

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE RENEE FAIRLEY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED

June 10, 2014

No. 315594

Court of Claims

LC No. 12-000031-MZ

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from the order of the Court of Claims denying its motion for summary disposition brought pursuant to MCR 2.116(C)(7). We affirm.

Defendant moved, untimely, to dismiss plaintiff's negligence action arising out of an automobile accident with a vehicle owned by defendant and driven by an agent of defendant, asserting that plaintiff's action must be dismissed for failing to file a proper notice of intention with the clerk of the Court of Claims as required by MCL 600.6431. It is undisputed that plaintiff filed a timely notice of intention, but that the notice was not signed by plaintiff or notarized as required by MCL 600.6431(1). The Court of Claims denied defendant's motion, citing *Kielb v Wayne State Univ Bd of Governors*, unpublished per curiam opinion of the Court of Appeals, issued October 2, 2012 (Docket No. 305927), which held that statutory notice provisions are affirmative defenses that must be raised or waived. Accordingly, the Court of Claims found that defendant's failure to raise the defense of non-compliance with the statutory notice provision constituted a waiver of that defense, and that defendant could therefore not raise the issue as a basis for summary disposition.

On appeal, defendant argues that the Court of Claims erred in denying its motion for summary disposition on the basis that defendant had waived the issue of plaintiff's non-compliance with MCL 600.6431(1). The grant or denial of a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

MCL 600.6431 establishes statutory procedures for filing complaints against the State in the Court of Claims. Specifically, MCL 600.6431(1) reads as follows:

No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

Defendant correctly notes that *Kielb*, as relied on by the Court of Claims, is not binding precedent. MCR 7.215(C)(1). However, in *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 840 NW2d 730 (2013), this Court held, consistent with *Kielb*, the following with regard to statutory notice provisions in medical malpractice actions:

It has essentially always been the rule in Michigan that defendants must “apprise the plaintiff of the nature of the defense relied upon, so that he might be prepared to meet, and to avoid surprise on the trial.” Today, pursuant to MCR 2.111(F), a defendant waives any affirmative defenses not set forth in the defendant’s first responsive pleading. An affirmative defense presumes liability and accepts a plaintiff’s prima facie case, but asserts that the defendant is not liable for other reasons not set forth in the plaintiff’s pleadings. We hold that failure to comply with purely procedural prerequisites for commencing a medical malpractice action is therefore an affirmative defense that must be raised or waived pursuant to MCR 2.111(F). [*Id.* at 212-213 (citations omitted).]

As in *Tyra*, the instant case involves plaintiff’s failure to comply with purely procedural prerequisites for commencing a cause of action. Further, as in *Tyra*, defendant’s argument that plaintiff’s non-compliance with the statutory notice provision entitles defendant to summary disposition “asserts that the defendant is not liable for other reasons not set forth in the plaintiff’s pleadings.” *Id.* at 212. Therefore, we conclude that defendant was required to raise the defense of non-compliance with the statutory notice provision as an affirmative defense and because it failed to do so, the defense is waived.

Defendant also asserts that MCL 600.6431 confers governmental immunity, which cannot be waived. However, defendant does not cite any authority for the proposition that MCL 600.6431 confers governmental immunity, and the text of the statute makes no mention of governmental immunity. Indeed, rather than precluding the filing of suit against the State, MCL 600.6431 establishes statutory procedures for doing so.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens