

STATE OF MICHIGAN
COURT OF APPEALS

ALAN JESPERSON,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

FOR PUBLICATION
September 16, 2014

No. 315942
Macomb Circuit Court
LC No. 2010-005127-NI

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

SERVITTO, J. (*dissenting*).

I respectfully dissent.

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." Under this rule, it is insufficient for a defendant to merely list the defense; the defendant must identify the affirmative defense under a separate heading and must plead specific facts indicating, where a statute of limitations is at issue, that the statute "is applicable as a special defense which prevented recovery against this defendant." See, e.g., *Kincaid v Cardwell*, 300 Mich App 513, 536 n 5; 834 NW2d 122 (2013).

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 defense 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). Given the requirement that specific facts must be stated to support an affirmative defense, it is only logical that a defendant is thus held/restricted to the specific defenses and the specific facts underlying those defenses that he has pleaded. That is, if he has not pled a specific defense, he has waived it, just as stated in the court rule. It is undisputed that defendant here did not plead the statute of limitations provision contained in MCL 500.3145 as an affirmative defense.

Relevant to the instant matter, our Supreme Court has explicitly held that MCL 500.3145 "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). Thus, there are at least two specific affirmative defenses contained within MCL 500.3145: a statute of limitations defense and a defense limiting the amount of damages recoverable. Though they appear in the same statute, they are two very different affirmative defenses and I disagree with the majority’s conclusion that plaintiff was arguably not unfairly surprised by defendant’s assertion of the statute of limitations defense in its summary disposition motion, given that defendant had referenced the one-year back provision of MCL 500.3135.

Statutes of limitations are procedural devices intended to promote judicial economy and protect the rights of defendants by precluding litigation of stale claims. *Attorney General v Harkins*, 257 Mich App 564, 559; 669 NW2d 296 (2003). A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982). Statutes of limitation bar a claimant from filing suit after the statutory period has expired. *Id.* at 167. The one-year-back provision, in contrast is “simply stated . . . not [a] statute[] that limit[s] the period of time in which a claimant may file an action. Rather, [it] concern[s] the time period for which compensation may be awarded once a determination of rights thereto has been made.” *Howard v General Motors Corp*, 427 Mich 358, 385; 399 NW2d 10 (1986). It does not, as a statute of limitation does, act as a complete bar to a claimant’s filing suit, but instead serves as a limitation on the time period for which damages are recoverable in a properly filed suit.

The principle that an affirmative defense must be specifically plead and supported by specific factual assertions, or it is waived is supported by *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208; 850 NW2d 667 (2013). In that case, a medical malpractice action, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). The plaintiff had sent notices of intent to defendants pursuant to MCL 600.2912b, but filed her complaint 112 days later instead of waiting 182 days or more as required by MCL 600.2912b(1). One group of defendants presented a list of affirmative defenses that, in relevant part, stated, “Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A.2912b and that Plaintiff’s action is thus barred; Defendant gives notice that it will move for summary disposition.” *Id.* at 214. These defendants moved for summary disposition, contending that because the plaintiff had failed to comply with the requisite notice period prior to filing suit, her complaint was insufficient to commence the action and, because by then the statute of limitations had expired, dismissal with prejudice was warranted. The trial court agreed. A panel of this Court, however, agreed with plaintiff’s position that because defendants’ responsive pleadings asserting their affirmative defenses failed to set forth sufficient facts to put plaintiff on notice that she had failed to comply with the notice period requirement, defendants had waived that affirmative defense pursuant to MCR 2.111(F).

Noting that “MCR 2.111(F)(3) requires that the party ‘*must state the facts constituting*’ any affirmative defense so raised” (emphasis in original), the *Tyra* court indicated that an affirmative defense must thus contain facts setting forth *why and how* the party asserting it believes the specific affirmative defense is applicable in order to apprise the plaintiff of the defense relied upon and take a responsive position. *Id.* at 213-214. In *Tyra*, the defendants had simply asserted that the plaintiff “failed to comply with the notice provisions of MCL 600.2912b”, but were specifically relying upon the notice *period* in support of their motion for summary disposition.

MCL 600.2912b does set forth the notice period, but also sets forth statements that must be contained within the notice such as the applicable standard of care and the manner in which the claimant alleges the standard has been breached, and a requirement that the claimant allow the person or facility receiving the notice access to all medical records relating to the claim within a specified time period. The failure to comply with any or all of these provisions could thus have been the basis of the defendants' affirmative defense. As the *Tyra* Court stated:

MCL 600.2912b(4) specifically concerns "the notice given to a health professional or health facility." An ordinary reading of the affirmative defense alongside the statute could reasonably induce a reader to believe that plaintiff's only alleged violation of MCL 600.2912b—specifically, the "notice provisions" thereof—pertained to the notice *itself*, as distinct from the notice period. It is true that "the primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." Therefore, by extension to other filings, the statement of facts required under MCR 2.111(F) should not need to be extensive or detailed. However, the statement here is merely a conclusion, not even a vague statement of "facts *constituting*" an affirmative defense. MCL 2.111(F)(3). The statement fails to explain why defendants believed plaintiff "failed to comply with the notice provisions of MCL 600.2912b." [*Id.* at 215.]

The *Tyra* court concluded, "Because defendants failed to provide any, let alone a comprehensible or adequate, statement of facts supporting the relevant affirmative defense, we find the affirmative defense statement by the defendants insufficient to raise the affirmative defense of plaintiff's failure to comply with the notice *period* requirement of MCL 600.2912b. Under a plain application of MCR 2.111(F), the affirmative defense would be waived." *Id.* at 216-217.

In this case, where there is more than one provision set forth in the applicable statute and defendant specifically referenced only one provision in its affirmative defenses, reference to the statute, generally, did not apprise plaintiff that defendant intended to rely upon any provision other than the one specifically referenced as a defense and thus allow plaintiff to take a responsive position. *Tyra*, at 213-214. The defense was therefore waived.

While the trial court could have, in its discretion, allowed defendant to amend its pleadings to include a statute of limitations defense, there is no indication that it did so. Whether it would have granted such a motion, given that the matter had proceeded for over one and one-half years and was essentially on the brink of trial would be conjecture. Moreover, MCR 2.111(F)(3) is clear that an amended pleading must fulfill the requirements of MCR 2.118. MCR 2.118(A)(4) states that "[a]mendments must be filed in writing, dated, and numbered consecutively[.]" Here, the record is void of any written amendment provided by defendant to include a statute of limitations defense, precluding this Court from treating such a defense as pleaded.

Again, because defendant did not assert the statute of limitations defense set forth in MCL 500.3145(1) in its first responsive pleading or an amended pleading, I would find that defendant waived that defense and I would thus hold that the trial court erred in granting summary disposition in defendant's favor. Based upon this ruling, I would not reach the issue of

whether, as the majority held, under MCL 500.3145(1), suit to recover PIP benefits may be filed more than one year after the date of an accident causing accidental bodily injury only if the insurer has either received notice of the injury within one year of the accident or made a payment of PIP benefits for the injury within one year of the accident. This Court does not render advisory opinions on issues unnecessary to the disposition of the case. See, e.g., *People v Wilcox*, 183 Mich App 616, 620; 456 NW2d 421 (1990). Because defendant waived any statute of limitation defense found in MCL 500.3145(1), interpretation of the statute of limitations provision contained therein is unnecessary.

I would reverse the trial court's grant of summary disposition in favor of defendant and remand.

/s/ Deborah A. Servitto