STATE OF MICHIGAN

COURT OF APPEALS

NEW PRODUCTS CORPORATION,
Plaintiff-Appellant,

v

BUTZEL LONG,

Defendant-Appellee.

UNPUBLISHED
May 18, 2023

No. 361412
Wayne Circuit Court
LC No. 21-003072-NM

Before: GLEICHER, C.J., and HOOD and MALDONADO, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff, New Products Corporation, appeals by right the March 18, 2022 order of Wayne County Circuit Judge Muriel D. Hughes granting summary disposition in favor of the defendant law firm, Butzel Long, pursuant to MCR 2.116(C)(7) (claim is time-barred). We reverse.

I. BACKGROUND

This case arises from a property dispute between New Products and the Harbor Shores Golf Course. Late in 2008, while Harbor Shores was constructing the golf course, New Products explored bringing an action against Harbor Shores to quiet title based on New Products' contention that a portion of the course's 18th hole was to be constructed on land actually owned by New Products. An attorney from Butzel Long initially represented New Products in this matter; however, the firm was later dismissed, and in 2011, New Products brought this malpractice suit against Butzel Long in which it alleged professional negligence regarding the firm's handling of the action to quiet title.

On January 23, 2012, New Products and Butzel Long executed an open-ended tolling agreement in which the parties agreed that the lawsuit would be dismissed without prejudice and the statute of limitations would be tolled while New Products litigated its underlying claim against Harbor Shores. This agreement provided, in relevant part:

* * *

> New Products alleged in a Complaint filed in Wayne County Circuit Court (Case Number 11-007915-CK) that it does not owe any money to Butzel Long and that Butzel Long committed legal malpractice in its representation of New Products by the following attorneys, without limitation, Susan L. Johnson, William B. Clifford Jr., and Patrick A. Karbowski, and that Butzel Long failed to meet the obligations of its agreement to represent New Products (collectively, the "Claims"), allegations that are denied by Butzel Long. Butzel Long has alleged in its Counterclaim that it is owed substantial attorney's fees by New Products.
>
> In September 2011, New Products filed [the underlying lawsuit]. If New Products is successful in the Berrien County Lawsuit, parts or potentially all of the Complaint against Butzel Long for legal malpractice may be rendered moot. The outcome of the Berrien County Lawsuit may affect the liability and damages at issue in this case.
>
> The Parties agree to dismiss their respective actions currently pending in the Wayne County Circuit Court, without prejudice and without costs.
>
> The Parties agree to toll the Statute of Limitations with respect to any and all of New Products Claims against Butzel Long, and Butzel Long's claims against New Products, in order to give New Products time to litigate the lawsuit in Berrien County.
>
> **NOW THEREFORE**, the Parties agree as follows:
>
> 1. All applicable Statutes of Limitation as to the Claims are tolled, effective immediately. The Parties waive any Statute of Limitations or laches defense based upon the lapse of time under the applicable Statute of Limitations or laches for the time periods covered by this Agreement. . . .
>
> 2. The effective date of this Agreement is December 13, 2011. This Agreement will remain in effect until 60 days after there is a final adjudication to all Defendants in the Berrien County Lawsuit, including any appeals to the Michigan Court of Appeals or Michigan Supreme Court.
>
> * * *

After several years of litigating the underlying dispute, which included multiple appeals in this Court,[1] Harbor Shores ultimately prevailed. New Products then resumed its litigation against Butzel Long, asserting that Butzel Long's negligence resulted in New Products losing title to the disputed land. However, in 2013, while the underlying action was still being litigated, the Legislature enacted MCL 600.5838b (statute of repose), which bars legal malpractice actions that

[1] *New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, 308 Mich App 638; 866 NW2d 850 (2014); *New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, 331 Mich App 614; 953 NW2d 476 (2019).

are commenced "[s]ix years after the date of the act or omission that is the basis for the claim." The trial court ultimately granted summary disposition in favor of Long, reasoning that the litigation was barred by the statute of repose. This appeal followed.

II. DISCUSSION

We agree with New Products that the trial court's interpretation of the agreement was erroneous because interpreting the tolling agreement as to include the statute of repose is consistent with the contract's plain language and because excluding it is contrary to the clear intent of the parties.

A trial court's interpretation of a contract is subject to de novo review. *Zwiker v Superior State Univ*, 340 Mich App 448, 474; 986 NW2d 427 (2022).

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties; to this rule all others are subordinate." *Joseph & Anita Russell Trust v Russell*, 338 Mich App 170, 179; 979 NW2d 672 (2021) (quotation marks and citation omitted). To accomplish this, a court must "examine the language of the contract according to its plain and ordinary meaning." *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 508 Mich 461, 477; 975 NW2d 826 (2021). When determining the meaning of a contract, this Court gives "the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Lakeside Retreats LLC v Camp No Counselors LLC*, 340 Mich App 79, 89; 985 NW2d 225 (2022).

New Products argues that the parties' intent "was to craft an agreement which would ease the litigation burdens on both Butzel and New Products, for the duration of time it took to resolve the Underlying Case through the appellate system." New Products argues that the trial court, therefore, erred by interpreting the "language of the contract to allow for the dismissal of the malpractice claim based on a statute which was not in existence at the time that the tolling agreement was executed and made binding." Butzel Long argues that the agreement was properly interpreted because the statute of repose was not named as a statute that was tolled.

As discussed above, the intent of contractual interpretation is to ascertain and give effect to the intent of the parties. *Russell Trust*, 338 Mich App at 179. It is undeniable, both from the language of the agreement and the circumstances surrounding its formation, that the parties' intent was that New Products would be allowed to bring its malpractice action against Butzel Long without being time-barred at the conclusion of its litigation against Harbor Shores. It is likewise undeniable that the parties did not intend that the action be time-barred by the statute of repose because the statute of repose did not exist at the time of the agreement's formation. Moreover, interpreting the contract as to toll the statute of repose is consistent with its plain language. The parties agreed to toll "[a]ll applicable Statutes of Limitation," and we conclude that the statute of repose fits within the term "Statutes of Limitation" as it is used in this agreement. First, the contract specifically says that it tolls *all* statutes of limitations, and this implies that the parties intended for a broad interpretation of the term. Second, the statute of repose is a statute that imposes a limitation on the timeframe within which an action may be commenced. Third, Butzel Long's motion for summary disposition was brought and granted pursuant to MCR 2.116(C)(7), and this court rule allows for judgment based on a "statute of limitations;" however, it makes no mention of a "statute of repose." By bringing and granting the motion pursuant to this court rule,

both Butzel Long and the trial court implicitly recognized that the statute of repose is a type of statute of limitations. We do note that there is caselaw recognizing a distinction between statutes of limitations and statutes of repose. See, e.g., *Frank v Linkner*, 500 Mich 133, 142; 894 NW2d 574 (2017) (recognizing that "a statute of limitations is generally measured from the date a claim accrues, while a statute of repose is measured from some other particular event, such as "the date of the last culpable act or omission of the defendant"). However, all rules of interpretation are subordinate to the goal of ascertaining the parties' intent, *Russell Trust*, 338 Mich at 179, and interpreting the term in such a way as to include the statute of repose is consistent with the parties' intent to waive time limitations so that New Products could litigate the underlying claim prior to bringing the malpractice action. The parties could not have intended for the statute of repose to remain effective given that it did not yet exist.

Therefore, we conclude that the trial court did not properly interpret the contract.

III. CONCLUSION

The trial court's order granting summary disposition in favor of Butzel Long is reversed. Because this decision is based on our interpretation of the contract, we need not address the retroactive application of the statute of repose nor New Products' equitable estoppel claim. We note that Butzel Long has raised alternative bases for affirmance pertaining to the merits of the underlying malpractice claim. However, because the merits were not addressed in the trial court, we decline to address them for the first time on appeal. Accordingly, this case is remanded to the trial court for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Noah P. Hood
/s/ Allie Greenleaf Maldonado

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GLEICHER, C.J. (*concurring*).

This case exemplifies gotcha lawyering.

Rather than honoring an agreement extending the time for filing New Products Corporation's legal malpractice claim, Butzel Long seeks to dodge its liability by exploiting an intervening and unforeseeable event – the passage of a statute of repose applicable to legal malpractice actions. Not only was the statute an unpredictable event, Butzel had specifically stipulated, in writing, to the precise timing of New Products' lawsuit. The majority correctly rejects Butzel's malign effort to abandon its commitment, holding that the contract controls. I write separately to suggest another reason that the majority opinion rests on legally solid ground.

In 2008, New Products hired Butzel to protect its interest in a valuable piece of real property. Butzel neglected to timely file an action to clear title and to enjoin the property's hostile use. This Court subsequently held that New Products should have sued in September 2008, when construction on the land began, rather than in 2011. *New Prods Corp v Harbor Shores BHBT Land Dev, LLC*, 331 Mich App 614, 629 n 3; 953 NW2d 476 (2019).

Butzel understood that it might bear liability for its failure to protect New Products' interest in the land. The parties entered into an agreement tolling the statute of limitations to permit New Products to retain other counsel to clean up the legal mess Butzel had made. As Butzel's lawyer admitted during oral argument, tolling agreements are common in legal malpractice cases. By forestalling a legal malpractice suit, such agreements afford an opportunity to remedy a lawyer's

error, saving defense costs and face.[1] As New Products' 2011 lawsuit dragged on, the parties repeatedly extended their tolling agreement.

The 2011 tolling agreement explained that "[a]ll applicable Statutes of Limitation as to the Claims are tolled, effective immediately. The Parties waive any Statute of Limitation or laches defense based upon the lapse of time under the applicable Statute of Limitations or laches for the time period covered by this Agreement." The agreement was "in effect until 60 days after" a final adjudication of the land case. New Products filed this suit within the 60 days.

While the tolling agreement was in effect and the attorneys for New Products were toiling to undo the damage done by Butzel's failure to file a timely action, the Legislature passed a statute of repose applicable to legal malpractice cases. MCL 600.5838b(1)(b), which took effect on January 2, 2013, bars a legal malpractice claim filed more than six years after the act or omission underlying the claim. Here, the omission occurred in 2008 when Butzel failed to act to protect New Products' interests. When New Products filed its timely suit under the tolling agreement in 2021, Butzel invoked the 2013 statute of repose.

In the trial court, New Products unsuccessfully argued that the 2013 statute of repose is not retroactive, and that the contract's plain language expressed the parties' intent that a malpractice lawsuit could be filed after New Products' efforts to right Butzel's wrongs were exhausted. My colleagues find the latter argument meritorious and reverse. Guided by the Michigan Supreme Court's opinion in *Buhl v Oak Park*, 507 Mich 236; 968 NW2d 348 (2021), I would reverse on a second ground as well: the 2013 statute of repose is not retroactive.

Butzel's argument in favor of retroactivity rests on this Court's 2017 opinion in *Nortley v Hurst*, 321 Mich App 566; 908 NW2d 919 (2017). In *Nortley*, the plaintiff's legal malpractice claim accrued in 2009, but the complaint was not filed until 2016. *Id*. at 571. The plaintiff argued that the statute of repose did not bar the action because the claim had accrued before the statute was enacted, and the Legislature did not intend it to apply retroactively. *Id*. After discussing a few general rules about retroactivity, this Court noted that there is an exception to the general rule of prospective application if the case involves "a statute that is remedial or procedural in nature and whose retroactive application will not deny vested rights." *Id*.

Nortley did not hold that the 2013 statute of repose *always* applies retroactively. Rather, the Court concluded that under the unusual circumstances presented in that case, retroactive application did not deny the plaintiff a vested right. *Id*. at 571-572. The *Nortley* Court also relied on the "procedural" nature of statutes of repose. Citing *Davis v State Employees' Retirement Bd*, 272 Mich App 151; 725 NW2d 56 (2006), the Court gave the green light to retroactivity.[2] *Nortley*,

[1] New Products sued Butzel in 2011, but voluntarily dismissed the case without prejudice when the parties entered into a second tolling agreement.

[2] *Davis* explained: "There is an exception to the general rule that newly enacted statutes are presumed to apply prospectively, which exception provides that no such presumption exists where the statute is remedial or procedural in nature, as long as it does not deny vested rights." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 158; 725 NW2d 56 (2006).

321 Mich App at 572. *Nortley* applied the statute of repose based on its conclusion that the plaintiff had two years to sue before the 2013 statute of repose would have barred her suit. *Id*.

The controlling distinction between *Nortley* and this case is the parties' tolling agreement. No such agreement existed in *Nortley*. Here, the parties specifically agreed that suit could be brought 60 days after a final adjudication of the underlying claim. Whether or not the parties should have included the words "statute of repose" in the agreement, the majority correctly holds that they intended that New Products could withhold suit until the underlying case concluded.

Viewed through a different legal lens, the tolling agreement endowed New Products with a "vested right" to bring suit 60 days after the conclusion of the underlying case. Because retroactive application of the statute of repose would impair that vested right, it is impermissible.

In *Buhl*, 507 Mich at 244, the Supreme Court highlighted that when assessing a statute's retroactivity, a careful inquiry into legislative intent, is required – an inquiry that the *Nortley* Court never undertook. The "inquiry into the Legislature's intent" mandated in *Buhl* requires the evaluation of four factors, also know called "the *LaFontaine* factors":

> "First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute." [*Id*. at 244, quoting *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38-39; 852 NW2d 78 (2014).]

Applying the pertinent *LaFontaine* factors here, as required by *Buhl*, leads to a determination that under the circumstances presented, MCL 600.5838b is not retroactive.[3]

In *LaFontaine*, the Supreme Court introduced its discussion of retroactivity with a caution: "Retroactive application of legislation presents problems of unfairness because it can deprive citizens of legitimate expectations *and upset settled transactions*." *Id*. at 38 (cleaned up, emphasis added). The tolling agreement at issue here is one such "settled transaction." *LaFontaine* reinforced that "[w]e have . . . required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect." *Id*. In other words, "In determining whether a statute should be applied retroactively or prospectively only, the primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle."

[3] The second factor is not relevant here, just as it was not in *Buhl*, because MCL 600.5838b "does not pertain to a specific antecedent event." *Buhl*, 507 Mich at 244.

Frank W Lynch & Co v Flex Techs, Inc, 463 Mich 578, 583; 624 NW2d 180 (2001) (cleaned up).[4] Summarizing, *LaFontaine*'s four factors limit the retroactivity of remedial statutes, whether procedural or substantive, to those which were intended by the Legislature to be retroactive, and which do not impair settled rights or obligations.

Turning to this case, the Legislature did not signal that the statute of repose it engrafted on legal malpractice cases was intended to have retroactive effect. This legislative silence about retroactivity counsels that the statute should be applied only prospectively. See *LaFontaine*, 496 Mich at 40.

The third *LaFontaine* factor instructs that a statute "may not be applied retroactively if doing so would take away or impair vested rights acquired under existing laws[.]" *Buhl*, 507 Mich at 246 (cleaned up). Our Supreme Court has explained:

> In its application, as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. [*Leonard v Lans Corp*, 379 Mich 147, 157; 150 NW2d 746 (1967) (cleaned up).]

Necessarily, "vested rights" may include express contractual rights. Equally necessarily, a statute cannot be applied retroactively if it "abolishes an existing cause of action," which is an interest worthy of protection:

> The general rule against retrospective application has been applied in cases where a new statute abolishes an existing cause of action. It is clear that once a cause of action accrues,—*i.e.*, all the facts become operative and are known—it becomes a "vested right". A new statute which abolishes an existing cause of action brings the statute within the general proscription of rule three. [*In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 573; 331 NW2d 456 (1982) (citations omitted).]

New Products had two types of vested rights: the right to sue within a specific time conferred by the tolling agreement, and a viable cause of action for legal malpractice against Butzel. The first right vested in 2011, when the parties signed the last tolling agreement. The second right vested when Butzel committed legal malpractice in 2008. At that point, the "facts became operative" and were known to the parties. The parties affirmatively recognized the existence of the vested cause of action when New Products voluntarily withdrew its 2011 legal malpractice lawsuit in exchange for Butzel's agreement that the suit would be timely if brought 60 days after the final adjudication of the companion suit filed that same year. Under *Buhl* and

[4] The Legislature fully agrees with this legal principle. MCL 600.5869 provides: "All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry."

LaFontaine, it would be inequitable to deprive New Products of an opportunity to seek redress for Butzel's negligence.

The fourth *LaFontaine* factor states, "[A] remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute." *LaFontaine*, 496 Mich at 39. In the recent opinion of *McClain v Roman Catholic Diocese of Lansing*, ___ Mich App___; ___ NW2d ___ (2023) (Docket Nos. 360163, 360173), slip op at 9, this Court explained:

> In *Davis*, 272 Mich App at 160-161, this Court explained, "In the context of the 'procedural' exception, statutes of limitations, while generally coined as procedural, necessarily affect substantive rights where causes of action can be lost entirely because the action is time-barred." *Davis* went on to hold that "the general remedial-procedural exception to prospective application" does not apply to statutes of limitations that had completely run. *Id*. at 162.

The fourth *LaFontaine* factor does not apply in this case because retroactivity of the statute of repose affects a vested right.

Because New Products' right to sue Butzel vested before the 2013 enactment of MCL 600.5838b(1)(b), the statute of repose may not be imposed retroactively. With these added observations, I join the majority.

/s/ Elizabeth L. Gleicher