

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA11-303

MARY GIBBS, Executrix of the Estate of
Bethel Acuff (Deceased)

APPELLANT

V.

DONALD V. BUMGARNER,
MILDRED R. BUMGARNER, and
DONALD W. "DONNIE"
BUMGARNER

APPELLEES

Opinion Delivered January 25, 2012

APPEAL FROM THE MADISON
COUNTY CIRCUIT COURT,
[NO. CIV2007-157-2]

HONORABLE KIM M. SMITH,
JUDGE

AFFIRMED ON DIRECT APPEAL
AND CROSS-APPEAL

JOSEPHINE LINKER HART, Judge

Appellant Mary Gibbs, executrix of the estate of her mother, Bethel Acuff, appeals from a circuit court order that refused to impose a constructive trust or resulting trust on six tracts of Madison County land owned by Bethel's brother, appellee Donald V. Bumgarner.¹ Donald acquired the land following the death of his father Frank through three deeds: one from his mother Mary in 1975, covering three tracts of land totaling 338 acres, and two from Bethel and another sibling, Virgil, in 1999 and 2000, covering the remaining three tracts totaling 140 acres. On appeal, Gibbs challenges the validity of those conveyances, arguing that 1) the 1974 Kansas probate of Frank's estate, which distributed the Arkansas tracts to Mary

¹The court also refused to award relief against appellees Mildred and Donnie Bumgarner, who are Donald's wife and son. We will refer to Donald as the sole appellee.



for life with equal remainders in the three siblings, should govern the ownership of the property; 2) Mary relinquished her tenancy by the entirety in the tracts she jointly owned with Frank and therefore could not convey a fee simple interest in any of those tracts to Donald; 3) Donald's claims of ownership are barred by judicial and equitable estoppel; 4) Donald breached an oral family agreement that the tracts would be divided equally among the three siblings; and 5) Donald committed fraud, undue influence, and a breach of fiduciary duty in procuring the deeds, particularly those from Bethel and Virgil. On cross-appeal, Donald contends that the circuit court erred in failing to award him attorney fees as the prevailing party. We affirm on direct and cross-appeal.

This case originally came to us when Bethel, who had filed suit against Donald in 2007, appealed from a summary judgment entered in Donald's favor. We reversed and remanded, holding that questions of fact remained on some issues, while other issues needed further development. *Acuff v. Bumgarner*, 2009 Ark. App. 854, 371 S.W.3d 709. Bethel has since passed away, and the action has been continued by her daughter, appellant Mary Gibbs.

In August and September 2010, the circuit court held a bench trial and issued a twenty-seven-page letter opinion, finding for Donald on a number of grounds. Among those were that Gibbs's claims were barred by the statute of limitations; that her claims regarding an oral family agreement were barred by the statute of frauds; and that a 2006 probate action, filed by Gibbs on Bethel's behalf, operated as res judicata as to all of her claims in the present lawsuit.

With regard to res judicata, the court's opinion recited the following:



The first attempt to address this matter was to file a petition for an ancillary administration of Frank's Will in Arkansas in 2006. In that action, [Gibbs] alleged that the lands were being wrongfully held and kept as Donald V.'s own and that fraud was involved, and [she] sought for the title in the lands to be determined and for the land to be distributed. That matter was dismissed after numerous filings and an opportunity for all sides to be heard as being barred by the statute of limitations. In response to that dismissal, which was not appealed, [Gibbs] filed the instant action in 2007 making the same allegations, which the defendants have argued are barred by *res judicata*. [Citations and discussion of the law omitted.] While Mary Gibbs actually filed the 2006 Petition in the probate court, she did so on behalf of Bethel, who was a potential heir under Frank's will, due to her having a power of attorney for Bethel. As such, the Madison County Probate Court had jurisdiction and power to hear and address [Gibbs's] claims. *And, as those claims are the same as [Gibbs's] present claims, all of [Gibbs's] claims are barred by res judicata.*

(Emphasis added.) Later in the opinion, the court reiterated that Gibbs "asserted the exact same claims and facts in this action that were presented in [her] attempt to obtain an ancillary administration in 2006, which was dismissed with prejudice and not appealed."

In this appeal, Gibbs confines her arguments to those set forth in the introductory paragraph of this opinion. She does not challenge any of the other grounds on which the court dismissed her case, in particular the court's ruling that her claims were barred by *res judicata*.² When a trial court bases its decision on more than one independent ground, and the appellant challenges fewer than all of those grounds on appeal, we will affirm without addressing any of the grounds. *Duke v. Shinpaugh*, 375 Ark. 358, 290 S.W.3d 591 (2009); *Coleman v. Regions Bank*, 364 Ark. 59, 216 S.W.3d 569 (2005); *Morehouse v. Lawson*, 90 Ark. App. 379, 206 S.W.3d 295 (2005). Because Gibbs's brief does not challenge the circuit court's

²Gibbs does make a brief reference to the court's finding that her claims were barred by the statute of limitations; otherwise, she states only that the court erred "in its recitation of a hodge-podge of various claimed bases for decision."



res judicata ruling, we must affirm.

On cross-appeal, Donald argues that he was entitled to attorney fees as the prevailing party in a breach-of-contract action. Ark. Code Ann. § 16-22-308 (Repl. 1999). The court denied the fee request, finding that the vast majority of the case involved noncontractual matters. We see no abuse of discretion in the court's ruling.

When both contract and tort claims are advanced, section 16-22-308 does not permit an award of attorney fees unless the action is primarily based in contract. *Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005). Here, the fraud, estoppel, and fiduciary-duty claims were paramount. The contract claim played a part in the litigation, but it was not the primary basis for the action. We therefore affirm the court's refusal to award attorney fees to Donald.

Affirmed on direct appeal and cross-appeal.

GLADWIN and WYNNE, JJ., agree.