STATE OF MICHIGAN

COURT OF APPEALS

ARLON ELSER, as next friend of DAVID ELSER, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED March 14, 2013
v	No. 294068 Oakland Circuit Court
AUTO OWNERS INSURANCE COMPANY, Defendant-Appellant/Cross-Appellee.	LC No. 1997-544275-CK

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

In this action to recover personal injury protection (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., defendant appeals as of right, and plaintiff[1] cross-appeals from a judgment entered after a jury trial. The 2008 judgment awarded plaintiff allowable expenses and penalty interest, as well as case evaluation sanctions, taxable costs, and prejudgment interest, for a total judgment amount of $4,391,894.22. We affirm in part, vacate the judgment, and remand.

I. BACKGROUND

In October 1988, plaintiff sustained a closed-head injury in a motor vehicle accident. In 1989, he entered into an agreement and resided at a residential facility operated by Lake Forest Health Services (Lake Forest). Plaintiff next stayed at a residential care facility referred to as "Hope Network Sojourner's." After plaintiff's condition progressed, he moved to a more independent living situation in an apartment at Wildwood Center. In January 1994, however, plaintiff left Wildwood and returned to Lake Forest, living there continuously through 2006. In 2006, plaintiff moved to a semi-independent apartment facility operated by Ann Arbor Rehabilitation Centers (AARC).

[1] Notwithstanding the appointment of Arlon Elser to represent David Elser as next friend, the term "plaintiff" shall generally refer to David Elser for purposes of this opinion.

In a prior action filed in 1994 against defendant, plaintiff's no-fault insurer, a jury awarded plaintiff no-fault benefits of $105,000 for expenses related to his care at Lake Forest. This 1996 award represented approximately one-third of the amount plaintiff had sought. After the jury trial, defendant began to apply a one-third ratio to each invoice it received thereafter from Lake Forest, such that defendant paid Lake Forest only one-third of what Lake Forest billed.

In 1996, Arlon Elser, as next friend for plaintiff, filed the instant action against defendant in the Wayne Circuit Court, seeking recovery of expenses that defendant refused to pay after the 1996 jury verdict in the 1994 action. Venue was later changed to Oakland County. In 1997, the trial court granted defendant's motion to remove Arlon Elser as next friend. Defendant's motion alleged that plaintiff was competent and did not require a next friend. The case was allowed to proceed in plaintiff's name only.

Numerous issues arose concerning the effect of the prior 1996 verdict on the issues in the new case. In 2000, Oakland Circuit Court Judge Gene Schnelz ruled that the jury would be instructed that, because the prior jury already determined that a one-third ratio was appropriate, plaintiff would have the burden of proving a change in his condition in order to recover more than one-third of his expenses. Given these rulings, the parties agreed that there was no triable issue, and Wayne Circuit Court Judge Kathleen MacDonald, acting as an Oakland County settlement judge, dismissed the action. Plaintiff appealed the dismissal of the action predicated on the rulings made by Judge Schnelz, and a panel of this Court reversed, stating in part that "the fact that the first lawsuit awarded plaintiff only one-third of the claimed benefits has no effect on plaintiff's claims for future benefits." *Elser v Auto-Owners Ins Co*, 253 Mich App 64, 67; 654 NW2d 99 (2002). This Court further held that "[b]ecause the issue of future expenses was not litigated and decided in the prior lawsuit, we reject defendant's argument that res judicata bars plaintiff's claims for additional expenses incurred after the February 1996 verdict." *Id.* at 69. Finally, this Court mandated that "no mention is to be made of the 1996 trial and verdict" on remand. *Id.* at 67 n 2.

After this Court's decision in *Elser*, defendant began paying Lake Forest $5,000 each month, regardless of the amounts actually billed by Lake Forest. Defendant continued to pay Lake Forest $5,000 each month until June 2006, when plaintiff moved to the apartment operated by AARC. Defendant then paid AARC an agreed-upon, per diem amount that was less than the $350 amount AARC usually charged. Later, plaintiff fell and sustained a nondisplaced fracture of his cervical vertebra which required AARC to provide additional services not previously discussed with defendant. Defendant, however, refused to pay AARC more than the original, agreed-upon per diem. Plaintiff was still residing at the AARC facility at the time of the 2008 trial, during which plaintiff sought PIP benefits for the allegedly unreimbursed expenses incurred at both Lake Forest and AARC.

The parties filed several motions in the trial court before the 2008 trial, seeking to limit and clarify the scope of admissible evidence. In February 2005, Judge Schnelz issued a ruling

precluding defendant from contesting whether plaintiff's injuries were caused by the 1988 motor vehicle accident.[2]

In 2008, Judge Shalina Kumar, who ultimately presided over the trial, also ruled that the doctrine of res judicata precluded defendant from arguing at trial that plaintiff never sustained a head injury. At trial, Judge Kumar instructed the jury that "it has already been determined by this Court that David Elser's injuries were a result of the motor vehicle accident." Judge Kumar also granted a motion by plaintiff's counsel to have Arlon Elser appear as next friend for plaintiff. The complaint was amended to comport with this ruling. The jury returned a special verdict in which it determined that allowable expenses were incurred by or on behalf of plaintiff arising out of accidental bodily injury that occurred on October 26, 1988. The jury determined that Lake Forest's allowable expenses arising out of the motor vehicle accident, excluding those expenses already paid by defendant, totaled $1.5 million and awarded $15,180 for net allowable expenses related to AARC. The jury also found that defendant was liable for penalty interest for overdue payments of $2,016,351 with respect to Lake Forest and $1,960 with respect to AARC. Judge Kumar later modified the interest awards for overdue payments and awarded plaintiff $1,276,370.03 with respect to Lake Forest and $3,039.33 with respect to AARC. Judge Kumar denied defendant's motion for judgment notwithstanding the verdict (JNOV) or a new trial.

II. PIP BENEFITS UNDER THE NO-FAULT ACT

"A no-fault insurer is responsible for paying first-party PIP benefits 'for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . .'" *Stewart v State*, 471 Mich 692, 696; 692 NW2d 376 (2004), quoting MCL 500.3105(1). PIP benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). The allowable expenses must be causally connected to the person's injury. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 530-531; 697 NW2d 895 (2005); see also *Krohn v Home-Owners Ins Co*, 490 Mich 145, 164-165; 802 NW2d 281 (2011).

In addition, MCL 500.3110(4) provides that "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense . . . is incurred." As a result, an insurer has no obligation to pay allowable expenses until they are actually incurred. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484-485; 673 NW2d 739 (2003). The word "incur" means "[t]o become liable or subject to, [especially] because of one's own actions." *Id.* at 484, quoting *Webster's II New College Dictionary* (2001). "An insured could be liable for costs by various means, including paying the costs out of pocket or signing a contract for products or services." *Proudfoot*, 469 Mich at 484 n 4; see also *Burris v*

[2] A March 2005 order entered by Chief Judge Wendy Potts, acting on behalf of Judge Schnelz, clarified that "[t]he issue of causation will not be tried, the Court having determined that issue is *res judicata* from the February, 1996 jury verdict; however, the issue of the reasonable value of the reasonably necessary incurred services will be at issue in this trial."

Allstate Ins Co, 480 Mich 1081, 1084-1085; 745 NW2d 101 (2008) (CORRIGAN, J., concurring); *Karmol v Encompass Prop & Cas Co*, 293 Mich App 382, 390; 809 NW2d 631 (2011).

III. DEFENDANT'S APPEAL

A. STATUTE OF LIMITATIONS

Defendant's first issue on appeal arises from the appointment of Arlon Elser, as next friend for plaintiff, and the filing of an amended complaint to reflect the appointment during trial on October 3, 2008. Defendant contends that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(8), on the basis that plaintiff was incompetent to file the instant case and that any claims arising before October 3, 2007, were barred by the one-year back rule in MCL 500.3145(1) because a "next friend" constitutes a new party. We disagree.

We review de novo a trial court's denial of a motion for summary disposition. *Bombalski v Auto Club Ins Ass'n*, 247 Mich App 536, 541; 637 NW2d 251 (2001). Because MCR 2.116(C)(7) is the appropriate subrule to apply when summary disposition is sought on the ground that a claim is barred by a statute of limitations, we shall consider defendant's motion under that subrule. *Spiek v Dep't of Transp*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). Where no facts are disputed, whether a claim is statutorily barred is a question of law. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720-721; 742 NW2d 399 (2007). We also review de novo a trial court's interpretation of court rules and statutes. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

The trial court reached the correct result in denying defendant's motion for summary disposition. However, it was unnecessary for the court to have considered the rule governing the substitution of parties in MCR 2.202(B) because MCR 2.201(E) addresses incompetent parties. Incompetent persons, as well as minors, cannot sue on their own behalf. See *Klida v Braman*, 278 Mich App 60, 71; 748 NW2d 244 (2008), citing MCR 2.201(E)(1). According to MCR 2.201(E)(1), a minor or incompetent person who does not have a conservator only can pursue a cause of action through representation of a next friend. Thus, in general, the appointment of a next friend must typically occur before the lawsuit is filed. However, MCR 2.201(E)(4) provides:

> A party who becomes incompetent while an action is pending may be represented by his or her conservator, or the court may appoint a next friend or guardian ad litem *as if the action had been commenced after the appointment*. [Emphasis added.]

Therefore, while the appointment of next friend in this case occurred *after* the initiation of the lawsuit, the suit is nonetheless still permissible. Plaintiff became incompetent while the action was pending. Thus, the appointment is treated "as if" the complaint was filed after the appointment, and therefore, the appointment is compliant with MCR 2.201(E)(1).

Defendant relies on *Yudashkin v Holden*, 247 Mich App 642, 649; 637 NW2d 257 (2001), where this Court offered the general rule that "the relation-back doctrine does not extend to the addition of new parties." But defendant provided no authority for its position that the appointment of a next friend under MCR 2.201(E)(4) is to be treated as the addition of a new

party, such that the relation-back doctrine should not apply under the circumstances of this case. Defendant's comparison to a situation where a suit is filed on behalf of a minor or incompetent plaintiff without the appointment of a next friend under MCR 2.201(E)(1) is also inapposite. In that circumstance, the appointment of the next friend would not relate back because an incompetent plaintiff *never* had the capacity to sue, and any complaint filed by such a plaintiff would be necessarily defective. In this case, however, in response to defendant's motion requesting the removal of Arlon Elser as the party plaintiff, Judge Schnelz ruled that plaintiff *was* competent at the commencement of the lawsuit and granted defendant's motion. In light of defendant's prior successful motion, defendant is precluded from now arguing the contrary position that plaintiff remained incompetent throughout the case. A party may not take a position in the trial court and later seek redress in an appellate court based on a contrary position. *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008).

B. INCURRED EXPENSES

We next address defendant's argument that the trial court erred in denying defendant's motion for JNOV because plaintiff failed to prove that he incurred expenses in an amount greater than defendant's payments to Lake Forest and AARC.

We review de novo a trial court's denial of a motion for a directed verdict or JNOV, by considering the evidence and all legitimate inferences arising from it in a light most favorable to the nonmoving party. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). "A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.* "When the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury." *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005). When reviewing a motion for directed verdict, this Court views the evidence up to the time that the motion is made. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000).

Defendant claims that plaintiff never offered into evidence any written contract concerning his stay at Lake Forest beginning in 1994, and that as such, there is insufficient evidence demonstrating that plaintiff incurred any Lake Forest expenses. However, we find it unnecessary to consider whether the contract signed by plaintiff in 1994 was actually admitted as part of plaintiff's evidence. Even assuming that the 1994 contract was not admitted into evidence,[3] the evidence was nonetheless sufficient for plaintiff to avoid a directed verdict.

[3] We note that given the evidence on the record, it is not clear that the statute of frauds, MCL 566.132, required a written contract in the instant matter. A contract that is capable of being completed within a year does not fall within the statute. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 533; 473 NW2d 652 (1991). Hence, because there was no evidence that plaintiff had a contractual duty to stay at the Lake Forest facility for any definite period of time, any contract was capable of being completed within one year, and the statute of frauds is not necessarily implicated.

First, liability for the payment of services generally will arise when the services have been rendered. *Community Res Consultants, Inc v Progressive Mich Ins Co*, 480 Mich 1097, 1098; 745 NW2d 123 (2008). While there are circumstances in which a claimant or an insured may be relieved of liability and, accordingly, not incur a full charge, *Bombalski*, 247 Mich App at 543, the evidence at trial, viewed in a light most favorable to plaintiff, did not establish that Lake Forest's policy decision to forgo collection proceedings on plaintiff's debt discharged the debt plaintiff incurred for services rendered.

Second, defendant claims the 1989 Lake Forest contract it relies upon, and introduced at trial, was still in effect when plaintiff returned to Lake Forest in 1994 and unambiguously relieved plaintiff of any personal liability for expenses incurred upon his return. While the exhibit containing the contract included the signature of plaintiff on a second signature page dated January 25, 1994, it appears on its face to be the last page of a different contract. Thus, looking in a light most favorable to plaintiff, reasonable jurors could disagree on whether this exhibit possessed any significance whatsoever.

Therefore, the trial court did not err in denying defendant's motion for JNOV with respect to the Lake Forest expenses.

Defendant has also failed to establish any basis for disturbing the trial court's denial of its motion for a directed verdict with respect to expenses relating to AARC. We agree that to the extent that the evidence established that AARC agreed to accept a certain per diem rate from defendant in satisfaction of services rendered in the reasonable care of plaintiff, reasonable jurors could only conclude that defendant was relieved of further liability for expenses incurred. But given that the per diem discussions occurred before plaintiff fractured his cervical vertebra and that AARC made unsuccessful attempts to collect additional amounts for expenses incurred after plaintiff's vertebra injury, we are not persuaded that the evidence, viewed in a light most favorable to plaintiff, established that plaintiff, and thus defendant as his insurer, was totally relieved of responsibility for all of the AARC expenses. Under *Bombalski*, the service provider's agreement to accept a payment from the insurer in satisfaction of a debt is an essential element of relieving the service provider's client of personal liability. *Id.* But this element is missing with respect to the payments AARC sought related to the care it provided associated with plaintiff's cervical vertebra fracture. This is consistent with the general rule that where extra work is not contemplated by an agreement, recovery is not precluded. See *Cascade Elec Co v Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976). Therefore, the trial court properly denied defendant's motion for directed verdict with respect to the AARC claims.

C. CAUSATION

We next address defendant's argument that the trial court incorrectly gave res judicata effect to the prior 1996 verdict and improperly precluded litigation in the present action on the question whether plaintiff sustained injuries that were caused by the 1988 motor vehicle accident. Defendant asserts that the trial court's application of res judicata also contravened the law of the case established by this Court in *Elser*, 253 Mich App at 64. While we agree that res judicata did not apply, we nonetheless conclude that collateral estoppel precluded relitigation of the causation of plaintiff's injuries during the 2008 trial.

With respect to Judge Schnelz's initial decision, we note that plaintiff filed a motion in limine in April 2004 in which he relied on the doctrines of res judicata and collateral estoppel when seeking to preclude relitigation of the issue of whether his injuries were sustained in the 1988 accident. We generally review a trial court's pretrial ruling on a motion in limine for an abuse of discretion. See *Elezovic v Ford Motor Co*, 472 Mich 408, 431; 697 NW2d 851 (2005). "An abuse of discretion occurs where the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). But a trial court's interpretation of a statute and application of a legal doctrine, such as res judicata and collateral estoppel, is reviewed de novo. *Estes*, 481 Mich at 578-579. A trial court's determination regarding whether the law of the case doctrine applies is also reviewed de novo. *Manske v Dep't of Treasury*, 282 Mich App 464, 467; 766 NW2d 300 (2009).

With respect to Judge Kumar's consideration of this issue in 2008, we note that Judge Kumar had the authority to modify Judge Schnelz's decisions "to reflect a more correct adjudication" of the parties' rights and obligations before entry of a final judgment. *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997), citing MCR 2.604.

We conclude that both Judge Schnelz and Judge Kumar erred in applying the doctrine of res judicata to preclude litigation of the question of causation in the present action.

The doctrine of res judicata operates to give preclusive effect to a judgment by precluding the relitigation of a *claim*, while the doctrine of collateral estoppel operates to preclude the relitigation of *issues*. *People v Gates*, 434 Mich 146, 154 n 7; 452 NW2d 627 (1990). The burden of establishing the applicability of either doctrine is on the party asserting the doctrine. See *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

Michigan broadly applies the doctrine of res judicata to bar *claims* already litigated and any *claim* arising out of the same transaction that the parties, exercising reasonable diligence, could have raised. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). "A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Id.*

Here, res judicata does not apply because the second element cannot be satisfied. Specifically, the matter contested and resolved in the second trial was not the same as the matter contested and resolved in the first trial because the 1996 judgment dealt with *past* medical expenses, and the 2008 judgment dealt with what would have been *future* expenses at the 1996 trial. Therefore, res judicata did not act to prevent plaintiff's subsequent *claims*.

However, whether the 1996 verdict, stating that plaintiff's injuries arose out of the operation of a motor vehicle, also conclusively determined that plaintiff's injuries at issue in the 2008 trial arose from the operation of a motor vehicle raises the question of whether collateral estoppel, or *issue* preclusion, is applicable. *Estes*, 481 Mich at 585. The doctrine of collateral estoppel generally requires that "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Id.* Collateral estoppel will only apply "when the basis of the prior judgment can be clearly, definitely, and

unequivocally ascertained." *Ditmore v Michalik*, 244 Mich App 569, 578; 625 NW2d 462 (2001). And here, it is clearly, definitely, and unequivocally ascertained through the 1996 verdict that plaintiff's injuries at issue at the first trial arose out of the operation of a motor vehicle.

Our review of the record discloses that the issue of causation was properly precluded from litigation at the second trial. During argument before both Judge Schnelz and Judge Kumar, the parties agreed that plaintiff's physical condition at the second trial was *the same* as his condition before the first trial. Specifically, defense counsel acknowledged the following to Judge Schnelz at a September 20, 2000, motion hearing:

> First and foremost, we have no question that the condition that the plaintiff was seen for, was treated for, and incurred expenses for, in the prior trial is substantially the same as the condition, treatment, and expenses which are at issue before the Court now.
>
> * * *
>
> We've deposed the director of Lake Forest. We've deposed the plaintiff's experts. And we've gotten all the records, Judge, from all of the experts. And everyone is consistent. . . . [A]ll of them say that this man is substantially the same as he was before the prior trial.

Then, almost eight years later, both parties reiterated this same premise to Judge Kumar at an August 13, 2008, motion hearing during which defendant's motion in limine revisited the question whether causation evidence would be admissible at the second trial:

> *[Defense Counsel]:* Following [the first trial] there was no change in the treatment rendered to [plaintiff]. *Nor was there any change in his condition* except for a short period of time he was on a drug study, but that's not really before the Court. *No change in condition, no change in treatment.*
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> * * *
>
> *THE COURT:* Are you going to be arguing that his condition is any different than you –
>
> *[Plaintiff's Counsel]:* No.
>
> *THE COURT:* – argued at the [first] trial?
>
> *[Plaintiff's Counsel]:* I think it's – I think that has been consistently documented that it has stayed the same. [Emphasis added.]

Thus, because the prior jury determined that plaintiff's previous condition arose out of the operation of a motor vehicle and because it was not contested that plaintiff's condition at the second trial was *the same* as his condition at the first trial, the 1996 jury verdict necessarily also determined that plaintiff's injuries at issue in the 2008 trial arose out of the operation of a motor

vehicle. Likewise, there is no question that the parties had a full and fair opportunity to litigate the causation issue at the 1994 trial and, since the same parties were involved in both trials, that there was mutuality of estoppel. See *Monat v State Farm Ins Co*, 469 Mich 679, 683; 677 NW2d 843 (2004). Therefore, collateral estoppel precluded relitigation of the issue of causation related to plaintiff's injuries at the second trial.

Further, we disagree that the law of the case required that the issue of causation be litigated at the second trial. Under the law of the case doctrine, "a ruling by an appellate court with regard to *a particular issue* binds the appellate court and all lower tribunals with respect *to that issue*." *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995) (emphasis added). The *Elser* Court's prohibition on referencing the 1996 trial and verdict was solely in the context of how that information "has no effect on plaintiff's claims for future benefits." *Elser*, 253 Mich App at 67. Because the question whether plaintiff was required to litigate causation was not decided by this Court, explicitly or implicitly, the law of the case doctrine simply does not apply. *Grievance Adm'r v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

D. EXPERT TESTIMONY

Defendant also challenges rulings by Judge Schnelz and Judge Kumar with respect to the admissibility of testimony from Annelle Hill. We review the trial court's rulings for an abuse of discretion. *Elezovic*, 472 Mich at 419.

Contrary to defendant's argument on appeal, Judge Schnelz did not totally exclude Hill's testimony, but rather ruled that he would not allow expert testimony (1) without a hearing first in order to determine Hill's qualifications as an expert to conduct a market survey and (2) without a showing that her proposed testimony would be admissible as an exception to hearsay. Because an evidentiary hearing is an appropriate means for a court to determine the admissibility of expert testimony, *Craig v Oakwood Hosp*, 471 Mich 67, 83; 684 NW2d 296 (2004), Judge Schnelz did not abuse his discretion it making his ruling. Notably, defendant never pursued the opportunity for an evidentiary hearing.

Further, because defendant's request that Judge Kumar reconsider Judge Schnelz's decision was not accompanied by an offer of proof that Hill's proposed testimony was not hearsay, or even a request for the evidentiary hearing that Judge Schnelz stated would be appropriate, Judge Kumar's decision not to revisit this evidentiary issue as it pertained to the reasonableness of the Lake Forest expenses was likewise not an abuse of discretion.

IV. PLAINTIFF'S CROSS-APPEAL

A. PENALTY INTEREST

Plaintiff argues that the trial court erred in correcting an apparent mistake made by the jury in the calculation of penalty interest under MCL 500.3142 of the no-fault act for overdue payments. We agree.

A trial court's remittitur decision is reviewed by an appellate court for an abuse of discretion. *Shaw v City of Ecorse*, 283 Mich App 1, 17; 770 NW2d 31 (2009). The evidence is

reviewed in a light most favorable to the nonmoving party to determine if the jury award is supported by the evidence. *Id.* An abuse of discretion occurs where a trial court's decision "results in an outcome falling outside the range of principled outcomes." *Barnett*, 478 Mich at 158.

Penalty interest is awarded under the MCL 500.3142 of the no-fault act in order to penalize insurers that are dilatory in paying a claim. *Williams v AAA Mich*, 250 Mich App 249, 265; 646 NW2d 476 (2002). Interest under MCL 500.3142 "is awarded as a penalty for the insurer's misconduct and is not intended to compensate the insured for damages." *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719, 735; 650 NW2d 129 (2002). To recover interest under MCL 500.3142, a plaintiff must establish that the insured presented the insurer with reasonable proof of loss and that the insurer did not pay the claim within 30 days after receiving the proof. *Id.* All such overdue payments bear a simple interest rate of 12% per annum. MCL 500.3142(3).

Here, the jury awarded over $2 million in penalty interest, which both parties acknowledged is more than the statutory authorized 12% per annum. The parties disagreed, though, on how to lower the award. Judge Kumar subsequently granted remittitur by reducing the penalty interest awarded from $2,016,351 down to $1,276,370.03 and entering this amount in the final judgment.

The problem in this case is that the verdict form lacked any detail regarding how the jury resolved each of Lake Forest's invoices that plaintiff claimed was overdue to determine how the penalty interest was computed. Judge Kumar recognized the difficulty of determining the basis for the jury's partial award of the requested Lake Forest expenses at the posttrial hearing on December 10, 2008. At the next hearing on March 18, 2009, plaintiff proposed reducing the highest bills. But Judge Kumar ruled that plaintiff's approach did not "make sense." Instead, she decided that each invoice should be reduced by the same percentage. While this approach is reasonable, given Judge Kumar's inability to determine the intent of the jury and failure to find any other error, the appropriate course under MCR 2.611(E)(1) would have been to afford defendant an opportunity for a new trial unless plaintiff agreed to entry of a judgment for no-fault penalty interest in the highest amount supported by the evidence. MCR 2.611(E)(1) provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

Because Judge Kumar did not apply the standards in MCR 2.611(E)(1), her decision does not fall within the range of principled outcomes, and we remand to the trial court for a redetermination of defendant's request for remittitur in accordance with MCR 2.611(E)(1).

B. ATTORNEY FEES

Plaintiff argues that the trial court erred in not awarding attorney fees pursuant to MCL 500.3148(1). We disagree.

"In no-fault personal injury protection insurance cases, MCL 500.3148(1) permits a claimant to obtain attorneys fees from an insurer 'if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." *Brown v Home Owners Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307458, issued December 4, 2012), slip op, p 6. Thus, as with penalty interest under MCL 500.3142, the award of attorney fees is linked to overdue payments.

> "The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). This Court reviews de novo questions of law, but we review findings of fact for clear error. *Id*. "A decision is clearly erroneous when 'the reviewing court is left with a definite and firm conviction that a mistake has been made.'" *Id*., quoting *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). [*Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).]

"MCL 500.3148(1) requires that the trial court engage in a fact-specific inquiry to determine whether 'the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.'" *Id.* at 522. The appropriate focus is whether the initial refusal to pay the claim was unreasonable. *Id*. "An insurer's refusal to pay benefits or delay in making payment creates a rebuttable presumption of unreasonableness, and the insurer bears the burden of justifying the refusal or delay." *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 515-516; 791 NW2d 747 (2010). But an insurer may reasonably refuse to pay benefits if the refusal is the result of a legitimate issue of statutory construction, constitutional law, or bona fide factual uncertainty. *Id.* at 516.

We find support for the trial court's determination in this case that defendant made a reasonable decision to pay amounts at the onset of this case based on the resulting ratio from the prior 1996 verdict. Even though defendant's decision was ultimately wrong, as evidenced by the 2008 verdict, it does not diminish from its reasonableness at the time. See *Ross*, 481 Mich at 11.

Here, defendant offered several justifications for its refusal to pay Lake Forest's expenses in its response to plaintiff's motion for entry of judgment. Defendant argued that it was justified in paying one-third of the amounts billed on the basis of the outcome of the 1994 action because nothing had changed since that trial. Defendant argued that it had also raised bona fide questions of fact regarding causation, as well as the proper application of the doctrine of res judicata to these issues. Defendant also alleged that it relied on a market survey to pay later bills at the monthly rate of $5,000.

Judge Kumar found defendant's actions were not unreasonable:

> Due to the unique nature of this case and of course I was the fortunate judge to get this case, I can't find that they were unreasonable, the Defense was unreasonable, in—in denying the payments. I was, I know, they already had a verdict, rulings were made, appeals were being made, I—I think that I may not agree with what they did, but I think that it was reasonable, a reasonable decision to pay the amount they paid based on the prior verdict. So, I can't award attorney fees under that statute.

We will not disturb this finding, as we are not left with a definite and firm conviction that it was incorrect. Given the bona fide factual uncertainty regarding defendant's liability for the full amount of Lake Forest's invoices after the 1996 verdict, Judge Kumar could reasonably conclude that defendant acted reasonably in making partial payments.

Of note, Judge Kumar did not address whether defendant's decision to pay $5,000 for each of Lake Forest's varying invoices beginning in 2002 and continuing until June 2006 was reasonable. However, on the basis of the existing record, it seems apparent that bona fide factual uncertainty regarding at least the reasonableness of the Lake Forest expenses continued during this time period, regardless of the method chosen by defendant to make partial payments. The evidence that defendant made later payments to AARC in amounts that exceeded $5,000 does not establish that defendant's initial determinations regarding Lake Forest's invoices were unreasonable or uncontested. Therefore, limiting this analysis to the existing record, we find no clear error in Judge Kumar's finding that defendant reasonably refused to pay each of the pertinent claims, and we conclude that she did not abuse her discretion in denying plaintiff's request for attorney fees.

C. JUDGMENT INTEREST

Plaintiff raises three issues involving his entitlement to prejudgment interest. MCL 600.6013 governs the award of prejudgment interest and provides in pertinent part:

> (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. . . .
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> * * *
>
> (5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.
>
> (6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1,

> 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).
>
> * * *
>
> (8) Except as otherwise provided in subsection[] (5) . . . , for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

Plaintiff first argues that the trial court erred by not awarding judgment interest using the 18.25% annual interest rate reflected in Lake Forest's invoices. Plaintiff argues that the invoices constitute "written instruments" as used in MCL 600.6013. We disagree.

This issue only pertains to Lake Forest's expenses. Because plaintiff's complaint was filed in 1996, and judgment was not rendered until May 2009, the applicable provision is MCL 600.6013(6).

The phrase "written instrument" in the statute has been interpreted to include the terms, "written contract" and "insurance contract." *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346-347; 578 NW2d 274 (1998). But it does not follow that invoices used by a jury to determine an insurer's liability constitutes a judgment "rendered on a written instrument" as used in MCL 600.6013(6). The rationale for applying the interest rate contained in a "written instrument" arises from the existence of a greater expectation of performance and payment when *parties establish their rights and responsibilities* before a controversy arises, and the greater certainty of finding this expectation when there is a written, as distinguished from an oral, contract. *Id.* at 350. The Supreme Court stressed that MCL 600.6013(6) represented "[t]he Legislature's choice to impose a higher rate of interest on *defendants who enter into written contracts*." *Id.* (emphasis added). The invoices created by Lake Forest that plaintiff relies upon as being "written instruments" can in no way be construed as contracts to which defendant was a party. Therefore, the trial court correctly refused to treat the judgment as being rendered based on the invoices and properly did not award interest based on MCL 600.6013(6).

Plaintiff next argues that the trial court erred in refusing to compute prejudgment interest under MCL 600.6013(8) as of the date of the complaint with respect to *all* outstanding payments. We disagree.

The difficulty in applying this statute's requirement of calculating interest "from the date of filing the complaint" is that most of plaintiff's allowable expenses were incurred *after* the

complaint was filed in 1996. Indeed, AARC did not become involved in providing care for plaintiff until 2006. Regardless of the statute's reference to calculating interest from the time of the complaint, this Court in *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 624; 550 NW2d 580 (1996), held that with respect to claims arising *after* the filing of the complaint, prejudgment interest is computed from the date that the defendant refused to pay the bills as they became due—not from the date that the plaintiff filed the complaint. The *Beach* Court explained:

> For claims that arise after the complaint is filed, however, it is erroneous to award prejudgment interest from the date of the complaint because such an award exceeds the purpose of compensating for a delayed payment, overcompensates for the related litigation, and departs from the purpose of providing an incentive for prompt settlement by both imposing a penalty upon the defendant and conferring a favor upon the plaintiff. Rather, prejudgment interest regarding subsequent claims would be properly awarded from the "date of delay," i.e., the postcomplaint date on which the insurer refused to pay and the delay in receiving money began. [*Id.* at 624-625 (quotation marks, brackets, and citations omitted).]

Therefore, Judge Kumar did not err in refusing to award prejudgment interest as of the date of the complaint with respect to claims arising after the filing of the complaint.

Lastly, plaintiff argues that the trial court erred in declining to award prejudgment interest under MCL 600.6013(8) on the award of penalty interest under MCL 500.3142(3). We agree that penalty interest has been treated as a substantive part of damages and an element of costs and therefore subject to prejudgment interest. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 176; 761 NW2d 784 (2008); *Attard v Citizens Ins Co of America*, 237 Mich App 311, 318-319; 602 NW2d 633 (1999). But plaintiff has failed to factually support his argument that he was not awarded prejudgment interest on the award for any penalty interest. An appellant may not merely announce a position and leave it to this Court to search for a factual basis for his claims. *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). Accordingly, plaintiff has abandoned this issue on appeal. *Id.*

V. CONCLUSION

We affirm in part, but because the trial judge did not follow the procedure for remitter detailed in MCR 2.611(E), we vacate the judgment and remand for proceedings consistent with this opinion's Part IV.A. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck