STATE OF MICHIGAN

COURT OF APPEALS

SHEILA ELLOUT, as Personal Representative of the ESTATE OF CYNTHIA LATIMORE,

Plaintiff-Appellant,

v

DETROIT MEDICAL CENTER, DETROIT RECEIVING HOSPITAL & UNIVERSITY HEALTH CENTER, and CHRISTINA L. COULBECK, R.N.,

Defendants-Appellees.

FOR PUBLICATION
October 8, 2009

No. 286207
Wayne Circuit Court
LC No. 06-635635-NH

K.F. KELLY, J. *(dissenting.)*

I respectfully dissent. I would affirm the trial court's order granting defendants' motion for summary disposition.

At issue is whether plaintiff's entire suit is barred because she filed her complaint before the end of the 154/182-day no-suit period of MCL 600.2912b. The trial court granted summary disposition for defendants because the statute of limitations had expired as to defendant Christina Coulbeck. See MCR 2.116(C)(7). It therefore dismissed the claim against Coulbeck with prejudice and also dismissed the claims against the remaining defendants as they had been sued based on the theory of vicarious liability. The majority concluded that this was error, because the appropriate remedy was to dismiss plaintiff's case against Coulbeck without prejudice. I disagree because plaintiff's suit is barred by the statute of limitations. It is also my view, and my concern, that the majority's opinion simply substitutes its opinion for that of the trial court's opinion, rather than analyzing the issue under the appropriate standard of review on appeal. Therefore, I respectfully dissent.

I.

Because defendants "moved for summary disposition under . . . MCR 2.116(C)(7), MCR 2.504(B)(3) applies." *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 295; 731 NW2d 29 (2007). MCR 2.504(B)(3) provides:

> (3) Unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than

> a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits.

It is clear that under this court rule, a trial court *may* in its discretion decide whether to dismiss a party with or without prejudice. As this Court recognized in *Rose v Rose*, 10 Mich App 233, 236; 157 NW2d 16 (1968):

> The reason for the rule is that if a plaintiff does not care enough to prosecute his action diligently, fairness requires that defendant be allowed to protect himself from the bother of filing answers to a multiplicity of complaints for the same claim, by relying upon the dismissal as ending the matter for all time. This affords plaintiff reasonable and ample opportunity to bring his action and sustain his claim, while demanding diligence on his part for the protection of the defendant.

And, this Court's review of whether a trial court's decision under this rule was proper is limited to determining whether the trial court abused its discretion. *Marquette v Fowlerville*, 114 Mich App 92, 96; 318 NW2d 618 (1982). Such an abuse occurs only when a trial court's decision is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006)

Here, the trial court dismissed Coulbeck with prejudice, relying on *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), and *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703; 620 NW2d 319 (2000), where dismissal with prejudice was appropriate when the statute of limitations had expired before the suit was commenced. The trial court made no mention in its original opinion and order whether or not its determination was an adjudication on the merits. Pursuant to MCR 2.504(B)(3) its dismissal operated as an adjudication on the merits. Moreover, on plaintiff's motion for reconsideration, the trial court affirmed its original decision, definitively stating that its initial decision dismissing Coulbeck with prejudice was an adjudication on the merits. Given the foregoing, and the fact that plaintiff failed to diligently proceed against Coulbeck, I fail to see how the trial court's determination was an abuse of discretion; rather, its decision to dismiss Coulbeck with prejudice because the statute of limitations had expired was squarely within the principled range of outcomes and was consistent with the court rule. *Al-Shimmari*, *supra* at 295.

Furthermore, the fact that the trial court reached this determination does not show, as plaintiff argues, that it failed to recognize that it had discretion to state in its order that Coulbeck's dismissal was not an adjudication on the merits consistently with MCR 2.504(B)(3). Nor does it indicate that the trial court erroneously believed that it was precluded from making such a statement. Rather, plaintiff's brief in support of her motion for reconsideration specifically directed the trial court to the relevant court rule. Thus, the trial court simply exercised its discretion to disallow plaintiff's attempt to further pursue her claims.

II.

I also consider to be unavailing plaintiff's argument that the trial court erred by denying her motion to voluntarily dismiss Coulbeck from the suit under MCR 2.504(A)(2).[1] The decision whether to grant or deny a voluntary dismissal is, again, within the trial court's discretion and we review its decision for an abuse of discretion. *McKelvie v City of Mount Clemens*, 193 Mich App 81, 86; 483 NW2d 442 (1992). A trial court should grant a party's motion for voluntary dismissal only if no prejudice will result to the defendant. *Makuck v McMullin*, 87 Mich App 82, 85; 273 NW2d 595 (1978).

Here, plaintiff sought to dismiss Coulbeck from the suit while defendants' motion for summary disposition was pending. Had the trial court voluntarily dismissed Coulbeck, it would have deprived all the other defendants of their entitlement to summary disposition before the trial court could decide the motion. A voluntary dismissal should not be granted to avoid an impending adverse decision. See *McLean v McElhaney*, 269 Mich App 196, 202-203; 711 NW2d 775 (2005) rev'd in part on different grounds by 480 Mich 978 (2007); *Rosselott*, *supra* at 375-376. Under these circumstances, I cannot conclude that the trial court abused its discretion in declining to voluntarily dismiss Coulbeck. The trial court's decision was certainly within the range of principled outcomes. *Maldonado*, *supra* at 388.

III.

Finally, I disagree with the majority that *Al-Shimmari* is not applicable to the present matter. The trial court properly considered the case and retroactively applied it to plaintiff's lawsuit, contrary to plaintiff's contention. A question concerning the retroactive application of a court's decision presents a question of law that we review de novo. *Duggan* v *Clare Co Bd of Comm'rs*, 203 Mich App 573, 575; 513 NW2d 192 (1994).

Typically, the decisions of this Court and the Michigan Supreme Court are given retroactive effect, meaning that they are applied to all pending cases in which a challenge has been raised and preserved. *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004). The courts of this state, however, will depart with this general rule if rare "exigent circumstances" exist. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005). In those matters, a decision will be applied prospectively, but such application is only appropriate if the decision at issue overrules "clear and uncontradicted case law." *Id*. at 587.

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[1] MCR 2.504(A)(2) provides in relevant part:

> Except as provided in subrule (A)(1) [dismissal by stipulation], an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper.
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> * * *
>
> (b) Unless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice.

In *Al-Shimmari*, our Supreme Court held that MCR 2.504(B)(3) means a dismissal based on the expiration of a statute of limitations operates as an adjudication on the merits unless the court specifies otherwise. *Al-Shimmari, supra* at 295-296. According to plaintiff, *Al-Shimmari* overruled *Rogers v Colonial Fed S & L Ass'n*, 405 Mich 607; 275 NW2d 499 (1979) (plurality opinion), which in plaintiff's view held that a dismissal based on expiration of the statute of limitations was *not* an adjudication on the merits. According to plaintiff, when she filed her complaint in December 2006, *Rogers*, and unpublished opinions citing it, was the existing, "clear and uncontradicted case law" on which she relied. However, the "sole issue" in *Rogers* was whether the plaintiff was barred, by res judicata or court rule, from bringing a second suit when her first suit had been voluntarily dismissed with prejudice. *Id*. at 613. The Court held that such a case would not be precluded. *Id*. *Rogers* did, however, state in a footnote, "An accelerated judgment based on the three-year statute of limitations is not an adjudication on the merits of a cause of action." *Id*. at 619 n 5, citing *Nordman v Earle Equip Co*, 352 Mich 342; 89 NW2d 594 (1958).

This footnote is not the holding of the *Rogers* Court, but is dicta that had the support of only three justices. Further, the case upon which this dicta relies for support, *Nordman*, was decided before the General Court Rules of 1963, which included the original version of MCR 2.504(B)(3), were even promulgated. Moreover, the *Al-Shimmari* Court found that the assertion in footnote 5 is contrary to the plain language of the court rule. *Al-Shimmari*, *supra* at 297. And, perhaps most significantly, our Supreme Court has already applied *Al-Shimmari* retroactively in *Washington v Sinai Hosp*, 478 Mich 412, 418-419; 733 NW2d 755 (2007). Thus, neither *Rogers* nor the unpublished Court of Appeals cases cited by plaintiff can be fairly described as "clear and uncontradicted case law," such that *Al-Shimmari* should only be applied prospectively. Accordingly, I would conclude that the trial court did not err in applying *Al-Shimmari* retroactively to plaintiff's case.

The trial court did not err in granting defendant's motion for summary disposition and did not abuse its discretion in dismissing plaintiff's case with prejudice. Accordingly, I dissent.

/s/ Kirsten Frank Kelly