

STATE OF MICHIGAN
COURT OF APPEALS

BRENDA LANCASTER,

Plaintiff-Appellant,

v

GARY L. WEASE, M.D., and GARY L. WEASE,
M.D., P.C.,

Defendants-Appellees.

UNPUBLISHED

September 28, 2010

No. 291931

Genesee Circuit Court

LC No. 08-088836-NH

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) and dismissing plaintiff's complaint. We affirm.

This is a medical malpractice case arising from plaintiff's bariatric surgery performed by defendant Dr. Gary L. Wease. Dr. Wease performed a "Roux-en Y" gastric bypass procedure on plaintiff on November 29, 2005. On May 30, 2008, plaintiff filed the instant malpractice suit alleging that Dr. Wease improperly performed the procedure. The trial court granted defendants' motion for summary disposition, finding that plaintiff's complaint was barred by the statute of limitations.

Plaintiff first contends that the trial court erred in finding that her complaint was not timely filed. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Arthur Land Co, LLC v Otsego County*, 249 Mich App 650, 661; 645 NW2d 50 (2002). Summary disposition is available under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. "A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence." *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995); see also *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If documentation is submitted, the court must consider it. MCR 2.116(G)(5). "If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff." *Turner*, 210 Mich App at 348. "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a

matter of law whether the claim is statutorily barred.” *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

The period of limitations in a medical malpractice action is two years. MCL 600.5805(6). A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. MCL 600.5838a(1). Here, the alleged malpractice occurred during plaintiff’s gastric bypass surgery on November 29, 2005. Absent tolling, the period of limitations on plaintiff’s malpractice claim would have expired on November 29, 2007. MCR 1.108(3); MCL 600.5805(6).

Plaintiff served her notice of intent¹ to file a malpractice claim on November 28, 2007. Under MCL 600.5856(c), if the period of limitations would expire during the 182-day notice period (which it did in the instant case), the period of limitations is tolled “not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.” Here, the tolling period began running on November 29, 2007. MCR 1.108(1). When the notice period expired on May 28, 2008, the period of limitations resumed running and expired one day later on May 29, 2008, because only one day in the limitations period had remained when the notice of intent was filed.² Plaintiff did not file suit until May 30, 2008. Because plaintiff filed suit one day after the period of limitations expired, the trial court did not err in concluding that plaintiff’s complaint was barred by the statute of limitations.

Plaintiff also asserts that the trial court erred in permitting defendants to assert the statute-of-limitations defense even though defendants failed to provide a sufficient factual basis supporting the defense. Review of plaintiff’s unpreserved claim of error is limited to determining whether a plain error occurred that affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

An affirmative defense, such as a statute-of-limitations defense, must be raised in a party’s first responsive pleading or by motion filed not later than this responsive pleading; otherwise, the defense is waived. *Attorney General ex rel Dept of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007); MCR 2.111(F)(2) and (F)(3). A party must state the facts constituting an affirmative defense. MCR 2.111(F)(3)(a). “The underlying rationale for requiring a party to provide factual support for affirmative defenses is to prevent the adverse party from being taken by surprise at trial.” *Horvath v Delida*, 213 Mich App 620, 630; 540 NW2d 760 (1995).

¹ “[A] person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.” MCL 600.2912b(1). A plaintiff is required to wait the entire 182-day period before filing suit. *Burton v Reed City Hospital*, 471 Mich 745, 747; 691 NW2d 424 (2005).

² We note that May 29, 2008, was a Thursday, and therefore, it was possible for plaintiff to file suit on that day. Plaintiff’s computation is one day off when she suggests that the period of limitations resumed running on May 29, 2008.

Paragraph four of defendants' affirmative defenses provided:

4. That if, during the course of discovery in this matter, it is substantiated that any of Plaintiff's claims are barred by the Statute of Limitations applicable to said cause, these Defendants reserve the right to bring on before this Court a Motion for summary Disposition on said basis.

It is true that defendants did not provide a factual basis for the statute-of-limitations defense. However, no affirmative defense will be held insufficient where the defense is "sufficient to permit the opposite party to take a responsive position." *Hanon v Barber*, 99 Mich App 851, 856; 298 NW2d 866 (1980) (internal citation and quotation marks omitted). Plaintiff does not suggest that she was surprised by the statute-of-limitations argument raised in defendants' motion for summary disposition, nor is there any evidence to suggest that plaintiff lacked enough notice of the defense to enable her to formulate a responsive position. Defendants have not presented some novel or unusual statute-of-limitations argument. Plaintiff did not require time or resources over and above what she had in order to adequately respond to defendants' argument. Defendants' statement in their affirmative-defenses document was sufficient to preserve a statute-of-limitations defense because it put plaintiff on notice that defendants might assert that the complaint was untimely filed. No plain error affecting substantial rights occurred. Accordingly, we conclude that reversal is unwarranted.

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio