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UNPUBLISHED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.

PER CURIAM.

In Docket No. 314836, appellant Progressive Michigan Insurance Company ("Progressive") appeals by leave granted[1] the December 6, 2012 orders granting summary disposition in favor of appellee QBE Insurance Corporation ("QBE") and denying Progressive's motion for summary disposition, or in the alternative partial summary disposition, against QBE. In Docket No. 319312, Progressive appeals as of right from the August 30, 2013 order denying its objections and granting QBE case evaluation sanctions and prejudgment interest. We reverse and remand for further proceedings consistent with this opinion.

[1] *Burton v Progressive Mich Ins Co*, unpublished order of the Court of Appeals, entered October 1, 2013 (Docket No. 314836).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This consolidated appeal arises from a collision involving plaintiff,[2] then a minor, who while riding a bicycle was struck by an automobile operated by Ruben Arreola, on June 2, 2007, in the city of Detroit. On the date of the accident, plaintiff resided with his father, Anthony Button, and his father's girlfriend, Marie Rudzinski. After the accident, Rudzinski contacted QBE, her insurer, and informed it that plaintiff was involved in an automobile accident. Rudzinski claimed that plaintiff was her step-son, and QBE paid personal protection insurance (PIP) benefits in the amount of $240,042, in the belief that plaintiff was a resident relative of Rudzinski, the named insured under the policy. On June 1, 2010, plaintiff filed a complaint against Arreola and QBE for PIP benefits and uninsured/underinsured motorist benefits; during discovery, the parties learned that plaintiff was not actually Rudzinski's step-son. Subsequently, on May 31, 2011, plaintiff named Progressive, Arreola's insured, as a defendant in his amended complaint. On July 18, 2011, QBE filed a cross-claim against Progressive seeking recovery of the $240,042 in PIP benefits paid to or on behalf of plaintiff, as well as a determination that QBE was not responsible for payment of past, present, or future PIP benefits owed to plaintiff.

On June 14, 2012, after the trial court determined that Progressive was the insurer in the highest order of priority, Progressive filed a motion for partial summary disposition against plaintiff, asserting that the one-year-back rule of MCL 500.3145(1) limits his recovery to damages incurred on or after May 31, 2010. The trial court granted the motion. On September 10, 2012, Progressive filed a motion for summary disposition and partial summary disposition against QBE pursuant to MCR 2.116(C)(8) and (10), and argued that the one-year-back rule limited QBE's recovery to damages incurred on or after one year preceding the date QBE filed its cross-claim. QBE also filed a motion for summary disposition pursuant to MCR 2.116(C)(10), and argued that the one-year-back rule was not applicable, and that the trial court should enter judgment in its favor based on the common-law right to reimbursement of payments made under a mistake of fact. On December 6, 2012, the trial court entered an order denying Progressive's motion. It further granted summary disposition in favor of QBE, and ordered that judgment be entered in favor of QBE against Progressive in the amount of $240,042.32. The trial court also awarded QBE case evaluation sanctions and prejudgment interest. Progressive now appeals.[3]

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[2] Intervening plaintiff Special Tree Rehabilitation System was allowed to intervene as a plaintiff after alleging that it that it provided medical and rehabilitative services to plaintiff that had gone unpaid by any insurance company. The singular "plaintiff" will be used in reference to both plaintiff and intervening plaintiff.

[3] After filing his complaint, plaintiff requested assistance from the State of Michigan Assigned Claims Facility to assign plaintiff's claim to an insurer for immediate payment of no-fault benefits. The State of Michigan Assigned Claims Facility subsequently assigned the claim to Citizens Insurance Company ("Citizens"), which was substituted as a defendant and cross-defendant. Citizens filed a cross-claim against QBE and Progressive (as well as another insurance company later dismissed from the lawsuit) asserting that it had paid no-fault benefits to

II. ONE-YEAR-BACK RULE

Progressive contends that the trial court erred in determining that the one-year-back rule did not apply to QBE's cross-claim for recovery of PIP benefits from Progressive. We agree.

Although the trial court did not specify under which subrule it made its summary disposition determinations, the record suggests that it denied Progressive's motion for summary disposition under MCR 2.116(C)(8), and granted summary disposition in favor of QBE under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion under MCR 2.116(C)(8) may not be supported with documentary evidence and tests the legal sufficiency of the claim as pleaded, and all factual allegations and reasonable inferences supporting the claim are taken as true. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). A motion under MCR 2.116(C)(8) should be granted "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) by considering the affidavits, pleadings, admissions, depositions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Greene v AP Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). A motion based on MCR 2.116(C)(10) is appropriately granted "if there is no genuine issue regarding any 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 could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013). Questions of statutory interpretation are questions of law, which this Court also reviews de novo. *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

Progressive asserts that QBE's cross-claim is a subrogation claim, and that the trial court, in rejecting the well-established principles of subrogation, erred by holding that the one-year-back rule does not apply to QBE's cross-claim against Progressive. Contrarily, QBE contends that its claim is not one of subrogation, but instead, the common-law right of reimbursement, which it contends is not subject to the one-year-back rule.

The one-year-back rule, as set forth in MCL 500.3145(1), provides, in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made,

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or on behalf of plaintiff and sought reimbursement from these parties. Citizens is not a party to this appeal.

> the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, 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.* [Emphasis added.]

Thus, according to MCL 500.3145(1), the one-year-back rule limits recovery in an action for PIP benefits to those losses incurred within one year preceding the commencement of an action to recover such benefits. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005).

In a subrogation action, "the subrogee, upon paying an obligation owed to the subrogor as the primary responsibility of a third party, is substituted in the place of the subrogor, thereby attaining the same and no greater rights to recover against the third party." *Citizens Ins Co of America v American Community Mut Ins Co*, 197 Mich App 707, 709; 495 NW2d 798 (1992). In effect, the subrogee stands in the shoes of the subrogor. *Yerkovich v AAA*, 461 Mich 732, 737; 610 NW2d 542 (2000). The nature of the lawsuit by a no-fault carrier in a subrogation action is determined by looking at the nature of the claim that the insured would have had against the primary insured. *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 60; 658 NW2d 460 (2003).

In *Titan Ins v North Pointe Ins*, 270 Mich App 339, 347; 715 NW2d 324 (2006), this Court held that claims between no-fault insurers for recovery of monies mistakenly paid by a non-primary insurer are considered claims of subrogation and are subject to the limitations period in MCL 500.3145(1). The Court noted that "the plain and unambiguous terms of MCL 500.3145(1) are not subject to interpretation, and the statute does not provide, as it could have, a separate limitations period in the event of mistake." *Id.* Although the *Titan* Court was specifically referring to the statute of limitations provision of MCL 500.3145(1), the holding is equally applicable to the one-year-back rule because in both instances, the subrogee stands in the shoes of the subrogor, and the nature of the subrogor's claim for PIP benefits falls within the scope of MCL 500.3145(1).

In this case, the trial court ruled that QBE's cross-claim was a subrogation claim, and that the one-year-back rule does not apply to such claims if there is a mistake of fact. We conclude that the trial court correctly determined the nature of the claim,[4] but incorrectly determined that the one-year-back rule did not apply. QBE's claim for recovery of mistakenly-paid PIP benefits from Progressive, even to the extent labeled a common-law claim for reimbursement for mistaken payments, is subject to the one-year-back rule. *Titan* definitively resolves this issue in

[4] Although QBE argues that its claim is not a subrogation claim, this Court has held that an action by an insurer to recover monies mistakenly paid is a subrogation action subject to the restrictions found in MCL 500.3145. See *Titan*, 270 Mich App at 346-347. Although QBE made payments under a perceived, rather than actual, obligation, the claim it asserts is still derivative of plaintiff's right to obtain benefits from Progressive, and the doctrine of subrogation is still applicable. See *id.*; see also *Amerisure*, 222 Mich App at 103.

favor of Progressive. *Titan*, 270 Mich App at 346-347; see also *Amerisure Co v State Farm Mut Auto Ins Co*, 222 Mich App 97, 103; 564 NW2d 65 (1997).

Further, regardless of whether the claim is labeled as one of subrogation, we would conclude that MCL 500.3145(1) would apply. Our Supreme Court has held that the one-year-back rule of MCL 500.3145(1) must be enforced by the courts as written. *Devillers*, 473 Mich at 586. The language in MCL 500.3145(1) provides a limitations period and limitation on damages for "[a]n action for recovery of personal protection insurance benefits payable under this chapter . . . ." Given that any claim by QBE, even brought directly against Progressive without relying on subrogation, is a claim for recovery of PIP benefits, that claim for recovery would fall within the purview of MCL 500.3145(1), and the one-year-back rule would apply.[5] Accordingly, 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.

III. AFFIRMATIVE DEFENSE--WAIVER

As alternative grounds for affirmance, QBE argues that the one-year-back rule is an affirmative defense, and that Progressive waived this defense by failing to raise the one-year-back rule in its first responsive pleading. We disagree.

Whether a particular ground for dismissal is an affirmative defense under MCR 2.111(F) is a question of law that is reviewed de novo on appeal. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001). A party generally must raise an affirmative defense in his first responsive pleading or it is waived. *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645, 648; 620 NW2d 310 (2000). MCR 2.111(F)(3) provides:

> *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
>
> (a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery;

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[5] We note additionally that although the common law allows recovery of mistaken payments from the parties to which the payments were made, see *Motors Corp v Enter Heat & Power Co*, 350 Mich 176, 181; 86 NW2d 257 (1957), this Court is unaware of any common-law authority allowing a party to recoup payments made under a mistake of fact from a party that did not actually receive the payments.

(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.

No published authority in Michigan specifically addresses whether the one-year-back provision in MCL 500.3145(1) constitutes an affirmative defense that must be raised in the parties' first responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading. With respect to MCL 500.3145(1), our Supreme Court has noted that the statute "contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered." *Devillers*, 473 Mich at 574. The Supreme Court, in *Joseph*, 491 Mich at 208, emphasized that the one-year-back rule in MCL 500.3145(1) is a limitation on damages and noted the legislative distinction between the statute of limitations and provisions that limit damages. Therefore, the one-year-back rule is not considered a statute of limitations, as listed under MCR 2.111(F)(3)(a).

Although the one-year-back rule is not specifically listed within MCR 2.111(F)(3)(a), that does not preclude it from being considered an affirmative defense. The affirmative defenses enumerated in MCR 2.111(F)(3)(a) "were not intended to form a closed class, but were included by way of illustration only." *Harris v Vernier*, 242 Mich App 306, 330; 617 NW2d 764 (2000), quoting *Campbell v St John Hosp*, 434 Mich 608; 455 NW2d 695 (1990). In *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993), this Court held:

> [a]n affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff. In other words, it is a matter that accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings. [Citation omitted.]

Thus, an affirmative defense presumes liability by definition. *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994).

We conclude that the applicability of the one-year-back rule constitutes an affirmative defense. The denial of relief to a plaintiff under the one-year-back rule does not depend on that plaintiff's failure to establish a prima facie case. Although QBE may have a valid claim and is able to establish a prima facie case for recovery of PIP benefits paid to or on behalf of plaintiff, Progressive, as an affirmative matter, may nevertheless establish that QBE is not entitled to prevail on any claim for PIP benefits on the basis of the one-year-back limitation. MCL 500.3145(1). Therefore, the one-year-back rule is an affirmative defense.

The question then becomes whether Progressive's failure to raise the one-year-back rule as an affirmative defense to QBE's cross-claim waives the defense. We conclude under the circumstances of this case that it does not.

"[T]he 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." *Stanke*,

200 Mich App at 317. In this case, Progressive failed to raise the one-year-back rule as an affirmative defense to QBE's cross-claim, and did not bring a motion to amend its answer to include this as an affirmative defense. However, Progressive did assert that the one-year-back rule barred or limited *plaintiff's* damages in its answers to both Button and Special Tree's complaints. QBE itself asserted the one-year-back rule as a defense against plaintiff, and Progressive made this same assertion against plaintiff in its answer to the amended complaint. Progressive later brought a motion for partial summary disposition against plaintiff based on this rule. Although Progressive did not raise the one-year-back rule specifically in relation to QBE's cross-claim (in another summary disposition motion) until approximately one year after the filing of its answer to the cross-claim, QBE was well aware that application of the one-year-back rule was at issue in the instant case, and was not unfairly surprised by Progressive's assertion and was given sufficient time to take a responsive position. *Stanke*, 200 Mich App at 317. For these reasons, and particularly given that QBE is plaintiff's subrogee and stands in plaintiff's shoes, and that Progressive timely pled the one-year-back rule as an affirmative defense to plaintiff's complaint, we find that Progressive did not waive the affirmative defense as to QBE, even though it failed to raise the one-year-back rule specifically in relation to QBE's cross-claim until its motion for summary disposition.[6]

IV. APPLICABLE DATE

Throughout the lower court proceedings, occasional reference was made to the one-year-back rule barring recovery for losses incurred more than one year before either (1) the date plaintiff filed his complaint or (2) the date QBE filed its cross-claim. To avoid any confusion, we will briefly explain why the date on which plaintiff filed his complaint is the correct reference point.

The starting point of the one-year-back rule is "the date on which the action was commenced." MCL 500.3145(1). "A civil action is commenced by filing a complaint with a court." MCR 2.101(B); see also *Waisenen v Superior Twp*, ___ Mich App ___; ___ NW2d ___ (2014), slip op at 5-6. The word "the" is a definite article which, especially when used before a noun, indicates a "specific or particular" instance of that noun. See *Robinson v City of Lansing,* 486 Mich 1, 14; 782 NW2d 171 (2010) (citations omitted). Because the relevant provision refers to "the action," we must determine to which "specific or particular" action it is referring. The phrase "the action" in this provision, plainly read, refers to the term "action" referenced earlier in MCL 500.3145(1). The first sentence sets forth a time limitation on the commencement of "[a]n action for recovery of personal protection insurance benefits." The

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[6] The fact that no published authority in Michigan has directly stated that the one-year-back rule is an affirmative defense also supports our holding. When a party has a "cogent reason" for not raising an issue as an affirmative defense, "it would be inequitable to bar" that party from raising the issue later. *Citizens Ins Co of Am v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001). Although QBE raised the one-year-back rule as an affirmative defense in its answers to Button and Special Tree, it may not have realized it risked waiver of application of the rule as against another insurer by its failure to additionally raise it in its answer to QBE.

second sentence further restricts the time for commencement of “the action.” It thus refers back to the “action” referenced in the first sentence. In further referencing “the action,” the third sentence, which comprises the one-year-back-rule, also refers to this same “action for recovery of personal protection insurance benefits . . .,” as set forth in the first sentence of the provision.

Here, plaintiff commenced “[a]n action for recovery of personal protection benefits” on June 1, 2010 by filing his initial complaint. When QBE later filed the cross-claim that is the subject of this appeal, it did so within an “action” that was already “commenced” for the purposes of the one-year-back rule. See *Waisenen*, slip op at 5-6.

Consequently, we reverse the trial court’s order denying Progressive’s motion for partial summary disposition, its order granting summary disposition to QBE, and its judgment in favor of QBE in the amount of $240,042.32, and remand for entry of an order precluding QBE from recovering losses incurred more than one year before the filing of plaintiff’s complaint on June 1, 2010, and for further proceedings consistent with this opinion. Additionally, because the trial court erred in entering the underlying judgment in favor of QBE against Progressive in the sum of $240,042.32, we necessarily vacate the order granting QBE case evaluation sanctions and prejudgment interest. MCR 2.403(O).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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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).