Cite as 2010 Ark. 255

SUPREME COURT OF ARKANSAS

No. 09-735

ERNST & YOUNG LLP,
APPELLANT,

VS.

BENJAMIN H. REID, JR. and WILLIAM B. STELL, INDIVIDUALLY AND AS TRUSTEE OF THE W.B. STELL CHARITABLE REMAINDER UNITRUST,
APPELLEES,

Opinion Delivered May 27, 2010

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT,
NO. CV2007-460,
HON. STEPHEN MERRILL TABOR, JUDGE,

REVERSED AND DISMISSED.

JIM HANNAH, Chief Justice

Ernst & Young, LLP (E&Y) appeals from a judgment entered in Sebastian County Circuit Court finding E&Y liable for fraud, constructive fraud, and professional negligence. Compensatory and punitive damages were awarded to appellees Benjamin H. Reid, Jr., and to William R. Stell, individually and as Trustee of the W.B. Stell Charitable Remainder Unitrust. E&Y asserts multiple points on appeal including that the action was precluded by the applicable statutes of limitation. We agree and reverse and dismiss this case. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(6).

Appellees acquired Sierra Corporation of Fort Smith, Inc. in the late 1980s while it was in bankruptcy. They rebuilt the company with the intention of going public. In preparation for a public offering of Sierra stock, Sierra retained E&Y to perform the 1993 and 1994 audits.

After these audits, and before a public stock offering was made, The Coleman Company, Inc. (Coleman), one of Sierra's largest customers, offered to purchase Sierra. The parties entered into negotiations that culminated in a July 14, 1995 Stock Purchase Agreement. The Stock Purchase Agreement included a purchase price of $6,750,000; however, section 2.04 of the Agreement provided for an equity adjustment. Under the equity adjustment provision, appellees agreed to pay Coleman "the amount by which the Adjusted Stockholders' Equity is less than $4,350,000." Pursuant to the terms of the equity adjustment provision, Coleman retained E&Y to audit the "Final Closing Balance Sheet." Based on this audit (the 1995 audit), Coleman asserted a $2,242,503 downward adjustment in the purchase price and demanded return of this sum from appellees. Appellees sued Coleman, and that litigation was resolved by appellees paying Coleman $500,000.

Appellees assert that E&Y committed fraud, constructive fraud, and professional negligence in carrying out the 1995 audit, and in this case, the statute of limitations begins to run from the date the 1995 audit issued because appellees assert they knew the 1995 audit was fraudulent and inaccurate from the date of its issuance. The statute of limitations on fraud is three years. *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 579, 66 S.W.3d 568, 582 (2002) (citing Ark. Code Ann. § 16-56-105 (1987)). The statute of limitations for constructive fraud is three years from the commission of the fraud unless the running of the statute of limitations is tolled. *Riddle v. Udouj*, 371 Ark. 452, 461, 267 S.W.3d 586, 593 (2007). Constructive fraud is tolled when the person alleged to have committed the fraud has committed a

"positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself." *Id.*, 267 S.W.3d at 593 (quoting *Hampton v. Taylor*, 318 Ark. 771, 778, 887 S.W.2d 535, 539 (1994)). In the present case, appellees allege that they believed from receipt of the 1995 audit that it was negligently and fraudulently prepared and presented. Thus, there is no issue of tolling based on concealment. Finally, professional negligence is also under a three-year statute of limitations. *Swink v. Ernst & Young*, 322 Ark. 417, 423, 908 S.W.2d 660, 663 (1995). Because the causes of action appellees assert began to run upon receipt of the 1995 audit, the statutes of limitations ran no later than 1998, four years before the present suit was filed.

Nevertheless, appellees allege that they may sue in the present case based on a 2002 tolling agreement entered into between Reid, Stell, and E&Y. The tolling agreement contains the following relevant language:

> If Reid/Stell bring an action against E&Y in any way relating to or arising out of E&Y's audit of the financial statements of Sierra Corporation for Fort Smith, Inc. for the fiscal year ended September 30, 1994, then such action shall be deemed to have been filed and served as of March 9, 1998, provided such action is filed on or before December 9, 2002.

A party may by agreement waive the defense of a statute of limitations. *See, e.g.*, *Slade v. Horn*, 208 Ark. 202, 204, 185 S.W.2d 924, 924–25 (1945). The question before us is whether the terms of the tolling agreement permit the present suit.

> The first rule of interpretation of a contract is to give to the language employed the meaning that the parties intended. *See First Nat'l Bank of Crossett v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992); *Valmac Indus., Inc. v. Chauffeurs, Teamsters & Helpers Local Union No. 878*, 261 Ark. 253, 547 S.W.2d 80 (1977). In construing any contract, we

> must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. *Id*. The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it, as it may be safely assumed that such was the aspect in which the parties themselves viewed it. *Missouri Pac. R.R. Co. v. Strohacker*, 202 Ark. 645, 152 S.W.2d 557 (1941). It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement.

Coleman v. Regions Bank, 364 Ark. 59, 65, 216 S.W.3d 569, 574 (2005). In considering the tolling agreement as a whole, the quoted language reveals the primary purpose was to waive the statute of limitations as to claims "arising out of E&Y's audit of the financial statements of Sierra Corporation . . . for the fiscal year ended September 30, 1994." The plain and ordinary meaning of this phrase, and the way in which "the mass of mankind" would understand it, is that appellees could sue on issues arising from the 1994 audit.

The 1994 audit is not at issue in this case. The appellees agree that it was properly undertaken, and that it was accurate. At issue on appeal are alleged inaccuracies and alleged fraud committed in the subsequent 1995 audit. Appellees argue that the definition of Financial Statements found in the Stock Purchase Agreement mandates that the 1995 audit relate to the 1994 audit, and that the claims in the present suit against E&Y do relate to or arise out of the 1994 audit. We disagree. Financial statements are defined in section 5.05 of the Stock Purchase Agreement as the 1993 and 1994 audits, as well as the unaudited balance sheet and income statement for the four months ended April 30, 1995. They were attached to the Stock Purchase Agreement. Pursuant to section 5.05, these financial statements were affirmed to have been prepared using consistent accounting methods and meeting other

requirements set out in section 5.05. There is no mention of section 2.04 or equity adjustment in section 5.05. The language in the Stock Purchase Agreement is that "accounting principles observed in a current period are comparable in all material respects to those applied in a preceding period." All the appellees had to do to make the 1995 audit subject to the tolling agreement was to provide in that agreement that any action arising from a post-sale audit was tolled.

The claims with respect to the 1995 audit are not related to nor do they arise from the 1994 audit. The statement by appellees that "the 1994 audit served as the basis for the 1995 post-closing audit," is incorrect. The 1995 audit provided an opinion of the financial position of Sierra Corporation "as of June 30, 1995." It was an analysis of the financial position of Sierra Corporation independent of the 1994 audit. Therefore, there is no merit to the assertion by appellees that the 1995 audit "arose out of the 1994 audit."

We hold that the causes of action in the present case are precluded by the applicable statutes of limitation. Because we decide this case on the statute of limitations, we need not address the remaining issues as they are moot. *See, e.g.*, *Allison v. Lee County Election Comm'n*, 359 Ark. 388, 198 S.W.3d 113 (2004).

Reversed and dismissed.

DANIELSON, J., not participating.