

STATE OF MICHIGAN
COURT OF APPEALS

NEW START, INC., HEALING PLACE AT
NORTH OAKLAND MEDICAL CENTER,
HEALING PLACE, LTD., and DANIEL
O'CONNELL,

UNPUBLISHED
November 18, 2008

Plaintiffs-Appellants,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Nos. 277474;279157
Livingston Circuit Court
LC No. 05-021203-NF

Defendant-Appellee.

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

In Docket No. 277474, plaintiffs appeal as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10) with respect to plaintiff Daniel O'Connell's claim for personal injury protection (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.* In Docket No. 279157, plaintiffs appeal as of right from the trial court's postjudgment order awarding defendant attorney fees and costs of \$48,063.16 against plaintiffs New Start, Inc. ("New Start"), Healing Place at North Oakland Medical Center ("Healing Place-Oakland"), and The Healing Place, Ltd. ("HPL"). We affirm the trial court's summary disposition order and affirm the award of attorney fees and costs against plaintiff HPL, but remand for modification of the attorney fee order consistent with defendant's earlier stipulated order to dismiss plaintiffs New Start and Healing Place-Oakland, with prejudice and without costs or attorney fees.

I. Docket No. 277474

Plaintiff O'Connell argues that the trial court erroneously granted summary disposition in favor of defendant with respect to his PIP claim for attendant care services provided by his sister-in-law, Margaret Young O'Connell. O'Connell argues that it was not necessary that formal documentation of this claim be submitted to defendant in order to satisfy the requirement of "reasonable proof" in MCL 500.3142(2).

We review a trial court's decision on a summary disposition motion *de novo*. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174

(2007). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties, to the extent that the material would be admissible as evidence, in a light most favorable to the nonmoving party. *Id.* at 56. The motion should be granted only “where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Initially, we note that O’Connell does not challenge the trial court’s ruling that the one-year back rule in MCL 500.3145 applies to any claims for benefits from the date his original complaint was filed on September 15, 2004. Therefore, the one-year back rule applies to any claim for benefit payments sought for Margaret’s alleged attendant care services.

Under MCL 500.3145(1), “the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.” A claimant must file an action for overdue payments within one year of when the losses were incurred. *Community Resource Consultants, Inc v Progressive Michigan Ins Co*, 480 Mich 1097, 1098; 745 NW2d 123 (2008). One generally becomes liable for the payment of services when they are rendered. *Id.* at 1098. But an insured does not incur attendant care expenses unless the attendant care provider expects compensation for services. *Burris v Allstate Ins Co*, 480 Mich 1081; 745 NW2d 101 (2008). An insurer has no obligation to pay for the expense until it is actually incurred. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003). The benefits are payable by the insurer to or for the benefit of the injured person. MCL 500.3112; see also *Lakeland Neurocare Centers v State Farm Mut Automobile Ins Co*, 250 Mich App 35, 39; 645 NW2d 59 (2002). Whether a payment is overdue is governed by MCL 500.3142, which provides:

(1) Personal protection insurance benefits are payable as loss accrues.

(2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer.

(3) An overdue payment bears simple interest at the rate of 12% per annum.

Under this statute, what constitutes reasonable proof of loss depends on the benefit sought. *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 596; 648 NW2d 591 (2002). “Exact proof” of the amount of loss is not required. *Williams v AAA Michigan*, 250 Mich App 249, 267; 646 NW2d 476 (2002). If reasonable proof is provided, the insured has 30 days to challenge or investigate the matter. *Id.* The filing of a lawsuit can trigger the 30-day period if it provides notice of the amount of loss sustained and proof of the fact of loss was provided. See

Regents of the Univ of Michigan v State Farm Mut Ins Co, 250 Mich App 719, 736; 650 NW2d 129 (2002).

O'Connell failed to show a genuine issue of material fact with respect to whether any benefits were overdue. Although there was evidence that defendant authorized a payment directly to Margaret and her husband for a period ending on July 7, 2003, O'Connell did not present any admissible evidence showing reasonable proof of his liability for Margaret's attendant care services in any amount since September 15, 2003, one year before the complaint was filed. We are not persuaded that the information in defendant's activity log regarding conversations between the claims representative and case manager demonstrates reasonable proof of the loss. There is nothing about that information that should have triggered an investigation by defendant into whether it should make or reject any payment to O'Connell or to Margaret on his behalf for Margaret's alleged attendant care services.

Further, there is nothing in either the original complaint filed in September 2004, or the amended complaint filed in October 2004, that can be construed as providing the requisite reasonable proof of loss. Margaret was not named as a plaintiff or claimant in the complaint. The amended complaint alleged, "At the present time, there is a balance of \$134,382.05 due and owing to Plaintiffs, New Start, Inc., The Healing Place at North Oakland Medical Center, and The Healing Place, Ltd." The fact that Margaret testified in her October 13, 2005, deposition that she provided attendant care services does not aid O'Connell's position, inasmuch as Margaret testified that she expected to be paid by New Start. Margaret did not testify that O'Connell was obligated to pay her for attendant care services in any amount or that she made any such claim for payment.

Considering the evidence as a whole, including Margaret's December 7, 2006, affidavit regarding her services, the trial court did not err in granting defendant summary disposition under MCR 2.116(C)(10). Even assuming for purposes of review that O'Connell properly could have pursued an unpleaded claim predicated on a theory that he was liable for Margaret's alleged attendant care services, any claim that benefits were owed to him or to Margaret on his behalf fails as a matter of law, because O'Connell did not show a genuine issue of material fact with respect to whether defendant was provided with reasonable proof of both the fact and amount of the loss.¹

Next, we decline to consider O'Connell's argument that he has a private cause of action against defendant under 42 USC 1395y. This issue is not properly before this Court because it is insufficiently briefed, and lacks citations to the record and supporting authority. MCR 7.212(C)(7); *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479

¹ We express no opinion whether O'Connell could have proven that Margaret's particular services were compensable under the no-fault act, but note that any benefits must be causally connected to accidental bodily injury arising out of a motor vehicle accident. MCL 500.3105(1); *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005). Allowable expenses include those reasonably necessary for the injured person's care, recovery, or rehabilitation. MCL 500.3107(1)(a).

(2008); *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Further, while O'Connell raised this issue in his motion for reconsideration, the trial court did not decide the merits, but instead denied the motion as untimely. Therefore, because O'Connell does not address the trial court's decision to deny his motion for reconsideration, we deem this issue abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

II. Docket No. 279157

Plaintiffs New Start, Healing Place-Oakland, and HPL collectively argue that the trial court erred in assessing attorney fees against them under MCL 500.3148(2). However, the record indicates that the trial court awarded defendant attorney fees and costs based on a finding that plaintiffs' claims were frivolous under MCL 600.2591. Plaintiffs do not address any claim of error with respect to MCL 600.2591; therefore, they have not established any basis for appellate relief. See *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (the failure to address a necessary issue precludes appellate relief).

Nonetheless, we note that plaintiffs New Start and Healing Place-Oakland were dismissed from this action under a March 6, 2006, stipulated order providing that the dismissal was with prejudice and without attorney fees or costs. In light of this order, under MCR 7.216(A)(7), we remand this case for modification of the June 13, 2007, attorney fee award consistent with defendant's earlier stipulation.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Bill Schuette