

STATE OF MICHIGAN
COURT OF APPEALS

PAUL MARSACK,

Plaintiff-Appellee,

v

TAMI SALENS, Personal Representative of the
Estate of LAURA GABRIEL,

Defendant-Appellant,

and

HASTINGS MUTUAL INSURANCE
COMPANY,

Defendant.

UNPUBLISHED

May 24, 2011

No. 291153

Sanilac Circuit Court

LC No. 08-032206-NI

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant, Tami Salens, as personal representative of the estate of Laura Gabriel, appeals by leave granted from the trial court's order denying her motion for summary disposition in this third-party no-fault action. We affirm.

On August 26, 2005, plaintiff suffered injury when he was a passenger in a single-vehicle accident. The vehicle was driven by Laura Gabriel, who died on October 27, 2007, from causes unrelated to the accident. On February 15, 2008, plaintiff filed a complaint alleging negligent operation of a motor vehicle by Gabriel that allegedly resulted in plaintiff suffering a serious impairment of a body function. On May 8, 2008, the process server learned through a neighbor that Gabriel had died in October 2007. Consequently, plaintiff requested the issuance of a second summons to account for the fact that an estate had not been opened for the decedent. On August 15, 2008, plaintiff requested the issuance of a third summons because he opened an estate for defendant on August 1, 2008, but could not serve as the personal representative of the estate due to a conflict of interest. Plaintiff alleged that counsel contacted Salens as the public administrator for Sanilac County, but she initially did not respond and eventually indicated that she was "not interested" in opening an estate. Unable to find someone willing to serve as the personal representative, plaintiff asserted that additional time was needed to perfect the opening

of the estate. Plaintiff also asserted that the earliest date upon which his petition for a personal representative could be heard was scheduled by the court for September 9, 2008. On August 14, 2008, the circuit court issued an order for a third summons. On September 9, 2008, the probate court apparently ordered Salens to serve as the personal representative and letters of authority issued on October 9, 2008.

On January 14, 2009, Salens, on behalf of the estate, filed a motion for summary disposition, alleging that the three-year statute of limitations, MCL 600.5805, expired on August 26, 2008, and the case was not filed until August 27, 2008. Additionally, at the time of the case filing, Gabriel was deceased and a personal representative had not been named. Therefore, Salens asserted that there was no proper party in existence to sue at the time the complaint was filed.

Plaintiff opposed the motion for summary disposition, alleging that the statute of limitations was tolled during the period in which the estate was without a personal representative and extended pursuant to MCL 600.5852. Plaintiff also asserted that the complaint was filed seven months before the expiration of the statute of limitations. When plaintiff learned that Gabriel was deceased, he learned that Salens was the public administrator for Sanilac County. Plaintiff's counsel alleged that he contacted Salens repeatedly to open an estate for Gabriel and serve as the personal representative, but she eventually indicated that she was "not interested." Ultimately, the probate court had to order Salens to serve as the personal representative. Therefore, plaintiff alleged that the cause of action was timely.

Shortly before the hearing on the motion for summary disposition, the personal representative filed a reply brief, alleging that MCL 600.5852 had been amended to allow for the filing of an action by an estate, but there was no equivalent provision addressing the defense of an action. At the hearing on the motion for summary disposition, the personal representative submitted that MCL 600.5852 was amended to eliminate actions against a decedent's estate and the case law relied on by plaintiff was inapplicable because it preceded the statutory amendment. The court ruled that MCL 600.5852 applied to the estate regardless of whether a plaintiff or a defendant was involved and denied the personal representative's motion for summary disposition. We granted the application for leave to appeal.

An issue of statutory construction is reviewed de novo. *Mich Ed Ass'n v Secretary of State*, 488 Mich 18, 26; 793 NW2d 568 (2010). The rules of statutory construction are well established:

Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature. Accordingly, a Court must interpret the language of a statute in a manner that is consistent with the legislative intent. In determining the legislative intent, the actual language of the statute must first be examined. As far as possible, effect should be given to every phrase, clause, and word in the statute. When considering the correct interpretation, a statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words within a statute, a court must consider both the plain meaning of the critical word or phrase as well as its

placement and purpose in the statutory scheme. When a statute explicitly defines a term, the statutory definition controls. [*Id.* at 26-27 (footnotes and quotations omitted).]

“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). “A statutory period of limitation provides a defense that bars a plaintiff’s cause of action because of an undue lapse of time since the cause of action arose.” *Herweyer v Clark Hwy Servs, Inc*, 455 Mich 14, 19; 564 NW2d 857 (1997), overruled in part on other grounds *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). Statutes of limitation were adopted to provide plaintiffs with a reasonable opportunity to bring suit, but also to protect defendants from stale claims, to shield them from protracted fear of litigation, and to ensure a fair defense. *Herweyer*, 455 Mich at 19. A statute of repose “prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed.” *Sills v Oakland Gen Hosp*, 220 Mich App 303, 308; 559 NW2d 348 (1996). “Unlike a statute of limitations, a statute of repose may bar a claim before an injury or damage occurs.” *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 513 n 3; 573 NW2d 611 (1998). Both the statute of limitations and the statute of repose prevent stale claims and provide relief to defendants from the protracted fear of litigation. *Id.* at 515.

The burden of establishing that a claim is barred by the statute of limitations is on the party raising the defense. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 74; 577 NW2d 150 (1998). “In determining whether an action is of a type subject to a particular statute of limitation, we look at the basis of the plaintiffs’ allegations.” *Ins Comm’r v Aageson Thibo Agency*, 226 Mich App 336, 342-343; 573 NW2d 637 (1997). Application of the law to the facts presents a question of law subject to review de novo. *Miller-Davis Co v Ahrens Constr, Inc*, 285 Mich App 289, 299; 777 NW2d 437 (2009). A party must cite authority in support of its position. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). A party may not merely announce its position and expect this Court to discover and rationalize the basis for the claims. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Furthermore, a party may not leave it to this Court to search for the factual basis offered in support of a position, but must correlate factual assertions to the location in the record. *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). We need not review an issue that is not raised in the statement of questions presented. *Brausch v Brausch*, 283 Mich App 339, 351; 770 NW2d 77 (2009).

The personal representative contends that MCL 600.5852 is a statute of limitations, and the statute of limitations was amended in 1998 to eliminate a cause of action against an estate. Salens asserts that the plain language of MCL 600.5852 merely provides for an action to be “commenced by” the personal representative, but may not be commenced against a personal representative. Finally, the personal representative alleges that this is an issue of first impression. We disagree with those arguments.

MCL 600.5852 provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be

commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

The personal representative bears the burden of establishing that plaintiff's claim is barred by MCL 600.5852. *Forest City*, 228 Mich App at 74. To determine whether an action is subject to a particular statute of limitation, we examine the foundation of the plaintiff's allegations. *Ins Comm'r*, 226 Mich App at 342-343.

Contrary to the argument raised by the personal representative, MCL 600.5852 is not a statute of limitations. Rather, MCL 600.5852 is a saving provision and an exception to the statute of limitations. *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004).¹ The plain language of MCL 600.5852 provides that it is invoked if a person dies before the period of limitations has run or within 30 days after the period of limitations has run. Thus, MCL 600.5852 must be applied in relationship to a separate period of limitations. *Id.* at 651. Therefore, MCL 600.5852 is an exception to the applicable statute of limitations "allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired." *Id.*

In the present case, plaintiff is not deceased. Additionally, a review of the allegations contained in plaintiff's complaint and amended complaint reveal that this is not a wrongful death action. Rather, plaintiff raised a claim of negligence resulting in a serious impairment of a body function governed by the provisions of the no-fault act. Consequently, the personal representative did not meet her burden of establishing that MCL 600.5852 applied. The application of an inappropriate statute to a factual scenario does not create an issue of first impression. Accordingly, the trial court did not err in denying the personal representative's motion for summary disposition. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009) ("[T]his Court will affirm where the trial court came to the right result even if for the wrong reason.")²

¹ See also *Miller v Mercy Mem Hosp*, 466 Mich 196, 202; 644 NW2d 730 (2002); *Lindsey v Harper Hosp*, 455 Mich 56, 60-61; 564 NW2d 861 (1997).

² We note that at the hearing regarding the motion for summary disposition, counsel for the personal representative acknowledged that he had failed to perform any research regarding the reason for the amendment to MCL 600.5852 to address the rationale for removing language addressing a cause of action against an estate. MCL 700.3803 addresses the propriety of claims against an estate that arise before, at, or after death. The parties did not brief the propriety of this section, and therefore, we do not address it. Additionally, although the personal representative asserted that the issuance of a third summons was inappropriate, the personal representative did not respond to the allegations that she was aware of the second summons, but refused to act as the personal representative during that time period because she was not interested. Moreover,

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

the issue of timeliness must be addressed in context with MCL 700.3803. In light of the failure to sufficiently brief this issue and where it was not raised in the statement of questions presented, we do not address it. *Brausch*, 283 Mich App at 351; *Peterson Novelties*, 259 Mich App at 14.