

STATE OF MICHIGAN
COURT OF APPEALS

COUNTY OF ALCONA and ALCONA
COUNTY BOARD OF COMMISSIONERS,

UNPUBLISHED
September 24, 2013

Plaintiffs-Appellees/Cross-
Appellants,

v

ROBSON ACCOUNTING, INC., d/b/a
REHMANN ROBSON, and REHMANN GROUP,
L.L.C., d/b/a REHMANN GROUP,

No. 301532
Alcona Circuit Court
LC No. 08-001111-NM

Defendants-Appellants/Cross-
Appellees.

COUNTY OF ALCONA and ALCONA
COUNTY BOARD OF COMMISSIONERS,

Plaintiffs-Appellees,

v

ROBSON ACCOUNTING, INC., d/b/a
REHMANN ROBSON, and REHMANN GROUP,
L.L.C., d/b/a REHMANN GROUP,

No. 302134
Alcona Circuit Court
LC No. 08-001111-NM

Defendants-Appellants.

Before: CAVANAGH, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

This litigation arises from the embezzlement of funds by the county treasurer. Specifically, the county treasurer became involved in the “Nigerian Advance Fee Fraud Scam” in which he transferred in excess of 1.2 million dollars of county funds by wire transfer to foreign

banks.¹ Plaintiffs entered into contractual agreements with defendants to perform audits from 1998 to 2005. Defendants' audits did not uncover the county treasurer's embezzlement of the funds, and defendants did not advise plaintiffs that a system of dual signatures would reduce the risk of error and fraud. Consequently, plaintiffs filed a complaint against defendants, alleging accounting malpractice, breach of contract, and breach of implied contract. The case proceeded to trial, and the jury rendered a verdict in favor of plaintiffs. Because the trial court erred by denying defendants' motion for summary disposition premised on the contractual period of limitation, we reverse and remand for entry of an order granting defendants' motion for summary disposition.²

On December 19, 2005, the parties entered into a contract of engagement for auditing services. The contract, signed by the chair of the board of commissioners, contained the following contractual period of limitations:

Because there are inherent difficulties in recalling or preserving information as the period after an engagement increases, you agree that, notwithstanding the statute of limitations of the State of Michigan, any claim based on the audit engagement must be filed within (12) months after performance of our service, unless you have previously provided us with a written notice of a specific defect in our services that forms the basis of the claim.

The parties do not dispute that the last day of service was June 28, 2006, and plaintiffs' complaint was filed on March 4, 2008. Defendants moved for summary disposition premised on the limitations period contained in the contract. Plaintiffs opposed the motion, asserting that it did not apply to the claim of accounting malpractice. The trial court held that the two-year period of limitations for accounting or professional service malpractice controlled.

Defendants first allege that the trial court erred by denying their motion for summary disposition. We agree. A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). A motion for summary disposition pursuant to

¹ See *Alcona Co v Michigan Muni League Liability & Prop*, unpublished per curiam opinion of the Court of Appeals, issued March 10, 2011 (Docket No. 292155).

² In Docket No. 301532, defendants filed a claim of appeal challenging the denial of their motion for summary disposition, the limitation on their ability to present a case in light of the ruling on the motion to set aside the default, the qualifications of the plaintiffs' expert, the damages, the interest, and the award of attorney fees. In Docket No. 301532, plaintiffs filed a cross-appeal contesting the hourly attorney fees and expert fees. In Docket No. 302134, defendants protested the award of attorney fees in light of MCR 2.403. The appeals were consolidated "to advance the efficient administration of the appellate process." *Alcona Co v Robson Accounting, Inc*, unpublished order of the Court of Appeals issued August 10, 2011 (Docket No. 301532). In light of our conclusion that the trial court erred by denying defendants' motion for summary disposition, we do not address the remaining issues raised in either appeal.

MCR 2.116(C)(7) is properly granted when a statute of limitations bars a claim. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). To determine whether summary disposition is appropriate on the basis of MCR 2.116(C)(7), a court must examine all documentary evidence submitted by the parties and accept as true the allegations in the complaints unless affidavits or other documentation contradicts them. *Blue Harvest, Inc v Dep't of Treasury*, 288 Mich App 267, 271; 792 NW2d 798 (2010).

Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id.* “The nonmoving party may not rely on mere allegations or denials in the pleadings.” *Id.* The documentation offered in support of and in opposition to the dispositive motion must be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). When the opposing party provides mere conclusions without supporting its position with underlying foundation, summary disposition in favor of the moving party is proper. See *Rose v Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Indus, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). In *McCoig Materials, LLC*, 295 Mich App at 694, this Court set forth the following discussion regarding contracts:

“The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.” *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Issues regarding the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. *Fodale v Waste Mgt of Mich, Inc*, 271 Mich App 11, 16-17; 718 NW2d 827 (2006). When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Id.* A contract is unambiguous, even if inartfully worded or clumsily arranged, when it fairly admits of but one interpretation. *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008). Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided. *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010).

In *Rory v Continental Ins Co*, 473 Mich 457, 460; 703 NW2d 23 (2005), the trial court refused to enforce a one-year contractual limitations period contained in an insurance policy issued to the plaintiffs. The plaintiffs were injured in an automobile accident and had an insurance policy with the defendant which included optional coverage for uninsured motorist benefits. *Id.* at 461-462. More than one-year after the accident, the plaintiffs filed suit and learned that the driver in the other vehicle was uninsured. The defendant denied the claim because it was not timely filed within a year as required by the policy. *Id.* at 462. The trial court

concluded that the one-year limitations provision was unfair, unreasonable, and an unenforceable adhesion clause, and the Court of Appeals affirmed. Our Supreme Court reversed, concluding:

We hold, first, that insurance policies *are* subject to the same contract construction principles that apply to any other species of contract. Second, unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of “reasonableness” as a basis upon which courts may refuse to enforce unambiguous contractual provisions. [*Id.* at 461 (emphasis in original).]

Consequently, “a court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable.” *Id.* at 489. “[A]n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy.” *Id.* at 470.

Public policy will not restrain enforcement of a contractual provision unless the policy is explicit, well defined, and dominant. *Terrien v Zwit*, 467 Mich 56, 67-68; 648 NW2d 602 (2002). The only way to properly ascertain public policy is to examine the laws as reflected in the constitutions, statutes, common law, administrative rules and regulations, and public rules of professional conduct. *Id.* at 67, n 11.

The *Rory* Court proceeded to analyze whether a contractual provision that shortened the period of limitations was contrary to public policy:

As noted by this Court, the determination of Michigan’s public policy “is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law.” In ascertaining the parameters of our public policy, we must look to “policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.”

As an initial matter, we note that this Court has previously held that Michigan has “no general policy or statutory enactment . . . which would prohibit private parties from contracting for shorter limitations periods than those specified by general statutes.” This is consistent with our case law, which had held that contractually shortened periods of limitations were valid, and were to be disregarded only where the insured could establish estoppel or prove that the insurer waive the contractual provision. [*Rory*, 473 Mich at 470-471 (footnotes omitted).]

The Supreme Court examined the insurance policy in dispute, noting that the insurance commissioner approved the contract at issue for use. The insurance commissioner’s decision to allow the policy was not established as arbitrary, capricious, or a clear abuse of discretion. *Id.* at

476. The public policy of the state of Michigan was that reasonableness of insurance contracts presented a matter for the executive, not judicial, branch of government. *Id.* Accordingly, the lower court erred in determining de novo whether the insurance policy at issue was reasonable. *Id.*

Plaintiffs contend that this contract is distinguishable because it does not involve a commissioner approved insurance policy. However, case law examining the public policy of shortening a statutory limitations period in a contract has not been limited to insurance contracts. In *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118, 126-127, 136; 301 NW2d 275 (1981) overruled in part on other grounds in *Rory*, 473 Mich at 470 (to the extent it also contained a reasonableness analysis), our Supreme Court rejected the contention that a one-year period of limitation was contrary to public policy in a private contract:

Absent any statute to the contrary, the general rule followed by most courts has been to uphold provisions in private contracts limiting the time to bring suit where the limitation is reasonable, even though the period specified is less than the applicable statute of limitations. . . .

This rule has been held to apply in contracts bonding the performance of building or construction projects. . . .

We find no violation of public policy or basic unfairness in allowing the enforcement of this private contractual period of limitation, even though shorter than the statutory period normally applicable. . . . Neither do we find a violation of public policy in the fact that the plaintiff failed to discover the contract prior to its limitation. Plaintiff had a year in which to investigate possible bases of recovery. It failed to initiate any action during the period when recovery for its work was possible. [Citations omitted.]

Accordingly, plaintiffs' argument that enforcement of the shortened limitations period contained in the contract is contrary to public policy must be rejected. Pursuant to *Rory* and *Camelot*, the shortened limitations period is enforceable.

Plaintiffs further contend that the shortened period of limitations does not apply because an additional claim of accounting malpractice was raised, and the statute of limitations for a claim of malpractice is two years.³ However, plaintiffs failed to address the fact that the contract action and claim of accounting malpractice arise from the same transaction, the engagement contract for an audit. When claims of negligence and breach of contract are alleged to arise from

³In Michigan, the statute of limitations is six years for breach of contract claims, see MCL 600.5807(8); *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 59; 817 NW2d 609 (2012), and two years for malpractice, MCL 600.5805(6); *Local 1064, RSDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 333; 535 NW2d 187 (1995). However, here the plain language of the contract reveals that the parties shortened the period of limitations by agreeing to a term of 12 months in the engagement contract.

the same conduct or transaction, the issue of the propriety of each claim will not rest on mere allegations, but an analysis of the pleaded facts must occur. *Rinaldo's Constr Co v Michigan Bell Tel Co*, 454 Mich 65, 82; 559 NW2d 647 (1997). "A plaintiff cannot maintain an action in tort for nonperformance of a contract." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006). To pursue a tort action arising out of a contract, a threshold question must be satisfied. That is, whether the defendant owed a duty to the plaintiff that was separate and distinct from the obligations contained in the contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). The failure to properly perform a contractual duty does not give rise to an action in negligence unless the plaintiff alleges a violation of a duty separate and distinct from the duty imposed under the contract. *Id.* "If no independent duty exists, no tort action based on a contract will lie." *Id.*⁴ The court is not bound by a party's choice of label for a cause of action because to do so would exalt form over substance. *Norris v City of Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). "A party cannot avoid the dismissal of a cause of action through artful pleading." *Id.* Rather, the essence of a plaintiff's action is determined by scrutinizing the entire claim. *Maiden*, 461 Mich at 135. The court must look beyond the label given to the counts in the complaint and analyze the exact nature of the claim. *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987).

In the present case, a review of plaintiffs' complaint reveals that the accounting malpractice claim fails to allege a duty separate and distinct from the contractual duties. *Fultz*, 470 Mich at 467. The engagement contract provided that the audit would be performed in accordance with generally accepted accounting principles accepted in the United States of America and in accordance with governmental audits. The breaches of duties raised in the count alleging accounting malpractice are encompassed within the responsibilities undertaken during the course of the contractual audit. *Norris*, 292 Mich App at 582. Indeed, the count alleging breach of contract indicates that it incorporates the references contained in the accounting malpractice claim. Because plaintiffs failed to allege a tort duty separate and distinct from the contractual obligations, a tort claim cannot be raised, *Fultz*, 470 Mich at 467, and the two-year period of limitations for malpractice is not controlling. Accordingly, the trial court erred by failing to enforce the shortened period of limitations contained in the engagement contract⁵ and erred by denying defendants' motion for summary disposition.

⁴ The *Fultz* decision does not extend to noncontracting third parties. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 168; 809 NW2d 553 (2011).

⁵ We also note that the plain language of the contract states that the 12-month period of limitation applies to "any claim based on the audit engagement." This language encompasses the tort claim of accounting malpractice and must be enforced as written. *Smith Trust*, 480 Mich at 24.

Reversed and remanded for entry of an order granting defendants' motion for summary disposition. We do not retain jurisdiction. Defendants, the prevailing parties, may tax costs. MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood