STATE OF MICHIGAN

COURT OF APPEALS

DANIEL BUTTON,

Plaintiff-Appellee,

and

SPECIAL TREE REHABILITATION SYSTEM,

Intervening Plaintiff,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant/Cross-Defendant/Appellant,

and

QBE INSURANCE CORPORATION,

Defendant/Cross-Plaintiff/Cross-Defendant/Appellee,

and

CITIZENS INSURANCE COMPANY,

Defendant/Cross-Plaintiff/Cross-Defendant.

UNPUBLISHED
September 4, 2014

No. 314836
Wayne Circuit court
LC No. 10-006165-NF

DANIEL BUTTON,

Plaintiff-Appellee,

and

SPECIAL TREE REHABILITATION SYSTEM,

Intervening Plaintiff,

v

No. 319312
Wayne Circuit Court
LC No. 10-006165-NF

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant/Cross-Defendant/Appellant,

and

QBE INSURANCE CORPORATION,

Defendant/Cross-Plaintiff/Cross-Defendant/Appellee,

and

CITIZENS INSURANCE COMPANY,

Defendant/Cross-Plaintiff/Cross-Defendant.

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

Servitto, J. (*concurring in part/dissenting in part*).

While I agree with the majority that QBE Insurance Corporation's (QBE) cross claim was one for subrogation and is subject to the restrictions found in MCL 500.3145, and that the one-year-back rule is an affirmative defense, I believe that Progressive Michigan Insurance Company (Progressive) waived this defense by failing to raise it in its responsive pleading to QBE's cross-claim against it. Thus, I respectfully disagree with the majority's conclusion that the trial court erred when it did not apply the one-year-back rule to QBE's cross-claim for recovery of PIP benefits from Progressive.

As indicated by the majority, MCL 500.3145(1) applies to "[a]n action for recovery of personal protection insurance benefits payable under this chapter . . . ." Because QBE's cross-claim against Progressive is an action for the "recovery" of PIP benefits, the claim falls within MCL 500.3145(1) and the one-year-back rule contained therein applies.

As also noted by the majority, our Supreme Court has found that MCL 500.3145 is not simply a statute of limitations provision, but instead "contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005). Noting the distinction between the statute of limitation provision and the damage limiting provision, *Devillers* stated, "although a no-fault action to recover PIP benefits may be *filed* more than one year after the accident . . . §3145(1) nevertheless limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action." *Id*. at 574.

MCR 2.111(F)(3) requires that affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended and states that a party must state the facts constituting "(a) an affirmative defense . . . ; (b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part; (c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise." MCL 500.3145(1) precludes the recovery of losses incurred prior to a date certain. It does not suggest that the loss was not incurred but, instead, is asserted defensively to avoid the legal effect of a claim, in part. The statute allows one to avoid payment of damages for which it may otherwise be liable due to operation of the statute. I thus find that the limitation on damages provision set forth in the one-year-back rule of MCL 500.3145(1) fits squarely within MCR 2.111(F)(3)(b) and therefore I also agree with the majority's conclusion that the one-year-back rule constitutes an affirmative defense.

However, MCR 2.111(F)(3) *requires* that affirmative defenses must be stated in a party's responsive pleading and it is undisputed that Progressive did not raise the one-year back rule as an affirmative defense in its first responsive pleading to QBE's cross-claim against it nor did it move to amend its answer to include this as an affirmative defense. Thus, according to the plain language of the court rule, Progressive waived this defense.

Progressive may very well have claimed that the one-year-back rule limited *plaintiff's* damages in its answers to both plaintiff and to intervening plaintiff's complaints. Progressive may also have later brought a motion for partial summary disposition against plaintiff based on this rule, and QBE may have asserted the one-year-back rule as a defense against plaintiff. The only relevance these facts have is to establish that Progressive was clearly aware that the one-year-back rule was at issue and to emphasize that it thus had no reason to fail to plead the affirmative defense of the one-year-back rule in its response to QBE's cross-claim. Whether QBE was not unfairly surprised by the defense is irrelevant. The court rule is clear. According to MCR 2.111(F)(2), "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 . . . ."(emphasis added). The court rule references cross-claims specifically and uses the word "the" preceding the word "claim." A party must state all of its affirmative defenses against "the" claim that was brought *against it* or the defenses are waived. I would find it disingenuous to rely upon the specific language in the court rules to find that the one-year-back-rule is an affirmative defense and must therefore be plead in accordance with the rules, then turn a blind eye to the remainder of the same rule's requirements and restrictions. Consistency would require that we remain loyal to the entirety of the rule.

I would also note that the Worker's Disability Compensation Act contains a somewhat similar "one year back" rule. MCL 418.833 provides:

> (1) If payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application.

In *Kleinschrodt v General Motors Corp*, 402 Mich 381, 382; 263 NW2d 246 (1978), a plaintiff suffered a work related injury and the defendant voluntarily paid 93 weeks of compensation. Two years later he suffered a brain tumor and was given a disability pension. Eight years later he sought additional workers' compensation benefits and the sole issue at the hearing was whether he had lost the use of his hand eight years prior. The Administrative Law Judge found that he had and awarded 122 additional weeks of compensation. The defendant took an appeal, limited to the issue of whether the plaintiff had, in fact, lost the use of his hand. The appeal board agreed, but sua sponte invoked the one year back rule and denied benefits altogether. The Michigan Supreme Court found that the Appeal Board erred in denying benefits on the strength of the one-year-back rule (MCL 418.833) because in its appeal defendant did not raise the one-year-back rule and that it was a defense which is waived if not raised before the appeal board. Other cases have followed *Kleinschrodt* in the workers compensation realm. See, e.g., *Kingery v Ford Motor Co*, 116 Mich App 606, 615; 323 NW2d 318 (1982).

I believe the same rationale should apply here. I would thus affirm the trial court's ruling based upon Progressive's failure to raise the one-year-back rule as an affirmative defense.[1]

/s/ Deborah A. Servitto

[1] Though the trial court did not grant summary disposition based upon this reasoning, we will not reverse a lower court that reaches the right result for wrong reasons. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).