

STATE OF MICHIGAN
IN THE SUPREME COURT

ALAN JESPERSON,
Plaintiff-Appellant,

-vs-

AUTOMOBILE CLUB INSURANCE
ASSOCIATION,
Defendant-Appellee.

Supreme Court No. _____

Court of Appeals No. 315942

Macomb County Circuit Court
No. ~~11-006160-NO~~

*Publ Opn
9-16-14*

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M-Smitalski*

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NOTICE OF HEARING

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiff-Appellant, Alan Jesperson, seeks leave to appeal from the Michigan Court of Appeals decision dated September 16, 2014. A copy of that Opinion is attached hereto as Exhibit B. That opinion affirmed a circuit court decision granting the defendant's motion for summary disposition predicated on the one-year statute of limitations contained in MCL 500.3145(1).

Plaintiff requests that this Court grant leave to appeal to consider several important legal questions presented in this case. Alternatively, plaintiff requests that the Court summarily reverse the Court of Appeals September 16, 2014 decision and remand this matter to the Macomb County Circuit Court for further proceedings.

STATEMENT REGARDING QUESTIONS PRESENTED

- I. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT DEFENDANT WAS ENTITLED TO SUMMARY DISPOSITION BASED ON THE ONE-YEAR LIMITATIONS PERIOD PROVIDED IN MCL 500.3145(1)?

Plaintiff-Appellant says "Yes".

Defendant-Appellee says "No".

- II. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT DEFENDANT COULD NOT BE DEEMED TO HAVE WAIVED AN UNPLEADED AFFIRMATIVE DEFENSE BECAUSE THE COURT OF APPEALS WOULD HAVE GRANTED DEFENDANT THE RIGHT TO AMEND ITS AFFIRMATIVE DEFENSES?

Plaintiff-Appellant says "Yes".

Defendant-Appellee says "No".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Alan Jespersen was involved in a vehicular accident on May 12, 2009, when the motorcycle he was riding was rear-ended. Mr. Jespersen developed back and shoulder pain as a result of the accident.

Mr. Jespersen did not notify Auto Club Insurance Company (ACIA) of the accident in writing within one year of its occurrence. He did, however, provide ACIA with such notice on June 2, 2010. Beginning in July 2010, ACIA began paying no fault benefits to Mr. Jespersen. ACIA paid more than \$22,000.00 in no fault benefits to Mr. Jespersen over the following nine months.

In December 2010, Mr. Jespersen filed a third-party negligence suit in the Macomb County Circuit Court against the driver of the vehicle who struck him and his employer. Four months after this suit was instituted, ACIA terminated the payment of no fault benefits to Mr. Jespersen. Mr. Jespersen then moved to amend his Complaint to add ACIA as a defendant based on its failure to pay all benefits due under the No Fault Act. ACIA was added to the case by amendment in May 2011.

In June 2011, ACIA filed its Answer and Affirmative Defenses. A copy of that pleading is attached as Exhibit A. In responding to Mr. Jespersen's complaint, ACIA claimed a number of affirmative defenses. Among the affirmative defenses listed by ACIA was the following:

That since notice was given, or payment has been previously made, Plaintiff may not recover benefits for any alleged expenses incurred more than one (1) year before the date on which the action was commenced, pursuant to MCL 500.3145(1).

ACIA Affirmative Defense (Exhibit A), No. 3.

In the nineteen month period that followed the filing of the answer, Mr. Jespersen and ACIA litigated this case. Discovery was conducted, case evaluation took place and the parties went to

facilitation in an unsuccessful attempt to resolve their differences.

The trial on Mr. Jespersen's claim against ACIA were scheduled to begin on February 19, 2013. Less than three weeks before that trial date, ACIA filed a motion for summary disposition. In that motion ACIA argued for the first time that Mr. Jespersen's claim was barred by the one-year limitations period provided in MCL 500.3145(1).

In response to ACIA's motion, Mr. Jespersen raised two arguments. First, he argued that this case was exempted from MCL 500.3145(1)'s one-year limitation by the language in that statute indicating that this one-year limitations period was inapplicable where "the insurer has previously made a payment of personal protection insurance benefits for the injury." Thus, pointing to the no fault benefits that ACIA had paid to him between July 2010 and April 2011, Mr. Jespersen argued that this case was not governed by the one year limitations period provided in MCL 500.3145(1).

Mr. Jespersen's second argument in response to ACIA's motion was that under the court rule governing the pleading of affirmative defenses, MCR 2.111(F), ACIA had waived any right to claim the limitations period in MCL 500.3145(1) by failing to plead it properly.

ACIA's motion for summary disposition was heard by the circuit court on the date that the case was set for trial, February 19, 2013. The circuit court ruled that Mr. Jespersen's claim was subject to the one-year statute of limitations set out in MCL 500.3145 and dismissed it on that basis.

In granting the motion for summary disposition on the basis of MCL 500.3145(1), the circuit court did not address the second argument that Mr. Jespersen raised in response to ACIA's summary disposition motion. Thus, the circuit court did not address the question of whether ACIA had waived any defense predicated on MCL 500.3145(1)'s limitations period by failing to properly plead it as an affirmative defense.

Following the denial of a motion seeking reconsideration, Mr. Jespersen appealed to the Michigan Court of Appeals. On appeal, Mr. Jespersen raised the same two issues that he argued in opposition to ACIA's request for summary disposition. First, he contended that the circuit court erred in concluding that his action was untimely under the 1 year limitation period of MCL 500.3145(1). On this issue, Mr. Jespersen again contended that this limitations period was inapplicable where, as here, ACIA had made various payments of no fault benefits prior to the date that he filed his case.

The Court of Appeals issued a published decision addressing these arguments on September 16, 2014. A copy of that opinion is attached as Exhibit B. In that opinion, a two person majority of the Court of Appeals affirmed the circuit court's grant of summary disposition based on MCL 500.3145(1). With respect to the limitations issue, the Court of Appeals majority ruled that the exception to the one year limitations period that exists where "an insurer has previously made a payment of personal protection insurance benefits for the injury," did not apply in this case since that exception only applied where the insurer made those payments within one year of the date of the accident. Thus, the majority held in the September 16, 2014 opinion:

We conclude from this plain statutory language that the Legislature intended that the word "previously" mean previous to "1 year after the date of the accident causing injury." This interpretation is supported by the fact that the Legislature juxtaposed "previously" with "1 year after the date of the accident causing injury," which language thus appears much closer in proximity to the word "previously" than does the Legislature's earlier reference to the commencement of "[a]n action." This interpretation also is supported by two principles of statutory construction: our directive to avoid interpretations that result in absurd consequences, and our directive to avoid interpretations that render portions of a statute nugatory. See *Detroit Int'l Bridge Co v. Commodities Export Co*, 279 Mich.App 662, 674; 760 NW2d 565 (2008); *Robinson v. City of Lansing*, 486 Mich. 1, 21; 782 NW2d 171 (2010). To hold, as plaintiff suggests, that any payment made by an insurer would revive a stale claim, no matter how much time has elapsed, would render an absurd result by

allowing, potentially, even decades-old claims to be asserted. Further, such an interpretation would essentially eliminate the limitations period of MCL 500.3145(1) in cases where an insurer has ever paid anything on a claim, rather than providing a limited exception that allows for the filing of suit more than one year after the accident in certain circumstances. We decline to adopt plaintiff's preferred interpretation, which we find would be in contravention of the "Legislative purpose in the No-Fault Act in encouraging claimants to bring their claims to court within a reasonable time and the reciprocal obligations of insurers to adjust and pay claims seasonably" and to "protect against stale claims and protracted litigations." *Pendergast v. American Fidelity Fire Ins Co*, 118 Mich.App 838, 841-842; 325 NW2d 602 (1982).

In reaching this conclusion, we are not unmindful of the fact that in crafting the first exception the Legislature chose language that expressly required written notice of injury "within 1 year after the accident," whereas in crafting the second exception it chose to use the word "previously." However, in the context of this statute, we conclude that the two phraseologies mean precisely the same thing. The Legislature was not required to use identical terminology in crafting the two exceptions, particularly when doing so in the context of a single statutory sentence would be repetitive. We conclude in this circumstance that the Legislature did not intend different temporal meanings in the two exceptions, but instead intended that the second exception's use of the word "previously" conveyed the same temporal meaning as did the quoted language of the first exception.

Opinion (Exhibit B), at 6-7.

With respect to Mr. Jesperson's waiver issue based on MCR 2.111(F), the Court of Appeals majority ruled that any failure on the part of ACIA to plead the one-year limitations period of MCL 500.3145(1) as an affirmative defense would be excused for the following reasons:

However, leave to amend pleadings should be freely granted to a nonprevailing party at summary disposition, unless such amendment would be futile or otherwise unjustified. *Lewandowski v. Nuclear Mgt*, 272 Mich.App 120, 127; 724 NW2d 718, 723 (2006). Thus, had the trial court found that defendant had failed to plead the statute of limitations defense with sufficient clarity, it could have, in its discretion, granted defendant leave to amend its pleading, in which case the result would be the same—the limitations period of MCL 500.3145(1) would still bar plaintiff's claim. Given the trial court's discretion to simply allow amendment of the pleading, and in the interest of judicial efficiency, we see no need to remand the case for the trial court to do just that. Accordingly, we find no waiver of the affirmative defense of statute of limitations.

Id., at 8.

Judge Deborah A. Servitto dissented from the majority's ruling on the waiver issue.

ARGUMENT

I. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS MISCONSTRUED MCL 500.3145(1) AND ITS ONE YEAR LIMITATIONS PERIOD.

This case presents a significant question as to the appropriate interpretation of MCL 500.3145(1), the provision of the no fault act containing one-year limitation period for the filing of any claim for benefits under that act. That subsection provides:

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, 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. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

This case concerns the first two sentences of §3145(1). That section's first sentence begins with a general statement of the limitations period: an action for no fault benefits "may not be commenced later than 1 year after the date of the accident . . ." That general statement of the limitations period is, however, subject to two exceptions, both introduced with the word "unless."

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.

The second sentence of §3145(1) specifies that, if "a payment has been made" by a no fault insurer, a plaintiff may bring suit within one year from the date that the most recent allowable

expense was incurred.

There is no question here that Mr. Jespersen did not name ACIA in a suit for no fault benefits until more than one year had elapsed after the date of the accident. There is also no question that the first of the two exceptions to the one year limitations period is inapplicable here since Mr. Jespersen did not provide written notice of the injury to ACIA until more than one year after the accident.

However, prior to the date that Mr. Jespersen instituted this action against ACIA, that insurer did, in fact, make a series of payments of no fault benefits to him. It was on the basis of these payments and the second exceptions to the one year limitations period provided in §3145(1) that Mr. Jespersen argued below that his claim was timely filed. The circuit court and the Court of Appeals rejected Mr. Jespersen's argument. They held that this second exception to the one year statute of limitations only applies where an insurer's payment of no fault benefits occurs within one year of the date of the accident. Because ACIA did not begin paying no fault benefits to Ms. Jespersen until July 2010, fourteen months after the accident, the Court of Appeals majority ruled that his claim was barred by the one year limitations period of §3145(1).

This Court should review the Court of Appeals determination that §3145(1)'s one year period of limitations applies to these facts. By requiring that payments of no fault benefits must be made within one year of the accident to trigger the exception to the one-year limitations period of §3145(1), the Court of Appeals has read into §3145(1) an additional requirement that simply was not placed there by the Legislature.

Contrary to the conclusion reached by the Court of Appeals in this case, this Court has already summarized how this statute is to operate under the clear text chosen by the Michigan Legislature. In *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006), overruled by

Regents of University of Michigan v Titan Ins Co, 487 Mich 289; 718 NW2d 784 (2006), overruled by *Joseph v Auto Club Ins Ass'n*, 491 Mich 200; 815 NW2d 412 (2012), this Court noted:

Thus, an action for PIP benefits must be commenced within a year of the accident unless the insured gives written notice of injury *or previously received PIP benefits from the insurer*. *If notice was given or payment was made, the action can be commenced within one year of the most recent loss*. Recovery, however, is limited to losses incurred during the year before the filing of the action.

476 Mich at 61. (emphasis added).

The *Cameron* Court's summary of how §3145(1)'s one year limitations period operates was correct. If a plaintiff has previously received payment of no fault benefits, an action to recover unpaid benefits may be commenced within one year after the plaintiff's most recent loss. There is no additional requirement that the payment of benefits be made within one year of the accident.

A closer examination of the text of §3145(1) confirms the accuracy of the *Cameron* Court's observations. The general one-year statute of limitations of §3145(1) gives way in two circumstances. Either where the plaintiff provides written notice of injury within one year of the accident *or* where the insurer has previously made a payment of benefits. The use of the disjunctive "or" in separating these two exceptions to the one year limitations period is significant.

The use of the disjuncture "or" indicates "a disunion, a separation, an alternative." *People v Kowalski*, 489 Mich 488, 499, n. 11; 803 NW2d 200 (2011), *cf Baker v General Motors (After Remand)*, 420 Mich 463, 496; 363 NW2d 602 (1984); *People v Pfaffle*, 246 Mich App 282, 297; 632 NW2d 162 (2001). Thus, under standard principles of statutory interpretation, the two exceptions to §3145(1)'s one year limitation period must be construed as completely independent of the other. As expressed in a primary treatise on the interpretation of statutes, "[t]he disjunctive 'or' usually, but not always, separates words or phrases in the alternative relationship, indicating that *either of the*

separated words or phrases may be employed without the other. The use of the disjunctive usually indicates alternatives and *requires that these alternatives be treated separately.*” 1A Sutherland Statutory Construction (7th ed), §21-14 (emphasis added).

The independent character of the two exceptions to the one year limitation period of §3145(1) is of importance here because one of these two exceptions makes specific reference to the one year period after the accident. Thus, §3145(1)’s first sentence exempts from the one year limitations period those situations in which written notice of the injury has been provided to the insurer “within 1 year of the accident.”

Notably, this reference to the time period one year after the accident in the “written notice” exception to the statute of limitations is absent from the entirely separate and independent second exception that comes into play in this case. Quite obviously, the Legislature could have drafted this “payment” exception to the one year statute of limitations with the same temporal limitation it imposed in the “written notice” exception. The Legislature could have indicated that the one year limitations period applied, “unless the insurer has *within 1 year of the accident* made a payment of personal protection insurance benefits for the injury.” But, that is not what the Legislature did in drafting the first sentence of §3145. Instead, it provided an exception to the statute of limitations where an employer has “previously” made a payment of no fault benefits.

Since Michigan courts “may not assume that the Legislature inadvertently made use of one word or phrase instead of another,” and because courts have a duty “to give meaning to the Legislature’s choice of one word over the other,” *Robinson v City of Detroit*, 462 Mich 439, 459, 461; 613 NW2d 307 (2000), the logical conclusion to be drawn from the two exceptions to §3145(1)’s one year statute of limitations is directly the opposite of that reached by the Court of

Appeals majority. The Legislature's use of the word "previously" in the second exception to the one year limitations period has to mean something different from the phrase "1 year after the accident" contained in the clause that precedes it.¹

The Court of Appeals majority chose to ignore the first exception altogether except to note in passing that it does refer to the one year period after the accident. Opinion (Exhibit B), at 6.

Removing that first exception left the Court of Appeals majority with the following:

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 the insurer has previously made a payment of personal protection insurance benefits for the injury.

The majority elected to have the word "previously" refer back to the phrase "1 year after the date of the accident," thus arriving at the conclusion that the no fault payments triggering this exception had to be made within one year of the accident. The majority offered no explanation as to why the adverb "previously" would not be read in tandem with the verb that is used in the preceding clause, "commenced."

MCL 500.3145(1) is a statute of limitations. And, like most other statutes of limitations in

¹The Court of Appeals majority expressly rejected this basic principle of statutory interpretation when, after noting the differences in the language of the two exceptions, it reached the conclusion that "in the context of this statute, we conclude that the two phrasologies mean precisely the same thing." The Legislature was not required to use identical terminology in crafting the two exceptions." Opinion (Exhibit B), at 7. While principles of good expository writing might counsel use of two different phraseologies to express comparable concepts, the same thing cannot be said in the field of legislative draftsmanship. In that setting, where precision really matters, if a legislative body means to express the same thing, it must use the same terminology for the simple reason that courts are compelled to give effect to differences in statutory terminology. The Court of Appeals majority's approach, therefore, runs afoul of this Court's observation that "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993); *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011).

Michigan law, this particular statute of limitations is written in terms of when a cause of action must be *commenced*. See MCL 600.5805(1); MCL 600.5807; MCL 600.5808. There is no reason why the adverb “previously” should not be read together with the operative verb used in this and most other statutes of limitations. Such a reading renders the following entirely logical interpretation of the first sentence of §3145(1): An action for recovery of no fault benefits may not be *commenced* outside the statutorily prescribed period of limitations “unless the insurer has previously made a payment of personal protection insurance benefits for the injury.”

Not only is this an entirely reasonable rendering of the first sentence of §3145(1), it is the only one that fits the express language of the second sentence of that statute, a sentence that the Court of Appeals majority overlooked entirely in its analysis.

The second sentence of §3145(1) both reinforces and adds an additional element to the two exceptions to the statute of limitations identified in the prior sentence. That second sentence states: “If the notice has been given or *payment has been made*, the action may be commenced at any time within 1 year after the most recent allowable expense . . . has been incurred.” (emphasis added). There is, obviously, no temporal limitation on the “payment” mentioned in this second sentence; it does not state that a case may be filed one year after the last allowable expense if payment of a no fault benefit was made *within one year after the accident*.

The fundamental point to be made is that Mr. Jespersen’s cause of action was timely filed on the basis of the *second* sentence of §3145(1). In light of that fact, it was particularly inappropriate for the Court of Appeals to strain to read the first sentence of §3145(1) in such a way as to conflict with the clear language of that subsection’s second sentence.

Finally, the majority suggested that its reading of the first sentence of §3145(1) was

necessitated by the need to avoid an absurd result. Assuming for the moment that the “absurd results” doctrine remains viable, *cf Johnson v Recca*, 492 Mich 169, 192-193; 821 NW2d 520 (2012), the Court of Appeals majority seriously missed the mark with the suggestion that the interpretation of §3145(1)’s literal text as proposed by plaintiff somehow reaches an absurd result.

The Court of Appeals majority offered the view that the interpretation proposed by plaintiff was “absurd” because it would “essentially” eliminate the statute of limitations in claims for no fault benefits and would, in the majority’s view, be in contravention of the no fault act’s purpose of “encouraging claimants to bring their claims to court within a reasonable time . . .” Opinion (Exhibit B), at 7. This is a particularly hollow critique of Mr. Jespersen’s legal position. In point of fact, there is both a statute of limitations and a damage limitation contained in §3145(1) which completely eliminates the “absurd” results that the majority envisioned.

The forgotten second sentence of §3145(1) represents a statute of limitations that would still remain in effect even under the interpretation of that statute that Mr. Jespersen has offered. That second sentence specifies that where, as here, no fault benefits have previously been paid, a case must still be commenced within one year of the most recent allowable expense.

But, even more important in avoiding the “absurdity” that the Court of Appeals majority foresaw is the effect of the one year back rule of §3145(1). That statute specifically provides that “the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date in which the action is commenced.” The upshot of the one-year back rule of §3145(1) is that, with or without a statute of limitations governing such actions, not a single no fault insurer will ever be called upon to defend against “stale” claims since the farthest back that such a case could reach in terms of the damages to be awarded is one year. Moreover, the one year back rule of

§3145(1) guarantees that, with or without a statute of limitations, no claimant will ever be encouraged to sit on his legal rights for an extended period of time before bringing suit to recover no fault benefits.

For each of these reasons, this Court should review and reverse the Court of Appeals majority's interpretation of §3145(1)'s "payment" exception to the one year limitations period provided in that subsection. Because this case was brought after "the insurer . . . previously made a payment of personal protection insurance benefits . . ." and within one year of the most recent allowable expense, Mr. Jespersen's action was timely filed.

II. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT DEFENDANT DID NOT WAIVE ITS STATUTE OF LIMITATIONS DEFENSE.

The second issue that Mr. Jespersen raised in response to ACIA's motion for summary disposition was that it had waived any defense based on §3145(1)'s one year statute of limitation. The circuit court failed to consider this question. The Court of Appeals majority brushed aside the circuit court's failure to address this issue and, instead, took it upon itself to allow the defendant an amendment of its deficient affirmative defenses. What the Court of Appeals did on this waiver question was completely wrong.

The Michigan Court Rules specify that a party against whom a case is filed "must assert in a responsive pleading the defenses the party has against the claim." MCR 2.111(F)(2). The court rules further specify that, except for the question of subject matter jurisdiction, "[a] defense not asserted in the responsive pleading . . . as provided by these rules is waived." MCR 2.111(F)(2).

The Michigan Court Rules contain a specific provision with respect to affirmative defenses,

MCR 2.111(F)(3). That subrule 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;

(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.

Id.

MCR 2.111(F)(3) does not merely require that a defendant *identify* a potential defense in its list of affirmative defenses. Rather, MCR 2.111(F)(3) specifically requires that a responding party state *the facts* that form the basis for an affirmative defense. It is also noteworthy that the court rules pertaining to the pleading of affirmative defenses is written in mandatory language. A party *must* assert all defenses under MCR 2.111(F)(2), all affirmative defenses *must* be stated in a party's first responsive pleading, and the separate list of affirmative defenses *must* include a statement of the facts constituting such a defense.

The language contained in a Michigan Court Rule is subject to the same rules of construction as that of a statute. *Marketos v American Employers Ins. Co.*, 465 Mich 407, 413; 633 NW2d 371 (2001); *McAuley v General Motors Corp.*, 457 Mich 513, 518; 578 NW2d 282 (1998). This means that if a court rule is clear and unambiguous as written, no amount of interpretation is necessary and the rule is to be enforced according to its plain language. *Grievance Administrator v Underwood*,

462 Mich 188, 193-194; 612 NW2d 116 (2003); *Hinkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). Here, the language of MCR 2.111(F)(2) and (3) is clear and unambiguous.

It is well established that a party's failure to comply with the mandatory language of MCR 2.111(F)(3) results in the waiver of any affirmative defense not raised in that party's initial response. *Campbell v St. John Hospital*, 434 Mich 608, 615; 455 NW2d 695 (1990); *Citizens Insurance Company of America v Juno Lighting, Inc.*, 247 Mich App 236, 241; 635 NW2d 379 (2001); *Harris v Vernier*, 242 Mich App 306, 330; 617 NW2d 764 (2000); *Cole v Ladbroke Racing Michigan, Inc.*, 241 Mich App 1, 8; 614 NW2d 169 (2000).

ACIA did not properly preserve a limitations defense based on §3145(1). ACIA did claim an affirmative defense based on the one year back rule of that statute, but it did not assert that Mr. Jespersen's claim for recovery was barred by the one year statute of limitations in §3145(1). Answer and Affirmative Defenses (Exhibit A), No. 3. MCR 2.111(F)(2) is explicit on the effects of ACIA's failure to properly name that statute of limitations defense. That defense has been waived.

In its September 16, 2014 opinion, the Court of Appeals majority indicated that since §3145(1)'s one-year back rule was included in ACIA's affirmative defenses, it was "arguable" that plaintiff "was made aware of the limitations period of that statute and not unfairly surprised by defendant's assertion of the defense." Opinion (Exhibit B), at 8.

However, the question for purposes of MCR 2.111(F) is not whether plaintiff was aware of the one year statute of limitations contained in §3145(1). The question, instead, was whether ACIA in its affirmative defenses stated the facts sufficient to support a defense based on §3145(1)'s statute of limitations. ACIA stated no such defense.

Indeed, the manner in which ACIA posed the only defense that it raised under §3145(1) - the

one year back rule - completely negated the notion that AICA was actually claiming that subsection's statute of limitations. In stating its claim to the one year back rule, ACIA's affirmative defense began, "*since notice was given, or payment has been previously made,*" Mr. Jesperson could only recover for the unpaid benefits that had accrued in the one year period before the filing of his case." Answer and Affirmative Defenses (Exhibit A), No. 3 (emphasis added). Thus, not only did ACIA fail to affirmatively claim a defense based on the one year limitations period of §3145(1), *it even explained in its affirmative defenses why no such defense was available to it - because it had previously made payment of no fault benefits to Mr. Jesperson.*

To suggest under these circumstances that Mr. Jesperson was "arguably" put on notice of ACIA's intent to resort to the one year limitations defense in §3145(1) is not merely legally irrelevant, it is ridiculous. In actuality, the explicit "notice" that ACIA provided to Mr. Jesperson in its affirmative defenses was that it would *not* be asserting a statute of limitations defense based on §3145(1) in this litigation.

In any event, the Court of Appeals majority did not appear to ground its decision with respect to ACIA's waiver of its limitations defense on the question of whether Mr. Jesperson was put on notice of ACIA's intent to raise such a defense. Instead, the Court of Appeals majority relied on an even more dubious proposition to conclude that there was no waiver.

The majority noted that ACIA's failure to include this limitations defense among its affirmative defenses could be corrected by amendment. Thus, the Court of Appeals majority observed that "the trial court . . . could have, in its discretion, granted defendant leave to amend its pleading . . ." Opinion (Exhibit B), at 8. After recognizing that the circuit court possessed the discretion to allow an amendment of ACIA's affirmative defenses, the Court of Appeals majority

offered the following completely baffling resolution of the waiver issue presented in this case: “Given the trial court’s discretion . . . we see no need to remand the case for the trial court to do just that.” Opinion (Exhibit B), at 8. Thus, while recognizing that it was the trial court who possessed the discretion to grant or deny amendment of ACIA’s affirmative defenses, the Court of Appeals took it upon itself to exercise the trial court’s discretion and, on that basis, it concluded its September 16, 2014 opinion with the following sentence: “[w]e find no waiver of the affirmative defense of statute of limitations.” *Id.* (emphasis added).

The Court of Appeals majority exhibited a fundamental misunderstanding of the role of that court in the review of discretionary decisions entrusted to circuit court judges. The Court of Appeals *reviews* circuit court discretionary decisions. The Court of Appeals does not *make* those decisions for the circuit court. The Court of Appeals, therefore, reviews circuit court decisions granting or denying requests to amend. But, the Court of Appeals does not grant or deny motions to amend.

It was for the circuit court in this case to determine whether to allow amendment of ACIA’s affirmative defenses. The circuit court failed to make that determination as it did not even address Mr. Jesperson’s arguments predicated on MCR 2.111(F). If the circuit court had addressed an ACIA request to amend, that decision would have been reviewable by the Court of Appeals under the deferential abuse of discretion standard. *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 53; 684 NW2d 320 (2004); *Wormsbacher v Seaver Title Co*, 284 Mich 1, 8; 772 NW2d 827 (2009).

In the absence of a circuit court decision on a request to amend ACIA’s affirmative defenses, the Court of Appeals majority had nothing to review. Its review role was limited to determining whether the circuit court abused its discretion in granting/denying such a request. Since the circuit court never exercised that discretion, it was impossible for the Court of Appeals to determine

whether that discretion has been appropriately exercised.

The Court of Appeals majority viewed its usurpation of the circuit court's discretionary decision-making as somehow furthering "the interest of judicial efficiency." *Id.*, at 8. This is not a question of "judicial efficiency," it is a question of the appropriate role of an appellate court. The circuit court in this case might have come to the conclusion that a defendant who waits nineteen months after being sued to raise a limitations defense and who proceeds through discovery, case evaluation and facilitation is not particularly deserving of the right to amend to claim a defense that it had previously conceded. The circuit court could well have been moved to reach this result and deny a request to amend. It is absolutely irrelevant that the two members of the Michigan Court of Appeals were willing to reach a different result.

The Court of Appeals majority blatantly erred in making a decision that was not theirs to make. Recognition of the appropriate role of the Court of Appeals demanded that the discretionary decision regarding any right to amend rest with the circuit court.

RELIEF REQUESTED

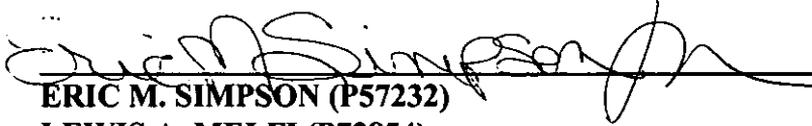
Based on the foregoing, plaintiff-appellant, Alan Jesperson, respectfully requests that this Court grant his application for leave to appeal and give full consideration to the issues presented. In the alternative, plaintiff requests that the Court summarily reverse the Court of Appeals September 16, 2014 ruling and remand this matter to the Macomb County Circuit Court for further proceedings.

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