STATE OF MICHIGAN

COURT OF APPEALS

CITY OF PONTIAC,

Plaintiff-Appellant,

v

PRICEWATERHOUSE COOPERS, L.L.P.,

Defendant-Appellee.

UNPUBLISHED
February 12, 2008

No. 275416
Oakland Circuit Court
LC No. 06-076389-NM

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting partial summary disposition in favor of defendant. We affirm.

I. Background

Plaintiff's August 2, 2006, complaint alleges that defendant contractually agreed to provide "accounting and auditing services," including audits of its financial statements beginning in 1993. Defendant also allegedly agreed to provide additional professional services and training to plaintiff's employees to make them proficient in implementing Governmental Accounting Standards Board No. 34 (GASB 34), entitled "Basic Financial Statement and Management's Discussion and Analysis for State and Local Governments." In count I, plaintiff sought damages for breach of the professional standard of care applicable to audits for the years 2000 through 2003. In count II, plaintiff sought damages for defendant's alleged breach with respect to GASB 34 services. In count III, plaintiff sought the same damages as counts I and II for a claim labeled "breach of contract." In count IV, plaintiff sought damages for "quantum merit."

In lieu of filing an answer, defendant moved for summary disposition of each count. The trial court dismissed count I pursuant to MCR 2.116(C)(7) and (8), finding that plaintiff's claims involving audit services for the fiscal years ending in 2002 and before were barred by the applicable statute of limitations, and that certain alleged breaches of duty for each audit year failed to state a claim. The trial court also dismissed counts III and IV pursuant to MCR 2.116(C)(8), for failure to state a claim. On appeal, plaintiff challenges the trial court's dismissal of counts I and III.

II. Standard of Review

We review de novo a trial court's grant of summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Issues of statutory construction are also reviewed de novo. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007).

Summary disposition is appropriate under MCR 2.116(C)(7) if a claim is barred by the statute of limitations. A party may support a motion under this subrule by affidavits, depositions, admissions, or other documentary evidence, but the substance or content of the evidence must be admissible. *Maiden, supra* at 119; MCR 2.116(G)(6). All well-pleaded allegations in the complaint are accepted as true and construed most favorably to the plaintiff, unless contradicted by the documentary evidence. *Xu v Gay*, 257 Mich App 263, 266; 668 NW2d 166 (2003). "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 Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). A trial court may hold a trial to determine disputed issues of fact. MCR 2.116(I)(3); *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 288; 731 NW2d 29 (2007).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the pleadings alone. MCR 2.116(G)(5); *Maiden, supra* at 119-120. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.* at 119. Summary disposition is proper only where the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* at 119.

III. Statute Of Limitations For Audit Services

Plaintiff first challenges the trial court's application of the two-year statute of limitations for malpractice actions, MCL 600.5805(6), to count I of the complaint. Plaintiff argues that the "last treatment" rule in MCL 600.5838 should have been applied to determine the accrual date of its claim because it had an ongoing professional relationship with defendant.

MCL 600.5805(6) provides that "[e]xcept as provided in this chapter, the period of limitations is 2 years for an action charging malpractice." MCL 600.5838(1) provides:

> Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

The parties dispute when defendant discontinued serving plaintiff "as to the matters out of which the claim for malpractice arose."

In *Morgan v Taylor*, 434 Mich 180, 186-187; 451 NW2d 852 (1990), our Supreme Court explained that MCL 600.5838(1) represents a codification of the judicially created "last treatment rule" that was applied to medical malpractice claims. The Court commented on the rationale for the rule in the context of a medical malpractice claim involving treatment for a particular injury or illness, explaining that the physician-patient relationship, and its accompanying air of trustworthiness, would induce the patient to take no action against the doctor while the treatment continued. *Id.* at 188. In such cases, the limitation period did not begin to run until there was an "occurrence" indicating that the original physician-patient relationship, and its accompanying air of trustworthiness, was terminated. *Id.* at 189.

The "last treatment rule," as codified in MCL 600.5838(1), was construed in *Morgan, supra* at 191-194, to also apply to routine, periodic services for preventative care provided during an ongoing physician-patient relationship. The Court determined that the air of trustworthiness that formed the rationale for the rule still existed because the "doctor's assurance upon completion of the periodic examination that the patient is in good health . . . induces the patient to take no further action other than scheduling the next periodic examination." *Id.* at 194. As applied in *Morgan,* the Court determined that the plaintiff's medical malpractice claim predicated on the defendant's failure to refer the plaintiff to a specialist for a problem detected in a 1981 eye examination did not accrue at the time of that examination, but rather at the time of the next eye examination in 1983, when the plaintiff was referred to the specialist. In holding that it could not be said that the relationship between the plaintiff and the defendant terminated after each examination, our Supreme Court took particular note of the fact that the plaintiff was entitled to periodic eye examinations from the defendant under a contract executed by his employer and union with the defendant. *Id.* at 182, 194.

As amended by 1986 PA 178, the "last treatment rule" in MCL 600.5838(1) no longer applies to medical malpractice actions arising after October 1, 1986, *Morgan, supra* at 189 n 14, but continues to apply to other malpractice claims, including accountant malpractice claims. See generally *Local 164, RWDSU AFL-CIO v Ernst & Young,* 449 Mich 322; 535 NW2d 187 (1995).

In *American Industries Int'l Corp v Arthur Andersen & Co,* 961 F Supp 1078, 1091 (WD Mich, 1997), the court applied MCL 500.5838(1) in deciding a motion to dismiss an accounting malpractice claim arising out of the defendant's preparation for audits for the years 1986 through 1988. The defendant had also performed an audit for 1989. Its last date of service was October 3, 1990. Despite evidence that the defendant separately agreed to each audit in independent engagement letters, the plaintiff argued that a question of fact existed regarding whether October 3, 1990, should be used as the accrual date for each audit. *Id.* at 1091. In support of this argument, the plaintiff argued that each financial statement depended on earlier statements and was presented in connection with at least two years' prior statements, and that each year's audit was planned on the basis of work and information from prior statements. *Id.* at 1091. The plaintiff also argued that the defendant continued to be listed as the plaintiff's auditor with the Security Exchange Commission until its discharge on October 3, 1990, and that the defendant provided a broad range of services throughout each year. *Id.* at 1091. In

denying the motion to dismiss, the federal court observed that some evidence suggested that the defendant provided ongoing continuous and interrelated services and concluded that "whether the parties are engaged in a continuous relationship or in a series of discrete agreements to perform particular services is a question of fact for the jury." *Id.* at 1094.

In *Levy v Martin*, 463 Mich 478; 620 NW2d 292 (2001), our Supreme Court applied MCL 600.5838(1) in reversing a trial court's grant of summary disposition under MCR 2.116(C)(7). The defendants in *Levy* were accountants who prepared annual tax returns from 1974 until 1996. The plaintiffs sought damages allegedly caused by the defendants' malpractice in preparing the 1991 and 1992 returns, but did not file their complaint until 1997. *Id.* at 480-481. Unlike *American Industries Int'l Corp, supra,* the defendants' motion for summary disposition was based solely on the allegations in the plaintiffs' complaint. Applying the "last treatment rule" as construed in *Morgan, supra*, to the allegations in the plaintiffs' complaint, the Court determined that the accrual date for the limitations period did not begin until 1996, when the professional relationship ended. *Id.* at 485-487.

The Court explained that the statute of limitations for a nonmedical malpractice claim does not begin to run when professional services cease for a single matter, but "only when the professional has ceased providing services as to the broad 'matters' out of which the claim arises" and that the statutory requirement of "discontinuing services" should not be overlooked. *Id.* at 489 n 18. The Court cautioned, however, that the result might have been different if there was evidence that the preparation of each tax return involved a discrete transaction:

> Plaintiffs alleged that defendants prepared their income tax returns from 1974 to 1996. Defendants have failed to present any evidence that this is untrue – or that each income tax preparation was a discrete transaction that should be considered to separately constitute "the matters out of which the claim for malpractice arose," MCL 600.5838(1); MSA 27A.5838(1), for purposes of the last treatment rule. Accordingly, we conclude that defendants have not established that plaintiffs' claims are barred by the statute of limitations. We note that the result may have been different if defendants had come forward with documentary evidence that each annual income tax preparation was a discrete transaction that was in no way interrelated with other transactions. Accordingly, this opinion does not mean, for example, that if an accountant prepared income tax returns for a party annually over a period of decades, the statute of limitations for alleged negligence in preparing the first of these tax returns would not run until the overall professional relationship ended. [*Id*. at 490 n 19.]

Here, plaintiff's complaint alleges a continuing relationship. In particular, plaintiff alleges that "during the period of approximately 1993 and continuing to the present, the City of Pontiac, in return for valuable consideration, engaged PWC and/or its predecessor, Coopers & Lybrand, for certain accounting services for the fiscal years June 30, 1993, through the present."

We note, however, that despite alleging the existence of a contractual relationship for accounting and auditing services, as well as training and other services related to GASB 34, plaintiff did not attach a copy of any written contract or refer to any written contract in its complaint. Indeed, it cannot be determined from the allegations in the complaint whether plaintiff was claiming the existence of an oral or written contract for services. To the extent that plaintiff's claim is based on a written instrument, plaintiff should have attached the instrument to the complaint or explained its failure to do so, as provided in MCR 2.113(F).[1] See also *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007) (written contract attached to complaint becomes part of pleadings); *Belobradich v Sarnsethsiri*, 131 Mich App 241, 247; 346 NW2d 83 (1983) (purpose of any specificity requirement for pleadings is to provide a defendant with sufficient notice to provide a defense).

Nonetheless, we are not limited to the allegations in the complaint in reviewing defendant's motion under MCR 2.116(C)(7) because defendant submitted evidence in support of its motion. Defendant filed copies of specific engagement letters for the audits for the fiscal years ending on June 30 of 2001, 2002, and 2003, respectively, and provided plaintiff with reports regarding the audits. Each letter specified the estimated fee for the audit engagement and indicated that it reflected the parties' entire agreement relating to the services covered by the letter. The letter for the fiscal year ending June 30, 2003, contained an estimated fee for additional work required to implement GASB 34, and specified that any additional services that may be requested would be the subject of separate written agreements. Plaintiff's finance director signed it on December 15, 2003, approximately eight months after the April 4, 2003, date on defendant's audit report for the fiscal year ending June 30, 2002.

---

[1] MCR 2.113(F)(1) provides:

> If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit unless the instrument is
>
> (a) a matter of public record in the county in which the action is commenced and its location in the record is stated in the pleading;
>
> (b) in the possession of the adverse party and the pleading so states;
>
> (c) inaccessible to the pleader and the pleading so states, giving the reason; or
>
> (d) of a nature that attaching the instrument would be unnecessary or impractical and the pleading so states, giving the reason.

Defendant also submitted the affidavit of one of its senior managers to support its position that it considered, but never entered into, an agreement to assist plaintiff in updating its accounting procedures for GASB 34, so that it could maintain its independence when auditing plaintiff's financial statements. In response to defendant's motion, plaintiff provided documentary evidence of a written contract that indicates that it was signed by representatives of both parties between February 17 and April 10, 2003, for the purpose of refuting defendant's claim that there was no agreement for GASB 34 services. Plaintiff argued that the contract constituted a special agreement between the parties, independent of the audit services for 2003.

Plaintiff did not refute defendant's evidence that the engagement letters formed the basis of their relationship for audit services, but rather submitted the affidavit of its finance director, which confirmed that defendant's last audit was for the fiscal year ending June 30, 2003. Although plaintiff argues on appeal that multi-year contracts existed for audit services in addition to the engagement letters, and seeks an opportunity to expand the record on appeal if the contracts would be helpful to this Court, this evidence should have been presented in the trial court with plaintiff's complaint, as provided in MCR 2.113(F), or when opposing defendant's motion for summary disposition, as permitted under MCR 2.116(G)(5). A trial court considers all of the submitted evidence to the extent that the content or substance is admissible when deciding a motion under MCR 2.116(C)(7). *Maiden, supra* at 119; *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). We find no basis here for overlooking the general rule that our review is limited to the record presented to the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

We further note that while plaintiff referred in its response to defendant's motion for summary disposition to the comprehensive annual financial report for the fiscal year ending June 30, 2003, only defendant's independent auditors' report, dated December 14, 2004, appears in the lower court record. But even if the entire report was submitted to the trial court, it would not aid plaintiff in establishing a genuine issue of material fact.

Independent certified public accountants performing audits, as in this case, generally assume a responsibility that transcends any employment relationship with the client. See *Comm'r of Ins v Albino*, 225 Mich App 547, 565; 572 NW2d 21 (1997); but see MCL 600.2962(c) (limiting third-party negligence actions to circumstances where "certified public accountant was informed in writing by the client at the time of engagement that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages"). "An audit report represents the auditor's opinion of the accuracy of the client's financial statements at a given period of time. The financial statements themselves are the representations of management, not the auditor." *Raritan River Steel Co v Cherry, Bekaert & Holland*, 322 NC 200, 207; 367 SE2d 609 (1988) (citations omitted).

Although audit reports for each fiscal year may guide a plaintiff in preparing its financial statements for each subsequent year, the mere fact that there might be some connection between annual financial statements does not support an inference that a

professional relationship continued between the parties, with its accompanying air of trustworthiness, from year to year without interruption.

The evidence of defendant's separate engagement letters detailing the terms of each audit shows that each audit constituted the type of discrete transaction that our Supreme Court in *Levy, supra* at 490 n 19, observed could separately constitute "the matters out of which the claim for malpractice arose." We are not persuaded that plaintiff has established anything about the separate contract for GASB 34 services that supports a different result. That matter constituted a discrete transaction from the independent audit services that defendant was hired to perform.

Upon de novo review, we conclude that no genuine issue of material fact was shown to preclude summary disposition under MCR 2.116(C)(7). The critical date for the fiscal year ending June 30, 2002, was the April 4, 2003, date of defendant's audit report. Defendant's completion of that audit constituted the "occurrence" that terminated the parties' professional relationship. The trial court properly granted summary disposition in favor of defendant with respect to fiscal year 2002, and the earlier years, because the complaint was filed on August 2, 2006, more than two years after April 4, 2003.

IV. Standard Of Care For Auditing Services

Plaintiff next challenges the trial court's determination that defendant was also entitled to summary disposition under MCR 2.116(C)(8) with respect to six specific auditing duties alleged in count I of the complaint. Plaintiff argues that MCL 141.428 supports the alleged duties.

A negligence claim consists of the following elements: "(1) duty, (2) general standard of care, (3) specific standard of care, (4) cause in fact, (5) legal or proximate cause, and (6) damage." *Malik v William Beaumont Hosp,* 168 Mich App 159, 168; 423 NW2d 920 (1988). "The term 'malpractice' denotes a breach of the duty owed by one rendering professional services to a person who has contracted for such services." *Id.*

Plaintiff's argument involves the specific standard of care required for defendant to avoid breaching the general standard of reasonable care applicable to a negligence action. See *Case v Consumers Power Co,* 463 Mich 1, 4 n 8; 615 NW2d 17 (2000); *Moning v Alfono,* 400 Mich 425, 438-443; 254 NW2d 759 (1977).

In Michigan, a violation of a statute creates a rebuttal presumption of negligence. *Kennedy v Great Atlantic & Pacific Tea Co,* 274 Mich App 710, 721; 737 NW2d 179 (2007). In this case, however, we are not persuaded that plaintiff pleaded a statutory violation in any of the six allegations at issue. The provision of the Uniform Budgeting and Accounting Act on which plaintiff relies, MCL 141.428, only prescribes the contents of the audit report that local units may provide pursuant to MCL 141.426, by retaining certified public accountants to perform the audit. The local unit has a duty to obtain audits of its financial records, accounts, and procedures pursuant to MCL 141.425.

Construed in a light most favorable to plaintiff, none of the six allegations are directed at deficiencies in an audit report. Paragraphs (17)(a) to (d) allege that certain funds were improperly reported, resulting in the overstatement or understatement of funds. Paragraph (17)(e) alleges that defendant failed to record certain subsidy transfers as a journal entry, resulting in the overstatement or understatement of funds. Paragraph (17)(w) alleges only that defendant failed to "adhere to basic accounting principles."

Because MCL 141.428 provides no support for the six allegations against defendant, we affirm the trial court's dismissal of these allegations pursuant to MCR 2.116(C)(8). As a matter of law, plaintiff has not established that the allegations fall within the specific standard of care applicable to defendant's audit services.

V. Breach of Contract

Finally, plaintiff argues that the trial court erred in dismissing count III under MCR 2.116(C)(8) on the ground that plaintiff was improperly attempting to restate the professional malpractice claim as a breach of contract claim to circumvent the statute of limitations. Alternatively, plaintiff argues that it should be permitted to proceed under a breach of contract theory with respect to the GASB 34 services because the parties had a special agreement with regard to those services independent of the audit services.

Plaintiff has failed to fully recognize the basis of the trial court's decision. Although the trial court expressed agreement with defendant's argument that plaintiff's breach of contract claim was an attempt to circumvent the statute of limitations, it dismissed count III on the basis of its determination that it was a verbatim restatement of counts I and II, except for ¶ 29(y) of count III, which alleged that defendant "breached its obligation to provide services, training, and systems to make employees of the City of Pontiac more proficient in compliance with GASB 34."[2] The trial court explained that it wanted to "establish an efficient framework" for the lawsuit.

Although the trial court treated count I as a professional malpractice claim based on defendant's audit services, the court treated plaintiff's claim in count II regarding GASB 34 services as a breach of contract claim, even though it was labeled "PROFESSIONAL LIABILITY GASB 34 SERVICE" in the complaint. In concluding that count II sufficiently stated a claim to avoid summary disposition under MCR 2.116(C)(8), the trial court ruled, "Plaintiff's count two is a breach of contract claim" and found that the complaint alleged a breach. Moreover, we find nothing in the trial court's decision or order to indicate that it dismissed count II based on the statute of limitations. It ordered only that the claims "as to audit years 2002 and earlier are dismissed under MCR 2.116(C)(7) as these claims are time-barred.

---

[2] We note that the corresponding allegations in ¶¶ 23-24 of count II, while not identical, also allege a failure to provide agreed-upon services. Plaintiff alleged that defendant agreed to, but failed to provide, the services, training, and systems.

A court is not bound by a parties' choice of labels for a cause of action because this would exalt form over substance. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). A professional malpractice action is a tort claim predicated on the failure to exercise the requisite professional skill. *Stewart v Rudner*, 349 Mich 459, 468; 84 NW2d 816 (1957); see also *Malik, supra* at 168 (malpractice claim is grounded in negligence). Where there is a failure to perform a specific act, the action can sound in contract. *Stewart, supra* at 468; *Penner v Seaway Hosp*, 169 Mich App 502, 509; 427 NW2d 584 (1988); *Barnard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984) (claim sounded in legal malpractice, not negligence, where damages flowed from the attorney's failure to provide adequate representation, rather than the failure to provide the representation).

Further, the failure to address an issue that necessarily must be reached can preclude appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

We deem abandoned any argument that the trial court erred in treating the breaches of duty alleged in count III, which were duplicative of the specific standards of care that plaintiff alleged were breached in count I, as sounding in professional malpractice because plaintiff has not briefed this issue. Accordingly, we affirm the trial court's holding that plaintiff failed to state a breach of contract claim pursuant to MCR 2.116(C)(8) with respect to these allegations.

Similarly, any claim that the trial court erred in treating count II as a breach of contract claim is also abandoned because plaintiff likewise has not briefed that issue. Because the trial court's ruling, in substance, permits plaintiff to pursue the same failure to perform allegation set forth in count III, ¶ 29(y), of the complaint with respect to the GASB 34 services, the trial court's dismissal of this allegation pursuant to MCR 2.116(C)(8) is harmless. See MCR 2.613(A).

Although the allegation in ¶ 29(u) of count III that "[f]ailure to properly train City of Pontiac employees in order to achieve GASB 34 compliance" could be construed as sounding in malpractice, not breach of contract, this allegation is duplicative of the specific standard of care for auditing services that plaintiff alleged was breached in count I, ¶ 17(u). We express no opinion regarding the legal sufficiency of plaintiff's allegation in ¶ 17(u) with respect to auditing services because this issue is not properly before us. Limiting our review to plaintiff's claim on appeal that the trial court erred in dismissing count III, we hold that plaintiff has not established any basis for relief.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello