STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND HENRY ANDRES, by and through his guardian MARK KEVIN PHILLIPS,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 2, 2008

No. 279608
Wayne Circuit Court
LC No. 04-411019-NF

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered in favor of plaintiff in this action to enforce an attendant care services agreement. We affirm.[1]

Raymond Henry Andres suffered a severe brain injury in a motor vehicle accident on July 17, 2002. He thereafter required 24-hour attendant care. At some point in 2003, Lori Andres, Raymond's former wife and guardian, entered into an attendant care services agreement with

[1] Plaintiff erroneously argues that this Court does not have jurisdiction to decide this appeal. This Court has jurisdiction pursuant to MCR 7.203(A) because defendant, an aggrieved party, timely filed this appeal from a final order or judgment of the trial court. The fact that defendant inadvertently referenced MCR 7.204 in its jurisdictional checklist does not deprive this Court of jurisdiction. Moreover, "[w]here a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

Plaintiff also requests that this Court reconsider his motion to dismiss because defendant failed to comply with MCR 7.210(B)(1)(a) and MCR 7.210(F) by serving on him a copy of the entire record, including exhibits. This Court denied plaintiff's motion to dismiss in *Andres v State Farm Mut Auto Ins Co*, unpublished order of the Court of Appeals, entered March 21, 2008 (Docket No. 279608). We decline to reconsider that decision. It appears that defendant has filed all lower court transcripts with this Court, and plaintiff fails to indicate which transcript or transcripts defendant has failed to serve on him. In addition, the record shows that plaintiff proffered five of the six exhibits admitted at the evidentiary hearing, and the sixth exhibit was a letter sent to plaintiff's attorney. Under MCR 7.210(F), copies of documents already in an appellee's possession need not be served.

defendant, Raymond's no-fault insurance carrier, for his care. The agreement specified the hourly amounts to be paid for certain enumerated services, but did not specify the number of hours that each service was to be rendered. Defendant initially made monthly payments in the amount of $18,648. On April 13, 2004, plaintiff filed this action to enforce the agreement after defendant refused to continue making monthly payments in this amount.

Plaintiff moved for summary disposition to enforce the agreement, and, in response, defendant argued that the agreement was procured through fraud by Linda S. Swagler, defendant's claim representative, and Mark L. Silverman, plaintiff's attorney. Defendant asserted similar allegations of fraud against Swagler and Silverman in a counterclaim filed in a different action commenced in the United States District Court for the Eastern District of Michigan. In the instant case, the trial court granted summary disposition for plaintiff, ruling that the agreement is enforceable regardless of whether Swagler and Silverman engaged in fraud because there is no indication that Lori Andres, who signed the contract on Raymond's behalf, was involved in the alleged fraudulent conduct, and because Swagler had ostensible authority to enter into the agreement. The trial court then held an evidentiary hearing to determine the amount that defendant owed under the agreement and entered judgment in plaintiff's favor in the amount of $126,852.30.

Defendant first argues that the trial court erred by granting summary disposition for plaintiff and enforcing the agreement because it was procured through fraud. In response, plaintiff argues that defendant waived fraud as a defense by failing to properly plead fraud as an affirmative defense. This Court reviews de novo whether a party waived fraud as an affirmative defense. *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 89-90; 535 NW2d 529 (1995).

"A party that fails to raise an affirmative defense as required by MCR 2.111(F) waives the defense." *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000). MCR 2.111(F) provides, in pertinent part:

> (2) *Defenses Must Be Pleaded; Exceptions.* A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the defenses the party has against the claim. *A defense not asserted in the responsive pleading or by motion as provided by these rules is waived,* except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted. . . .
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> (3) *Affirmative Defenses.* Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting
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> (a) an affirmative defense, such as . . . *fraud*[.] [Emphasis added.]

Accordingly, a party that fails to assert fraud as an affirmative defense waives fraud as a defense to a claim. *Glenhurst Constr Co v Daniel*, 25 Mich App 115, 116; 181 NW2d 25 (1970).

Here, defendant waived the defense of fraud by failing to assert it as an affirmative defense. Under MCR 2.112(B)(1), a party asserting fraud must state "the circumstances constituting fraud" "with particularity." Defendant mentioned fraud only in its seventh affirmative defense, stating:

> 7. Defendant is entitled to attorney fees since Plaintiff's claim is in some respect fraudulent or so excessive as to have no reasonable foundation. See Section 3148 of the Michigan No-fault statute.

This assertion fails to state the circumstances constituting the alleged fraud "with particularity." Moreover, this assertion does not allege fraud generally as an affirmative defense to the agreement. Rather, defendant's assertion was clearly made for the purpose of recovering its attorney fees pursuant to MCL 500.3148(2).

Further, defendant's fourth affirmative defense, stating that any purported agreement is "void or is voidable," did not assert fraud as an affirmative defense "with particularity" as required under MCR 2.112(B)(1). Defendant's mere assertion that the agreement is void or voidable could not have apprised plaintiff of defendant's claim that Silverman and Swagler colluded to defraud defendant. Although defendant filed a counterclaim in the federal action alleging fraud as early as July 2005, defendant never moved to amend its affirmative defenses in the instant action. Therefore, defendant waived fraud as an affirmative defense to plaintiff's claims. See *Glenhurst, supra*.

Defendant also argues that sufficient evidence was not presented to justify the trial court's determination of damages following the evidentiary hearing. Specifically, defendant contends that there was no foundation for the trial court's determination that defendant must pay attendant care services at the rate of $15 an hour for 14 hours each day and $21 an hour for ten hours each day. We review a trial court's determination of damages for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003).

"[U]nder MCR 2.605(F), a court is empowered to grant money damages as are necessary or proper in a declaratory judgment action." *Hofmann*, *supra* at 90. "A party asserting a claim has the burden of proving its damages with reasonable certainty." *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). "Although damages based on speculation or conjecture are not recoverable, . . . damages are not speculative merely because they cannot be ascertained with mathematical precision." *Id*. (internal citation omitted). Damages are sufficient if there exists a reasonable basis for their computation, even though the amount is only approximate. *Id*.

Following the evidentiary hearing, the trial court determined that "Defendant is required to pay for care, rendered [to] Plaintiff at the rate of 14 hours at $15.00 per hour and at the rate of $21.00 per hour for 10 hours daily." This determination is not clearly erroneous. The trial court relied on the original attendant care services agreement, under which defendant would have been required to pay 12 hours of supervisory services each day at the hourly rate of $15, and ten hours

of attendant care services each day at the hourly rate of $21.[2] Anne Kamego, a claims litigation attorney for defendant, prepared the original agreement on behalf of defendant. The original agreement also provided that defendant would pay plaintiff for one hour of attendant care each day for case management services at the hourly rate of $75, and two hours of attendant care services each day to cover the fees of a visiting nurse at the hourly rate of $50. The trial court, however, determined that these services were not necessary and declined to award such damages. The record supports the trial court's conclusion that Raymond requires 24-hour care, but does not require skilled nursing care on a daily basis. Considering the terms of the original agreement and the evidence presented at the evidentiary hearing, there exists a reasonable basis for the trial court's computation of damages. See *Berrios*, *supra*. Moreover, we note that the trial court awarded significantly less than the amount contemplated under the original agreement.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

[2] Defendant alleges that Swagler engaged in fraudulent conduct in part by deleting those portions of the original agreement that specified the number of hours that each service was to be provided.