

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA FOCHTMAN, Personal Representative
of the Estate of WILLIAM FOCHTMAN,
Deceased,

UNPUBLISHED
January 18, 2007

Plaintiff-Appellant,

v

NORTHERN MICHIGAN HOSPITAL and BRAD
E. VAZALES, MD,

No. 259279
Emmet Circuit Court
LC No. 03-007845-NH

Defendants-Appellees.

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). We affirm.

Plaintiff brought this action following the death of her father William Fochtman after he underwent cardiac surgery performed by defendant Brad Vazales, MD. Plaintiff was appointed personal representative of William's estate on March 12, 2001, and she served defendants with a notice of intent to file a malpractice claim on March 5, 2003. The complaint in this case was filed on September 9, 2003. The trial court granted summary disposition in favor of defendants, finding that plaintiff's claims were time barred.

On appeal, plaintiff contends that defendants failed to timely raise and preserve their statute of limitations defense. Appellate courts review de novo a trial court's decision to grant a motion for summary disposition. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). Issues of law are also reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Pursuant to MCR 2.111(F)(2), a defendant generally must assert in his responsive pleading or by motion any defenses he has to the claims against him or they will be waived. Additionally, "[u]nder a separate and distinct heading, a party must state the facts constituting" any affirmative defenses, including those based on a statute of limitations. MCR 2.111(F)(3).

Here, defendants asserted in their answer to plaintiff's complaint under the heading "**AFFIRMATIVE DEFENSES**" that "the claim set forth in this Complaint did not accrue

within the applicable limitations period (under MCLA 600.5805 and 600.5838) before commencement of said action and is therefore barred by the Statute of Limitations.” Although defendants cited the wrong accrual provision for medical malpractice actions (MCL 600.5838a is the correct provision), we conclude that this statement was sufficient to preserve a statute of limitations defense under the court rules because it put plaintiff on notice that defendants might assert that the complaint was not timely filed. See *Grzesick v Cepela*, 237 Mich App 554, 560; 603 NW2d 809 (1999) (noting that the primary purpose of pleadings is to provide adverse parties with notice of claims and defenses they will have to meet or defend).

Plaintiff argues that defendant’s answer failed to provide adequate notice because it did not specify that defendant would argue that the notice tolling provision would not apply to toll the period provided in the wrongful death saving statute, MCL 600.5852, and observes that a defense that would likely “take the adverse party by surprise” must also be set forth in the responsive pleading. MCR 2.111(F)(3)(c). However, the court rules only require that the facts constituting an affirmative defense or a defense that would take the adverse party by surprise be set forth in the pleading. MCR 2.111(F)(3). It does not require the party to set forth a legal argument supporting the defense. Here, plaintiff’s claim is barred by the applicable statute of limitations and the wrongful death saving statute did not act to save it. In their list of affirmative defenses, defendants assert that plaintiff’s claim was barred because it did not accrue within the applicable limitations period. This is a correct statement of the facts. Essentially, plaintiff argues, without support, that defendants were required to state why the statute of limitations barred plaintiff’s claim despite any argument plaintiff might make concerning the notice tolling provision and the wrongful death saving statute. We reject this argument.

Plaintiff also argues that even if defendants adequately preserved the argument, *Waltz* should not be given retroactive effect to bar her claim. However, this Court is bound to give *Waltz* full retroactive effect. *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 505-506; 722 NW2d 666 (2006).

Plaintiff also cites to *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 432-433; 684 NW2d 864 (2004), for the proposition that this Court should consider the equities of this case and allow this action to proceed. In light of *Ward v Siano*, ___ Mich App ___, ___; ___ NW2d ___ (2006), which concluded “that judicial tolling should not operate to relieve wrongful death plaintiffs from complying with *Waltz*’s time restraints,” we reject plaintiff’s argument.

Also, plaintiff asserts that the trial court erred by refusing to dismiss this case without prejudice so that a successor personal representative could be appointed who might have timely filed a new action. Relying on *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), plaintiff argues that the successor personal representative would have had an additional two years to file a claim on behalf of the estate, as long as the claim was filed within three years of the expiration of the statute of limitations. A trial court’s decision denying a motion for voluntary dismissal without prejudice should not be reversed “absent an abuse of discretion.” *Mleczo v Stan’s Trucking, Inc*, 193 Mich App 154, 155; 484 NW2d 5 (1992).

In *Eggleston*, our Supreme Court held that a successor personal representative might have two years after appointment to file an action on behalf of an estate under the wrongful death saving statute. *Eggleston, supra* at 30. In *Eggleston*, the decedent’s widower “was appointed temporary personal representative and issued letters of authority on April 4, 1997. He died on

August 20, 1997.” *Id.* at 31. The decedent’s son was appointed successor personal representative on December 8, 1998, and on June 9, 1999, he filed a medical malpractice complaint. *Id.* “Thus, the estate of the decedent was represented for a total of approximately 10½ months when the complaint was filed, and neither the initial nor the successor representative represented the estate for the full two years available to him under the wrongful death saving statute.” *McLean v McElhaney*, 269 Mich App 196, 202; 711 NW2d 775 (2005). Here, unlike *Eggleston*, plaintiff was provided the full two years allowed under the legislative scheme set forth in the wrongful death saving statute to file her complaint, but failed to do so. Accordingly, pursuant to *McLean*, we conclude the trial court did not abuse its discretion by refusing to dismiss this case without prejudice. *Id.*

Affirmed.

/s/ Stephen J. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder