed to prove the existence of a valid lien and that in the absence of a valid lien there could be no conversion. Poole and AAA argue that Multicare did not create a lien under the Health Care Services Lien Act (770 ILCS 23/10(b) (West 2006)) because no written notice was sent to Poole or his attorney, and the notice to AAA was insufficient to create a lien on the settlement

proceeds. Poole argues that neither he nor his attorney was aware of the lien so there was no actual knowledge of the lien.

¶ 28 Section 10 of the Health Care Services Lien Act provides, in pertinent part:

"Every health care professional and health care provider that renders any service in the treatment, care, or maintenance of an injured person, except services rendered under provisions of the Workers' Compensation Act or the Workers' Occupational Diseases Act, shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person."

770 ILCS 23/10(a) (West 2006).

¶ 29 A health care provider lien should include a written notice containing the name and address of the injured person, the date of the injury, the name and address of the health care provider, and the name of the party alleged to be liable to compensate the injured person for the injuries received. 770 ILCS 23/10(b) (West 2006). The lien notice shall be served on the injured person and the party against whom the claim exists. 770 ILCS 23/10(b) (West 2006).

¶ 30 AAA argues that the notice of the lien failed to include the dollar amount allegedly owed. Poole contends that the lien was not perfected because there was no service on him, his attorney, or the tort defendant.

¶ 31 In *Cirrinzione v. Johnson*, 184 Ill. 2d 109 (1998), the defendant was injured in an automobile accident and was treated by the plaintiff, a chiropractor. *Id.* at 111. The plaintiff filed a physician's lien with the defendant's attorney. The insurance company

sent a medical payment check to the defendant and the defendant did not pay the plaintiff. *Id.* The trial court ruled as a matter of law that the lien was a valid physician's lien, and the appellate court affirmed that the lien was valid. *Id.* at 112. It was undisputed that the lien did not strictly comply with the statute in that it did not contain the defendant's address, it did not give the date of the defendant's injury, it did not list the name of the party liable to make compensation for the defendant's injuries, it failed to give the name of the other driver in the automobile accident, and no attempt was made to serve the other driver or his insurance company. *Id.* at 113. In examining whether these deficiencies were sufficient to defeat the lien, the supreme court held that technical difficulties should not be allowed to overwhelm the purpose of a lien statute. *Id.* The court found that the rights of the parties had not been prejudiced by the deficiencies in the lien. *Id.* Both the defendant and his attorney had actual notice, and those not served with the lien were not parties to the action. *Id.* The court found that any missing information was already known by the defendant. *Id.* The court held that to invalidate the lien due to the technicalities would serve no purpose and would exalt form over substance. *Id.* at 113-14. The court further found that invalidating the lien would be contrary to the purpose of the lien statute, which is to lessen the financial burden on those who treat nonpaying accident victims. *Id.* at 114. The court held that the lien was valid and should be enforced. *Id.*

¶ 32 AAA asserts that the lien was invalid because it did not state an amount. Section 10(b) of the Health Care Services Lien Act sets out the information that must be included

in the lien notice. Stating the amount of the lien is not a statutory requirement. The failure to state the amount of the lien does not invalidate it.

¶ 33 Poole contends that the lien was not perfected because there was no service on him, his attorney, or the tort defendant. Under the facts in this case, these are technical deficiencies. Although the tort defendant was not served with the lien, her insurer, AAA, was served. Additionally, Poole's attorney, Mandel, had actual notice of the lien. Mandel testified that during the settlement negotiations with AAA, the claims adjuster told Mandel that it had a lien from Multicare. Having been specifically told of the existence of Multicare's lien, Mandel had actual notice of the lien. The attorney-client relationship is generally one of principal and agent. *In re Marriage of Stephenson*, 2011 IL App (2d) 101214, ¶ 35. An agent's knowledge is imputed to the principal unless the agent's interests are adverse to those of the principal. *Lease Resolution Corp. v. Larney*, 308 Ill. App. 3d 80, 86 (1999). Because Mandel had actual knowledge of Multicare's lien, his knowledge is imputed to Poole, so Poole also had knowledge of the lien.

¶ 34 Multicare argues that once the health care lien attached, failure to remit the proceeds to the health care provider constituted conversion. Poole and AAA argue that Multicare did not create a valid lien, and therefore there could be no conversion. As discussed, Multicare did create a valid lien.

¶ 35 "To prove conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property."

*Cirrinzione*, 184 Ill. 2d at 114. When the circuit court determines that a plaintiff has proven the elements of conversion, this court will reverse only when the decision is against the manifest weight of the evidence. *IOS Capital, Inc. v. Phoenix Printing, Inc.*, 348 Ill. App. 3d 366, 370 (2004). At trial, Multicare presented evidence of the existence of a lien which established a right to a portion of the settlement proceeds, and that AAA, Mandel, and Poole knew of the lien. Instead of honoring the lien, AAA relied upon the representation of Mandel that all liens had been "resolved" and paid the settlement proceeds directly to Poole, through his attorney. Multicare presented evidence that the day after Mandel represented that all liens had been "resolved," he called Medical Billing and requested that any outstanding bills be sent to UHC. The circuit court could have found from this evidence that Mandel knew there was an outstanding balance and chose not to pay it from the settlement proceeds. At a minimum, Mandel admitted that, without further investigation, he assumed that UHC had paid all of Multicare's bills. Actual knowledge of the existence of the lien required that he investigate whether a balance was due. There was ample evidence from which the circuit court could conclude that Multicare proved its conversion claims against both Poole and AAA, and its decision in that regard is not against the manifest weight of the evidence.

¶ 36 Poole next argues that, regardless of whether Multicare proved breach of contract or conversion, the circuit court's finding that he failed to prove his affirmative defense of estoppel is against the manifest weight of the evidence. An affirmative defense does not negate the essential elements of a plaintiff's cause of action, but rather admits the legal sufficiency of that cause of action. *Vroegh v. J&M Forklift*, 165 Ill. 2d 523, 530 (1995).

An affirmative defense assumes that the defendant would otherwise be liable, if the facts alleged are true, but asserts a new matter that avoids liability. *Id.* The elements of the cause of action are no longer contested, and the only contested issue becomes the affirmative defense. *Triple R Development, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 16.

¶ 37 Poole and AAA argue that the doctrine of estoppel precludes Multicare from collecting money from Poole or AAA above copays and deductibles. Poole argues that in word and deed Multicare represented to him that it accepted UHC and he would only owe copays. He argues that Multicare's acceptance of his health insurance card in April of 2006, and his prior dealings with Multicare, created a reliance that his health insurance would be billed and his only liability would be copays. He further alleges that Multicare concealed from him that it would not bill his health insurance when a tort claim was the genesis for the need for treatment. Poole contends that, to his detriment, he continued to get treatment even though he was not receiving the benefit of his UHC plan. As a result, he contends that Multicare is now estopped from collecting any money other than copays and deductibles from him.

¶ 38 "To establish equitable estoppel, the party claiming estoppel must demonstrate that: (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representation; (5) the party

claiming estoppel reasonably relied upon the representation in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313-14 (2001). "The question of estoppel depends on the facts of the case, and the party claiming estoppel must prove it by clear and unequivocal evidence." *Hahn v. County of Kane*, 2013 IL App (2d) 120660, ¶ 17. The circuit court's determination as to whether estoppel has been proved will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.*

¶ 39 The trial court specifically held that it "did not find credible Poole's assertions that he was assured he would not be balance billed" after benefits payable by UHC were exhausted. This finding has ample support in the record. On the intake form Poole completed when he first presented to Multicare for treatment, he indicated he was there for treatment for injuries sustained in an automobile accident; he listed his automobile insurance carrier; he identified the person responsible for the accident; and he listed AAA as the responsible party's insurance company and included her policy number. Poole testified that he expected all of Multicare's charges to be paid either by AAA or UHC or some combination of the two. He further testified that he did not care whether Multicare's bills were paid by UHC or AAA. He stated that Multicare did not tell him that UHC was an in-network provider and did not tell him he would receive a discounted rate. Poole's testimony that he expected Multicare's charges to be paid by AAA, UHC, or some combination of the two contradicts his claim that Multicare promised or led him to believe that it would look solely to UHC for payment. When an unpaid balance

developed, Ensor phoned Poole to discuss the outstanding balance. Ensor testified that she left a message for Poole asking whether Multicare's claims should be billed to the accident insurance listed or to his health insurance. She stated that on August 24, 2007, Poole phoned her office and told her that the claims should be sent to the automobile accident insurance company and not UHC. Poole testified he remembered the August phone call and being asked if the charges pertained to an automobile accident but denied directing Medical Billing to stop billing UHC. There is sufficient evidence in the record to support a finding that Multicare did not represent to Poole that it would bill his UHC insurance, that he would only owe copays, and that he would not be balance billed.

¶ 40 In further support of the affirmative defense of estoppel, Poole and AAA argue that the PCHS preferred professional agreement between one of Multicare's medical providers and a third-party insurance benefit administrator, which was marked as "Defendants Exhibit 1," prevented Multicare from balance billing. This argument must fail because, as previously noted, the preferred professional agreement was never offered or admitted into evidence. Consequently, the circuit court could not have relied on that document in support of the affirmative defense.

¶ 41 Likewise, the record reflects, and the circuit court found, that Poole failed to prove the terms of his UHC contract or that Multicare had any contractual obligation to submit its bills to UHC. Poole failed to produce his UHC plan or provide any other evidence that Multicare's charges were reimbursable under the plan. No evidence was presented to show what UHC would have paid if Multicare's charges would have been submitted to UHC. Poole specifically testified that he did not know what, if any, of the medical

expenses UHC would have paid if Multicare had submitted the charges to UHC. The uncontradicted evidence revealed that Multicare was not in the UHC network. Likewise, Dr. Eavenson and Corey Voss, whose charges represented the unpaid bill, were not in the UHC network. Absent a contract between the provider and the insurer or the patient, there is no obligation for the provider to bill the patient's insurer or to accept insurer discounts. *Richmond v. Caban*, 324 Ill. App. 3d 48, 52 (2001).

¶ 42 The record on appeal affirmatively establishes that Poole failed to prove that he relied upon any statement by Multicare that it would bill UHC, that Multicare was under any contractual obligation to bill UHC, or what amounts UHC would have paid if it had been billed. The circuit court's determination that Poole failed to prove the affirmative defense of estoppel is not against the manifest weight of the evidence.

¶ 43 We note in passing that Poole also argues before this court that the evidence in this case proves, apparently as an affirmative defense, that Multicare intentionally interfered with his contract with UHC by not submitting his bills for medical treatment to UHC. This defense was never pled in the circuit court. The first time it was raised was in the defendants' posttrial motion, which was denied by the court, without explanation. "If a party fails to plead an affirmative defense, he is deemed to have waived the defense, and it cannot be considered even if the evidence suggests the existence of the defense." *Athans v. Williams*, 327 Ill. App. 3d 700, 705 (2002). Accordingly, any claimed defense of intentional interference with a contract has been waived. Waiver aside, as previously noted, Poole could not claim intentional interference with his contract with UHC under this record since he never proved any of the terms of that contract.

¶ 44 Finally, Poole argues that it was error for the circuit court to grant summary judgment on Poole's class action counterclaim for violation of the Illinois Consumer Fraud Act. Multicare asserts that because the notice of appeal filed by the defendants did not mention the order granting summary judgment, this court lacks jurisdiction to review it. We agree with Multicare.

¶ 45 "A notice of appeal is a procedural device filed with the trial court that, when timely filed, vests jurisdiction in the appellate court in order to permit review of the judgment such that it may be affirmed, reversed, or modified." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 173 (2011). Illinois Supreme Court Rule 303(b)(2) provides that the notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. May 30, 2008). Because the filing of a notice of appeal is the jurisdictional step which initiates appellate review, the reviewing court has no jurisdiction unless there is a properly filed notice of appeal. *People v. Smith*, 228 Ill. 2d 95, 104 (2008). A notice of appeal should be liberally construed and considered as a whole. *Id.* at 104-05. The notice of appeal's purpose is to inform the prevailing party in the trial court that the other party seeks review of the judgment. *Id.* A notice of appeal advises the successful litigant of the nature of the appeal and is sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought. *Id.* at 105. The failure to strictly comply with the form of the notice of appeal is not fatal when the deficiency in notice is one of form, rather than substance, and the appellee is not prejudiced. *Id.*

¶ 46 In the instant case, Poole and AAA's notice of appeal, no matter how liberally construed, cannot be said to have fairly and adequately set out the October 27, 2010, order granting summary judgment, as the judgment complained of. The notice of appeal not only failed to mention the October 27, 2010, order, it specifically mentions the orders entered July 31, 2012, and December 26, 2012, and only those orders. This was more than a defect in form. Poole and AAA's notice of appeal failed to apprise Multicare that it was appealing the October 27, 2010, order granting summary judgment. The notice of appeal failed to confer jurisdiction on the appellate court to consider the summary judgment order. Lacking jurisdiction, we cannot determine whether the circuit court erred in granting summary judgment in favor of Multicare and against Poole on the counterclaim.

¶ 47 Having disposed of the issues raised by Poole and AAA in their appeal, we now turn to the issues raised by Multicare in its cross-appeal.

¶ 48 Multicare argues that it is entitled to statutory prejudgment interest. A party generally has no right to recover prejudgment interest unless permitted by statute or contract. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 96. "The purpose of an award of prejudgment interest is to fully compensate the injured party for the monetary loss suffered." *Id.*

¶ 49 Section 2 of the Interest Act (815 ILCS 205/2 (West 2006)) provides, in pertinent part:

"Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other

instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment."

The decision to allow or deny statutory interest lies within the sound discretion of the trial court, and this court will not disturb that decision absent an abuse of discretion. *Sheth*, 2013 IL App (1st) 110156, ¶ 95.

¶ 50 Multicare argues that this court should review the denial of prejudgment interest *de novo* because its right to prejudgment interest turns solely on the interpretation of the Interest Act, which mandates prejudgment interest in cases of "money received to the use of another and retained without the owner's knowledge." Multicare bases its argument on the holding in *Sheth*. In *Sheth*, the parties were involved in the trade of used manufacturing machines. *Id.* ¶ 1. The jury found that the plaintiff committed fraud against the defendant by misrepresenting the sale price in a transaction. *Id.* ¶ 66. While contradictory evidence was presented, the plaintiff admitted that he intentionally misrepresented the purchase price of the transaction. *Id.* ¶ 75. The *Sheth* court held that while the trial court is typically accorded deference to its decision awarding or withholding prejudgment interest, in cases where a party is liable for obtaining funds through fraudulent misrepresentation, prejudgment interest attaches as a matter of right from the date of payment as "money received to the use of another and retained without the owner's knowledge." *Id.* ¶ 98.

¶ 51 Multicare argues that AAA ignored its lien and remitted payment to Poole and his lawyer, who wrongfully retained the money. Neither AAA nor Poole notified Multicare that the claim had been settled. Multicare argues that AAA and Poole's surreptitious conversion of its funds resulted in "money received to the use of another and retained without the owner's knowledge."

¶ 52 This case is distinguishable from *Sheth*. In *Sheth*, the defendant filed a counterclaim alleging fraud on the part of the plaintiff. In the instant case, Multicare alleged breach of contract and conversion. The court in *Sheth* held that "where a party is liable for obtaining funds through fraudulent misrepresentation, prejudgment interest attaches as a matter of right." *Id.* The instant case does not involve funds obtained through fraudulent misrepresentation. While Multicare filed a lien against AAA, based on the assurances by Mandel, AAA thought that the lien had been paid. Mandel testified that he assumed that at the time he entered into the settlement agreement whatever bills Poole had incurred with Multicare had been submitted to UHC and had been paid. He stated that it was his expectation that Multicare had been paid everything that it was legally entitled to under the law and the health insurance plan. While AAA and Poole converted funds, they did not do so in a manner involving fraudulent misrepresentation.

¶ 53 Because Multicare was not entitled to prejudgment interest as a matter of right, the decision whether to award prejudgment interest was a matter within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. *Marcheschi v. Illinois Farmers Insurance Co.*, 298 Ill. App. 3d 306, 313 (1998). Where the trial court has rendered a decision in which it may exercise its discretion, and there is

no evidence of a clear refusal to exercise discretion, it is presumed that the exercise has duly occurred. *People v. Lewis*, 97 Ill. App. 3d 982, 988-89 (1981). There is no evidence in the record that the trial court refused to exercise its discretion in denying prejudgment interest. "The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court." *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 29. After examining the record, we cannot say that the trial court abused its discretion in denying prejudgment interest.

¶ 54 Next, Multicare argues that the trial court failed to properly consider the issue of punitive damages. It contends that it sought punitive damages against AAA for willful conversion. It alleges that the trial court offered no explanation for its denial of punitive damages, and the absence of an explanation is conspicuous because the record reveals compelling evidence of deliberate, inexcusable misconduct on the part of AAA that was so willful and unremorseful as to render the failure to punish it to appear to be a result of oversight or misapprehension. Multicare requests that the matter be remanded to the trial court for reconsideration of the issue.

¶ 55 The purpose of punitive damages is to punish the wrongdoer and to deter the wrongdoer and others from committing similar acts in the future. *In re Estate of Wernick*, 127 Ill. 2d 61, 83 (1989). "Because of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." *Id.* A court may award punitive damages in cases where the

wrongful act is characterized by wantonness, malice, oppression, or other circumstances of aggravation. *Id.* at 83-84. While a trial court's determination of punitive damages is always subject to review, we will not disturb that finding or substitute our own opinion unless it is against the manifest weight of the evidence. *Id.* at 85.

¶ 56 The tort of conversion may under the proper circumstances support an award of punitive damages. *Turner v. Firststar Bank, N.A.*, 363 Ill. App. 3d 1150, 1160 (2006). Punitive damages for the tort of conversion properly lie where the defendant acts willfully or with such gross negligence as to indicate a wanton disregard for the rights of others. *Id.*

¶ 57 In the instant case, there was a pretrial order striking Multicare's claim for punitive damages. Multicare filed a motion to reinstate its prayer for punitive damages. During the trial, the circuit court granted the motion to reinstate. Although the circuit court reinstated the prayer for punitive damages, the record reveals no explicit ruling on the claim. "In a bench trial, a trial judge is presumed to know the law, and this presumption is rebutted only when the record affirmatively shows the contrary." *People v. Taylor*, 344 Ill. App. 3d 929, 937 (2003). It is obvious from the record that the court was aware of the issue of punitive damages. During the trial, the judge specifically stated that he would consider Multicare's motion for punitive damages along with the rest of the case. Additionally, the trial judge asked Multicare's attorney what the standard for punitive damages was and was told that it was "willful and wanton or gross negligence." Multicare's attorney then argued his evidence of punitive damages. Because we may presume that a trial judge knows the law and it is clear from the record that the trial judge

planned to consider the issue of punitive damages when deciding the case, we may assume that the trial court decided not to award punitive damages.

¶ 58 The circuit court's denial of punitive damages is not against the manifest weight of the evidence. There is evidence in the record to support a finding that AAA did not act willfully and with such gross negligence as to indicate a wanton disregard for the rights of others. Mandel testified that he told AAA that he would protect it against any claims of third parties having or claiming liens against the settlement proceeds. While AAA did convert funds, given this evidence, the trial court could find that AAA's actions did not indicate a wanton disregard for the rights of others, and its decision not to award punitive damages is not against the manifest weight of the evidence.

¶ 59 Finally, Multicare argues that the trial court erroneously used the common fund doctrine to reduce its damages by one-third. Whether the common fund doctrine applies to a case is a question of law, which we review *de novo*. *Wajnberg v. Wunglueck*, 2011 IL App (2d) 110190, ¶ 16. "The common fund doctrine is an exception to the general American rule that, absent a statutory provision or an agreement between the parties, each party to litigation bears its own attorney fees and may not recover those fees from an adversary." *Wendling v. Southern Illinois Hospital Services*, 242 Ill. 2d 261, 265 (2011). The common fund doctrine allows an attorney who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses and counsel fees. *Wajnberg*, 2011 IL App (2d) 110190, ¶ 17. "The doctrine is based on the court's inherent equitable powers and the rationale that fees

and expenses incurred in creating the fund be apportioned among those who benefit from its creation." *Id.*

¶ 60 The common fund doctrine is not applicable to health care liens under the Health Care Services Lien Act (770 ILCS 23/1 *et seq.* (West 2006)). *Wendling*, 242 Ill. 2d at 263. In contrast to other common fund cases where the beneficiaries of the fund would not be paid absent the creation of the fund, the health care provider's recovery of its charges does not depend on the creation of the fund. *Id.* at 266. In health care lien cases, the patient is a debtor obligated to pay for medical services out of any resource that might become available to him. *Id.* A health care provider's claim exists irrespective of the outcome of a personal injury suit. *Id.* at 270. While a health care provider's right to collect on its lien flows from the personal injury suit, its cause of action does not; therefore, health care providers do not directly benefit from, and are not unjustly enriched by, the efforts of a plaintiff's attorney. *Id.*

¶ 61 Multicare's lien was in the amount of \$14,990. The trial court reduced Multicare's damages by one-third, or \$4,996, to correspond to the one-third contingency fee Poole paid his lawyer. Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) allows an appellate court to modify a trial court's order to reflect the proper amount of damages. *Turner*, 363 Ill. App. 3d at 1165. Because the common fund doctrine is not applicable to health care liens under the Health Care Services Lien Act, we modify the trial court's award of damages to reflect the entire amount of Multicare's lien.

¶ 62

## CONCLUSION

¶ 63 For the reasons stated, we affirm the judgment of the circuit court of Madison County and modify Multicare's damage award to \$14,990 to reflect the entire amount of its lien.

¶ 64 Affirmed as modified.