

STATE OF MICHIGAN
COURT OF APPEALS

WHIPPERWILL & SWEETWATER, LLC.,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE CO.,

Defendant,

and

IOTT INSURANCE AGENCY, INC. and
WILLIAM PALMER,

Defendants-Appellants.

UNPUBLISHED

March 10, 2011

No. 295467

Monroe Circuit Court

LC No. 08-025932-CK

Before: MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ.

PER CURIAM.

Defendants Iott Insurance Agency, Inc. (Iott) and William Palmer appeal by leave granted the trial court's order denying in part their motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10). On appeal, Iott and Palmer argue in relevant part that plaintiff Whipperwill & Sweetwater, LLC's contract claim was in reality a claim premised on negligence and, for that reason, was subject—at least—to the three-year period of limitations applicable to claims to recover damages for injury to persons and property. We conclude that Whipperwill's contract claim sounded in negligence rather than contract and was subject to the period of limitations applicable to claims seeking to recover damages for injury to persons or property. Because the applicable period of limitations had passed, the trial court should have granted Iott and Palmer's motion for reconsideration of its decision to deny their earlier motion for summary disposition. Accordingly, we reverse the trial court and remand for entry of summary disposition in favor of Iott and Palmer.

I. BASIC FACTS AND PROCEDURAL HISTORY

Whipperwill operated an auction gallery out of a building on Monroe Street in Monroe, Michigan. Karl Kurtz testified at his deposition that he purchased Whipperwill from its prior owner in 2003. Kurtz stated that he purchased the building for between “two and 300,000” and purchased the business itself for “around 100,000.” The latter price included all the contents of the building. Kurtz said that he formed Four Friends Land Group, LLC to own the building out of which Whipperwill operated.

Kurtz said he contacted Palmer at the Iott agency to secure insurance for Whipperwill. He met with Palmer at the building on Monroe to discuss his insurance needs. He specifically requested “[r]eplacement coverage for everything that we had in the building including the building.” Kurtz admitted that he did not request a specific amount of coverage for the building and that, in order to determine the replacement value of the building and its contents, Palmer would have had to conduct an investigation. He stated that he told Palmer that he wanted at least \$200,000 in coverage on the contents, but he assumed that Palmer independently determined the total amount of contents coverage necessary to replace every item as new. Kurtz explained that, to him, replacement coverage meant that the amount of insurance would be equal to the cost to replace the building and every item in it without regard to the actual value of the item at the time of the loss.

With Palmer’s help, Whipperwill secured a policy from Auto-Owners Insurance Company (Auto-Owners). He renewed the policy in 2004. The renewed policy was effective May 1, 2004 and lasted through May 1, 2005. The policy provided \$300,000 for building loss, \$200,070 for contents, and \$30,000 for lost business.

In March 2005, the building on Monroe caught fire and was destroyed along with all the contents. In April 2005, Whipperwill received a copy of an adjuster’s report that indicated that the cost to rebuild the building would be in excess of \$820,000 and that the actual value of the building was also greater than the coverage provided in the insurance. In June 2005, Whipperwill also learned that the cost to replace the building’s contents would exceed \$300,000 even though its insurance only provided for coverage of \$200,070. Auto-Owners eventually paid Whipperwill \$300,00 for the building loss and \$200,070 for the contents loss.

In August 2008, Whipperwill sued Auto-Owners, Iott and Palmer. Whipperwill alleged that Auto-Owners breached the insurance contract and violated certain statutory provisions when it refused to pay additional compensation under an inventory endorsement that provides for an increase of 25% in contents coverage to cover temporary variations in inventory value.¹ Whipperwill also alleged claims of negligence and breach of contract against Palmer and Iott. Specifically, Whipperwill alleged—for both its negligence and contract claims—that Palmer and Iott had a duty to properly advise Whipperwill about the coverage levels that should be

¹ Whipperwill’s claims against Auto-Owners are not at issue in this appeal.

purchased and breached that by advising Whipperwill to purchase “commercial insurance in woefully inadequate amounts.”

In August 2009, Palmer and Iott moved for summary disposition under MCR 2.116(C)(7) and (C)(10). Palmer and Iott argued that, because Whipperwill sued more than three years after it suffered the fire loss and learned of the discrepancy between the coverage levels and the replacement costs, its negligence claim was clearly untimely whether one applied a two year or three year period of limitations. They also argued that Whipperwill’s contract claim was really a claim premised on negligence and, even if it were not, there is no evidence that Whipperwill had a contract with Palmer or Iott. As such, Palmer and Iott asked the trial court to dismiss Whipperwill’s contract claim as untimely or because there was no material question of fact that there was no contract between the parties. In response, Whipperwill conceded that its negligence claim was untimely, but argued that it pleaded a valid contract claim. Specifically, it argued that its application for insurance coverage was an express contract between Whipperwill, Palmer and Iott. In the alternative, it argued that the application is evidence of an implied contract between the parties or that the parties had an oral agreement based on Palmer’s promise to procure replacement coverage for Whipperwill.

In October 2009, the trial court denied Palmer and Iott’s motion for summary disposition in its entirety. Iott and Palmer then moved for reconsideration. In their motion for reconsideration, Iott and Palmer noted that Whipperwill conceded that its negligence claim was untimely and, on that basis, argued that the trial court erred when it denied their motion for summary disposition as to that count. They also argued that the trial court committed a palpable error when it denied their motion as to the contract claim for reasons that were similar to those proffered in their motion for summary disposition.

In November 2009, the trial court denied Iott and Palmer’s motion for reconsideration. Nevertheless, in December 2009, the trial court granted their motion for summary disposition in part; it dismissed Whipperwill’s negligence claim as untimely.

Palmer and Iott then applied for leave to appeal the trial court’s decision to deny its motion for reconsideration, which this Court granted. See *Whipperwill & Sweetwater LLC v Iott*, unpublished order of the Court of Appeals, entered on February 1, 2010 (Docket No. 295467).

II. MOTION FOR RECONSIDERATION

A. STANDARDS OF REVIEW

On appeal, Iott and Palmer argue that the trial court erred when it denied their motion for reconsideration. Specifically, they argue that the trial court committed a palpable error when it denied their motion for summary disposition and, for that reason, should have granted their motion for reconsideration. This Court reviews a trial court’s denial of a motion for reconsideration for an abuse of discretion. *Woods v SLB Property Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). To the extent that this issue also involves the trial court’s decision on a motion for summary disposition, this Court reviews de novo a trial court’s decision to grant or deny a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Finally, this Court also

reviews de novo the proper interpretation and application of statutes and court rules. *Estes v Titus*, 481 Mich 573, 578-579, 751 NW2d 493 (2008).

B. THE MOTION FOR SUMMARY DISPOSITION

Iott and Palmer argue on appeal that the trial court erred when it denied their motion for reconsideration because it palpably erred—in a variety of ways—when it denied their motion for summary disposition. That is, Palmer and Iott’s argument with regard to their motion for reconsideration necessarily depends on the propriety of the trial court’s decision to deny their motion for summary disposition—at least with regard to Whipperwill’s contract claim. Therefore, we shall first examine whether the trial court erred when it denied Iott and Palmer’s motion for summary disposition of Whipperwill’s contract claim.

In their motion for summary disposition, Iott and Palmer primarily argued that Whipperwill’s contract claim was really a mislabeled claim for negligence. And, because Whipperwill filed the claim more than three years after the point at which the claim accrued, it was untimely under either MCL 600.5805(6) or MCL 600.5805(10), whichever applied. The period of limitations under MCL 600.5805 applies to actions seeking “to recover damages for injuries to persons or property.” MCL 600.5805(1). If the action to recover damages to persons or property arises from malpractice, the plaintiff must sue within two years after the claim first accrued. See MCL 600.5805(6). For all other actions to recover for injury to a person or property, the plaintiff must sue within three years after the claim first accrued. See MCL 600.5805(10). However, for actions seeking to recover damages for a breach of contract, the plaintiff must sue within six years after the breach. See MCL 600.5807(8). Accordingly, if Whipperwill’s contract claim is indeed a claim seeking to recover damages for breach of contract, it is timely. But if it is actually a claim seeking to recover damages for injury to persons or property, it is untimely.

It is well-settled that a plaintiff may not avoid a period of limitations through artful drafting. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993). Hence, a plaintiff may not avoid the period applicable to a malpractice claim by characterizing the defendant’s conduct as a breach of a contract for professional services. See *Barnard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984) (noting that the plaintiff’s claim against her attorney did not sound in contract: “Her claim is that damages flowed not from his failure to represent her, but from his failure to represent her adequately. This is a claim grounded on malpractice and malpractice only.”); *Penner v Seaway Hospital*, 169 Mich App 502, 510; 427 NW2d 584 (1988) (stating that the plaintiff could not avoid the period of limitations applicable to a medical malpractice claim by pleading a breach of contract claim where the gravamen of the claim was the failure to provide proper care); see also *Brownell v Garber*, 199 Mich App 519, 524-526; 503 NW2d 81 (1993) (noting that, where the duty allegedly imposed under the contract is no different than that imposed by law—in the absence of a special agreement—the applicable period is that for claims seeking to recover damages for injuries to persons or property rather than contract). Similarly, where a plaintiff does not have an express contract, the plaintiff may not avoid the period of limitations applicable under MCL 600.5805 by arguing that the claim arises under an implied contract. See *Coates v Milner Hotels*, 311 Mich 233, 239-240; 18 NW2d 389 (1945) (explaining that a claim premised on an implied contract is subject to the three year period of limitations applicable to claims seeking recovery for damages to persons). Rather, for

every cause of action, courts must look past the label chosen by the plaintiff to determine which period of limitations properly applies. See *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10, 535 NW2d 187 (1995) (stating that “in ruling on a statute of limitations defense the court may look behind the technical label . . . to the substance of the claim asserted.”).

Although Michigan courts have articulated it in a variety of ways, the test to determine which period of limitations properly applies to a given claim depends on the nature of the interest allegedly harmed. See *Huhtala v Travellers Ins Co*, 401 Mich 118, 126-127; 257 NW2d 640 (1977) (holding that, when an action to recover damages for injury to persons or property arises under a duty imposed by law, it cannot be maintained under a contract theory); *Aldred v O’Hara-Bruce*, 184 Mich App 488, 490, 458 NW2d 671 (1990) (“The type of interest allegedly harmed is the focal point in determining which limitation period controls.”); *Stroud v Ward*, 169 Mich App 1, 9; 425 NW2d 490 (1988) (determining the applicable period of limitations by examining the nature of the acts alleged to have caused the damages); *Baldyga v Independence Health Plan*, 162 Mich App 441, 445; 413 NW2d 30 (1987) (holding that the “plaintiff’s claims that [the] defendant was negligent in hiring these doctors and in failing to supervise them was not based on the parties’ express contract but was implied in law, making a three-year period of limitation applicable.”). Whatever the test’s formulation, courts must look to the gravamen of the claim—to its true nature—and then apply the period of limitations that governs that type of claim. *Adams v Adams*, 276 Mich App 704, 710; 742 NW2d 399 (2007).

As already stated, the period of limitations provided under MCL 600.5805, applies to claims seeking to recover damages for injuries to persons or property. Typically, if an injury concerns only a person’s financial expectations or commercial benefits under a contract, the claim will not be subject to the period of limitations under MCL 600.5805. See *Fries v Holland Hitch Co*, 12 Mich App 178, 185; 162 NW2d 672 (1968). However, a claim premised on an injury to persons or property does not have to involve physical injuries; it may be pecuniary alone. *Local 1064*, 449 Mich at 328. And, because traditional common-law torts vindicate the rights of persons, the period of limitations applicable to claims seeking to recover damages for injuries to persons or property, see MCL 600.5805, generally applies to traditional common-law torts. *Local 1064*, 449 Mich at 328.

In its complaint, Whipperwill alleged that Iott and Palmer owed a “contractual duty” to provide it “with the appropriate limits of insurance to purchase in order to protect their property and business losses in the event of a fire.” But Whipperwill did not attach a contract to its complaint nor did it specifically identify the terms of an oral agreement that gave rise to this contractual duty. Instead, Whipperwill alleged that there was “a special relationship” between it and Palmer and Iott that gave rise to the duty: “Because of the special relationship between [Whipperwill] and [Iott and Palmer], and the contractual duties that had been assumed,” Palmer and Iott had a duty to “properly advise” Whipperwill “regarding the amount of insurance that should be purchased” and to “advise [Whipperwill] on how the insurance policy [sic] would respond in the amount of a loss.” Whipperwill alleged that Palmer and Iott breached the duty to properly advise Whipperwill by advising it to purchase “woefully inadequate” coverage and failing to inform it about how Auto-Owners would apply the contract. Finally, Whipperwill stated that these breaches of contract proximately caused it to suffer damages.

Although labeled as a claim for breach of contract, with this claim, Whipperwill clearly alleged the traditional elements of a common-law negligence claim: duty, breach, cause, harm. See *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Indeed, Whipperwill focused on the special nature of the relationship between it and its agent—a relationship that must be demonstrated in order to show that the agent had a common-law duty to advise. See *Harts v Farmers Ins Exchange*, 461 Mich 1, 8-10; 597 NW2d 47 (1999) (discussing when the common law will impose upon an insurance agent a duty to properly advise a potential insured). And Whipperwill also alleged that Palmer and Iott proximately caused it damages by failing to properly *advise* it consistent with the duty that arose from this special relationship. When read as a whole, and in light of the fact that Whipperwill never identified a specific contract or contractual provision, it is evident that this claim was actually a common-law claim premised on the failure to properly advise.

In response to Palmer and Iott’s motion for summary disposition, Whipperwill argued that the application for insurance was an express contract that required Palmer and Iott to properly advise it as to the amount of coverage necessary to replace the building and its contents. It also argued that the evidence warranted the imposition of an implied contract with the same duty. Finally, Whipperwill presented evidence that permitted an inference that Palmer had explicitly or implicitly promised to procure replacement coverage for Whipperwill. Even if we were to disregard the way in which Whipperwill actually pleaded this claim, it is nevertheless apparent that the claim—as argued in Whipperwill’s response to the motion for summary disposition—is still a claim premised on the common-law rather than contract.

There is no evidence in this case that Palmer guaranteed a particular result, agreed to perform a specific type of investigation, promised to procure an express dollar amount of coverage, or otherwise promised to perform at a level beyond that normally performed by an insurance agent. Cf. *Stewart v Rudner*, 349 Mich 459, 467-468; 84 NW2d 816 (1957) (involving a doctor’s express promise to perform a Caesarean Section, which the promisor did not perform). Instead, even assuming that Palmer actually promised Whipperwill that it would procure replacement coverage or would identify an amount of coverage sufficient to replace the insured property, that promise was, in effect, no more than a promise to use his best efforts to ascertain the cost to replace the building and contents and to advise Whipperwill appropriately. In order to prove its claim, Whipperwill would therefore have to show that Palmer negligently determined that \$300,000 was sufficient to replace the building, negligently determined that \$200,070 was sufficient to replace the contents, and then negligently advised Whipperwill to purchase those levels of insurance.² This claim clearly sounds in common-law negligence. See *Harts*, 461 Mich at 12 (characterizing a breach of the agent’s duty to advise as negligence). Stated another way, the harm at issue with this claim arose from a failure to adhere to a duty implied by law—

² We note that Kurtz stated that he purchased the building and contents shortly before he procured the insurance at issue and these coverage levels were equal to or significantly higher than the amount Kurtz paid to purchase the building and contents. As such, it is possible that Palmer and Iott could show that the coverage levels were reasonable at the time.

namely, the duty to properly advise and inform a potential insured about adequate levels of coverage. *Id.* at 8-10. And the breach of a duty implied by law cannot be maintained as a cause of action under a contract theory. *Huhtala*, 401 Mich at 126-127. Accordingly, Whipperwill's contract claim plainly sounds in tort, not contract, and MCL 600.5805 supplied the appropriate period of limitations. See *Local 1064*, 449 Mich at 328. Because Whipperwill brought this claim more than three years after it accrued, it was untimely. See MCL 600.5805(6) and (10). Consequently, the trial court plainly erred when it denied Palmer and Iott's motion for summary disposition under MCR 2.116(C)(7).

C. THE MOTION FOR RECONSIDERATION

Having concluded that the trial court erred when it determined that Iott and Palmer were not entitled to have Whipperwill's contract claim dismissed as untimely under MCR 2.116(C)(7), we must next determine whether the trial court should have corrected this error on Iott and Palmer's motion for reconsideration. This Court will only reverse a trial court's decision to deny a motion for reconsideration if the decision to deny the motion falls outside the range of principled outcomes. *Woods*, 277 Mich App at 630. This standard of review is deferential and recognizes that a trial court might legitimately deny a motion for reconsideration for a variety of reasons. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (stating that the abuse of discretion standard is more deferential than the de novo standard and recognizes that there will be no single correct reason for a particular outcome). The court rules even provide that a trial court can generally deny a motion for reconsideration that merely reiterates issues already resolved—presumably even if the prior resolution of those issues might have been in error: “Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted.” MCR 2.119(F)(3). Nevertheless, it is clear that a trial court does have the discretion—notwithstanding MCR 2.119(F)(3)—to correct an earlier decision that was made in error. *In re Moukalled Estate*, 269 Mich App 708, 714; 714 NW2d 400 (2006) (“The plain language of the court rule does not categorically prohibit a trial court from granting a motion for reconsideration even if the motion presents the same issues initially argued and decided.”). Consequently, it necessarily follows that a trial court can abuse its discretion when it denies a motion for reconsideration that identifies a palpable error even if the motion merely restates arguments and evidence already presented with regard to the earlier decision.

In their motion for reconsideration, Iott and Palmer noted that Whipperwill had conceded that its negligence claim was untimely. For that reason, they asked the trial court to correct its earlier decision to deny summary disposition of that claim. And the trial court eventually corrected that error by entering an order dismissing that claim. In all other respects, Iott and Palmer's motion for reconsideration merely presented issues and evidence that the trial court explicitly or implicitly addressed in its opinion on their motion for summary disposition. Nevertheless, it was obvious on the face of the complaint that Whipperwill's contract claim sounded in common-law negligence rather than contract. And, because Whipperwill conceded that any claims that it might have under common-law negligence were untimely, it is equally plain that Iott and Palmer were entitled to have Whipperwill's mislabeled contract claim dismissed under MCR 2.116(C)(7). Because the trial court's decision to deny Iott and Palmer's motion for summary disposition on this basis was so plainly in error for the reasons already

addressed in Iott and Palmer's motion for summary disposition, the trial court could not reasonably deny the motion for reconsideration on the sole basis that the motion for reconsideration merely presented the same issues. The trial court had a duty to correct its erroneous decision in the absence of other considerations that might independently warrant denial of the motion for reconsideration. Because there were no such other considerations, we conclude that the trial court abused its discretion when it denied Palmer and Iott's motion for reconsideration.

For these reasons, we reverse the trial court's decision to deny Iott and Palmer's motion for reconsideration and remand this case to the trial court for entry of an order dismissing Whipperwill's remaining claim against Iott and Palmer with prejudice. Given our resolution of this issue, we need not address any of Iott and Palmer's alternative arguments for reversal.

Reversed and remanded for entry of an order dismissing Whipperwill's remaining claim against Iott and Palmer. We do not retain jurisdiction. As the prevailing parties, Iott and Palmer may tax their costs. MCR 7.219(A).

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly