STATE OF MICHIGAN

COURT OF APPEALS

SHARI RATERINK and MARY RATERINK, Copersonal Representatives of the ESTATE OF SHARON RATERINK, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED May 3, 2011
v	No. 295084 Kent Circuit Court
MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, Defendant,	LC No. 07-012468-NI
and	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant/Cross-Appellee.	

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

In this no-fault action, defendant State Farm appeals as of right the trial court's order granting summary disposition on liability in favor of plaintiff, and awarding case evaluation sanctions to plaintiff.[1] Plaintiff cross-appeals as of right the trial court's subsequent order, which denied its request for no-fault attorney fees and interest. For the reasons set forth in this opinion, we affirm in part, and reverse in part.

Defendant alleges on appeal that the trial court erroneously granted summary disposition in favor of plaintiff because material factual disputes exist. Generally, defendant claimed that it was not liable to pay benefits for injuries arising from a subsequent vehicular accident, for which

[1] Defendant Michigan Municipal Risk Management Authority (MMRMA) and plaintiff settled. As a consequence, MMRMA is not a party to this appeal.

it was not an insurer, or due to complications from the decedent's preexisting medical conditions. We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

"The no-fault act, MCL 500.3101 *et seq.*, was intended to provide insured persons who have sustained injuries in automobile accidents with assured, adequate, and prompt compensation for certain economic losses." *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 515; 791 NW2d 747 (2010). "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). Disposition of the instant appeal boils down to whether the decedent's injuries, disability, and need for medical treatment arose out of the initial April 26, 2002 vehicular accident, of which defendant was the decedent's insurer. The "arising out of" language "does not require a showing of proximate causation, but rather something more than a showing that the causal connection between the injury and the use of the motor vehicle was merely incidental, fortuitous, or 'but for.'" *Kochoian v Allstate Ins Co*, 168 Mich App 1, 8; 423 NW2d 913 (1988).

Defendant first takes issue with the amounts claimed with respect to Heartland Home Care, asserting that plaintiff presented no evidence that her in-patient stay at that facility from January to June 2008 was related to the vehicular accidents. Our review of the record reveals that plaintiff did not present sufficient evidence from which we can make a definitive ruling affirming the trial court. The record reveals that on December 28, 2007, decedent suffered a heart attack, and was admitted into the hospital. Before her death, the decedent testified at a deposition that she was treated at Saint Mary's Hospital following her heart attack, and subsequently transferred to Heartland. Ultimately, there is no indication from the record presented on appeal that the expenses from Heartland were related to the first vehicular accident. Her treating physician, Dr. John Anderson, was unable to provide any specifics regarding the decedent's post-heart-attack treatment, although his testimony suggests that her injuries and complications all flow from her broken ankles in the first vehicular accident. However, the record sheds no light on the decedent's treatment at Heartland. Other than the "Transaction History" and snippets of deposition testimony, there is little reference to Heartland in the record, and no evidence tying the decedent's treatment there to the first vehicular accident. Because we are limited to the record presented to us, we conclude that plaintiff failed to specifically identify an undisputed factual issue related to Heartland, and support its position with necessary evidentiary support. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

On appeal, plaintiff asserts that the decedent required this type of care following her heart attack, because "she was incapable of standing and walking as a result of the motor vehicle accident, and therefore could not convalesce at home." However, there is no record support for this assertion. After viewing the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to State Farm, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), and drawing all reasonable inferences in favor of State Farm, *Dextrom*, 287 Mich App at 415, we conclude that reasonable minds could differ and so a genuine issue of material fact exists with respect to the expenses related to Heartland. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Defendant also objects to expenses related to attendant care, treating physicians, and a case manager. As noted previously, Dr. Anderson's testimony supported that the decedent's injuries and complications flow from her injuries in the first vehicular accident. He opined that the decedent's then-current complications, at least at the time of his deposition, were primarily related to diabetes, "which are all triggered by traumatic injuries. If she didn't have diabetes, these traumatic injuries wouldn't have ended up this way. But the injuries precipitated the chain of events that led to complications from diabetes." In this case there was something more than a showing that the causal connection between the decedent's injuries and the use of the motor vehicle on April 26, 2002 was merely incidental, fortuitous, or "but for." *Kochoian*, 168 Mich App at 8. As such, the record demonstrates that the decedent required treatment from physicians, physical therapy, and attendant care for complications from her diabetic condition that were ultimately triggered by the first vehicular accident. The record clearly indicates that a sizeable amount of the expenses incurred were related to attendant care. From the evidence presented in the testimony of Dr. Anderson, it is clear that the decedent required minimally two hours per day, three days per week, from the date of the first accident until she died, of attendant care. [2]

Viewing the evidence in the light most favorable to defendant, *Corley*, 470 Mich at 278, plaintiff specifically identified undisputed factual issues, and support its positions with evidentiary support. *Maiden*, 461 Mich at 120. Defendant argues that it presented evidence "indicating a lack of causal link between the bills sought to be paid and the car accident of April 2002." However, the contrary is true. While defendant notes that the case worker opined in a report that the decedent's disability and need for attendant care and wheelchair accessibility were "directly related" to the second vehicular accident, that opinion does not necessarily refute the opinions of Dr. Anderson and another examining physician, Dr. Michael Holda, who both indicated that the decedent's disability arose from the first vehicular accident. Moreover, the other exhibits cited by defendant on appeal do not undermine plaintiff's position. Defendant is liable to pay benefits to plaintiff for accidental bodily injuries arising out of the first vehicular accident, which include expenses for attendant care, wound care, doctors' bills, and the case manager as disputed by State Farm above. MCL 500.3105(1); MCL 500.3107(1)(a). Notably, plaintiff may recover if it can demonstrate that the accident aggravated a pre-existing condition. *Mollitor v Associated Truck Lines*, 140 Mich App 431, 438; 364 NW2d 344 (1985). Because defendant failed to demonstrate the existence of a genuine material issue of disputed fact regarding the expenses related to attendant care, treating physicians, and a case manager, plaintiff was entitled to summary disposition in this regard. *Graham v Ford*, 237 Mich App 670, 672-673; 604 NW2d 713 (1999), citing *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), superseded by statute on other grounds MCL 445.904(3).

---

[2] Relative to the issue of plaintiff's expert testimony and defendant's contention that it may simply rebut the expert testimony offered through defendant's counsel, we note that defendant failed to secure the services of an expert in this matter and also failed, when it had the opportunity, to require that plaintiff submit to an examination under MCR 2.311.

In reaching a conclusion, we note that defendant asserted that plaintiff's award should be offset by any amounts paid for Medicare and Medicaid, as well as by way of the settlement with MMRMA. Defendant addressed this matter in cursory fashion with no relevant supporting authority; ultimately, defendant has merely announced its position and left it to this Court to discover and rationalize the basis for its claims. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Defendant may not do so. Additionally, defendant complains that it was barred from communicating with the decedent's treating physicians, and that it was precluded from calling an expert witness at trial as a discovery sanction. Defendant has not included either issue in its statement of questions presented; thus, the foregoing issues are not properly presented for appellate consideration. MCR 7.212(C)(5); *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000). Further, we note that these issues are not preserved for appeal, where they were not raised before, addressed, or decided by the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Moreover, defendant advances no discernible argument in its appellate brief regarding these complaints. See *Peterson Novelties, Inc*, 259 Mich App at 14. In sum, we conclude that the foregoing assertions and complaints are abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Next on appeal, defendant raises an issue as to whether the trial court erred in awarding plaintiff case evaluation sanctions. No part of defendant's appellate brief, however, contains any discussion of this contention of error. We will not permit defendant to announce its position and leave it to us to discover and rationalize the basis for its claims. *Peterson Novelties, Inc*, 259 Mich App at 14. In any event, we find that plaintiff is entitled to case evaluation sanctions. Even if, upon remand, plaintiff estate does not prevail as to the Heartland Home Care bill, the amount of the judgment arising from those portions of the claim to which we have affirmed summary disposition is in excess of the case evaluation findings. See MCR 2.403(O).

On cross-appeal, plaintiff contends that the trial court erroneously declined to award no-fault attorney fees. We review a trial court's determination of the reasonableness of an award of no-fault attorney fees for an abuse of discretion. *Univ Rehab Alliance, Inc v Farm Bureau Ins Co*, 279 Mich App 691, 698; 760 NW2d 574 (2008). "The no-fault act provides for an award of reasonable attorney fees to a claimant if the insurer unreasonably refuses to pay the claim." *Ross v Auto Club Group*, 481 Mich 1, 10-11; 748 NW2d 552 (2008). "The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured." *Id.* at 11. "[A]n insurer's refusal or delay places a burden on the insurer to justify its refusal or delay." *Id.* "The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Id.*

In this case, the trial court found that defendant did not unreasonably refuse to pay plaintiff's no-fault benefits, and it concluded that a bona fide factual disputed existed. This case is complex in that it arose from a vehicular accident in April 2002 whereby the decedent became disabled as a result of her injuries. A subsequent vehicular accident in May 2006, along with complications from her preexisting medical conditions, made the decedent's condition worse. Plaintiff incurred numerous medical expenses following the second vehicular accident. The trial court found that some factual issues regarding expenses from Spectrum Health in May 2008, and expenses for replacement services existed; thus, summary disposition was not proper pursuant to those claims. Additionally, as discussed *supra*, factual questions exist whether the expenses

from Heartland related to the decedent's injuries from the first vehicular accident or from her intervening heart attack. Plaintiff sought to obtain no-fault benefits from State Farm for expenses incurred from October 17, 2007 to March 4, 2009. We agree with the trial court's decision that a bona fide factual uncertainty initially existed as to whether the benefits sought by plaintiff were related to the first vehicular accident, which uncertainty was resolved on summary disposition. A trial court does not err in refusing to award no-fault attorney fees where a legitimate question of factual uncertainty existed concerning a material issue in dispute. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317-318; 602 NW2d 633 (1999). The trial court's decision fell within the range of reasonable and principled outcomes; thus, the denial of plaintiff's request for no-fault attorney fees did not amount to an abuse of discretion. *Univ Rehab Alliance, Inc*, 279 Mich App at 698.

Finally, plaintiff on cross-appeal argues that the trial court erred by refusing to award no-fault penalty interest. "Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits." *Williams v AAA Mich*, 250 Mich App 249, 265; 646 NW2d 476 (2002).

The trial court denied plaintiff's request for an award of no-fault penalty interest, because defendant "became aware of most of the claims not through the submission of reasonable proof but rather as an incident of this litigation." Generally, a plaintiff is not entitled to no-fault penalty interest, if the plaintiff does not submit reasonable proof of loss and the defendant does not unreasonably refuse or delay payment. *Lewis v Detroit Auto Inter-Ins Exch*, 90 Mich App 251, 257; 282 NW2d 794 (1979). However, in this case, minimally, plaintiff submitted various expenses as part of its motion for summary disposition, which was filed August 4, 2009. Plaintiff also attached invoices and billing summaries from the various health care providers to its brief below to substantiate its claims. We conclude that the plaintiff's filings below with the corresponding attachments constituted reasonable proof of loss. As such, the trial court erred in deciding that plaintiff was not entitled to no-fault penalty interest. *Williams*, 250 Mich App at 265. Defendant had 30 days to pay from the filing of plaintiff's motion for summary disposition on August 4, 2009. See generally *McMillan v Auto Club Ins Ass'n*, 195 Mich App 463, 467-468; 491 NW2d 593 (1992). There is no indication that defendant made any effort to satisfy the outstanding benefits. Even though defendant may have had a reasonable basis to dispute the amounts sought by plaintiff, as discussed *supra*, penalty interest must be assessed against defendant if it refused to pay benefits and was later determined to be liable, notwithstanding defendant's good faith in not promptly paying the benefits. *Williams*, 250 Mich App at 265. In this case, defendant is liable for penalty interest for the amounts owed for attendant care, treating physicians, and a case manager, as discussed above.

Affirmed in part, reversed in part. Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello