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ARKANSAS COURT OF APPEALS

DIVISIONS III & IV

No. CV-17-283

	Opinion Delivered December 6, 2017
DAVID HILL AND DANA HILL APPELLANTS	APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DISTRICT
V.	[NO. 16JCV-13-478]
BROOKSIE FELTY HARTNESS AND IMAGE REALTY LLC APPELLEES	HONORABLE PAMELA HONEYCUTT, JUDGE
	AFFIRMED

N. MARK KLAPPENBACH, Judge

This appeal concerns the entry of summary judgment in favor of a real estate agent in the lawsuit filed by her clients subsequent to their purchase of a home. The house had settling and other problems that the buyers did not know about until after the sale had been completed, which the buyers blamed on the real estate agent. The trial court granted summary judgment on the tort claims as barred by the three-year statute of limitations and on the breach-of-contract claim because the real estate agent was not a party to the offer-and-acceptance contract between the buyer and seller. We affirm.

The facts are not in material dispute. Appellants David and Dana Hill (collectively "Hill") bought a house located at 4208 Nobhill Circle in Jonesboro. Hill was represented by

a buyer's agent, appellees Brooksie Felty Hartness and Image Realty LLC[1] (collectively "Hartness"). Hill entered into a real estate contract with the sellers, Martin and Karen Hesch, on September 6, 2010. The offer and acceptance set forth deadlines in which the seller was to provide the seller's disclosure (three business days after signing the offer and acceptance) and in which the buyer could exercise the right to obtain a home inspection (ten business days after acceptance of the offer). The sellers provided a "Seller Property Disclosure" to Hartness on or about September 8, which indicated settling issues, but Hartness did not provide this disclosure to Hill. Hartness also allegedly told Hill that a home inspection was not necessary because the house was so new and it would be a waste of money. The aforementioned deadlines passed in September. The sale closed on October 15, 2010, after which Hill discovered settling and other problems.

Hill sued Hartness in a complaint filed on October 11, 2013, asserting five causes of action: breach of the real estate contract (the offer and acceptance), violation of the Deceptive Trade Practices Act,[2] fraud, breach of fiduciary duty, and negligence. Hill recited in the complaint that Hartness was bound by Arkansas Real Estate Commission Regulation 10.6, which provides that real-estate agents are required to exert reasonable efforts to ascertain those

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[1]Although the appellate record's caption indicates that the company name is "Image Realty Inc.," the documents within the record make clear that this entity's name is "Image Realty LLC." Hartness is the principal broker of the real estate company. Documents in the record indicate that her last name is not hyphenated.

[2]The trial court granted summary judgment on the alleged violation of the Deceptive Trade Practices Act on a failure of proof on an essential element. The dismissal of this particular claim is not at issue on appeal.

facts that are material to the value or desirability of every property so that the agent will be informed about the property's condition and thus avoid intentional or negligent misrepresentations to the public about the property. Hill appended the offer-and-acceptance contract and the Arkansas Real Estate Commission Regulations as exhibits to the complaint. Hartness subsequently moved for summary judgment on all counts, asserting primarily that there could be no breach of contract because the real estate agent was not a party to the written real estate contract between the buyer and seller, that this case was essentially a professional-negligence claim, and that the three-year statute of limitations barred the tort claims. Hartness argued that Hill was trying, unsuccessfully, to assert that Hartness was a party to this offer and acceptance to trigger the longer five-year statute of limitations applicable to a breach of a written contract. Hill responded that Hartness was a party to the contract as the buyer's agent and had duties under the contract to the buyer. Hill argued that, as to the other claims, Hill did not suffer damages until the sale was closed, so the statute of limitations should commence in October 2010, not in September 2010 when Hartness failed in her obligations to her clients. The trial court ultimately granted the motion for summary judgment. Hill appeals.

On appeal, Hill presents two arguments for reversal: (1) that the trial court erred in finding that the statute of limitations had begun to run on the fraud, breach-of-fiduciary-duty, and negligence claims at any time before the October 15, 2010 closing; and (2) that the trial court erred in finding that Hartness was not a party to the written real estate contract in order to trigger a five-year statute of limitations.

The standard of review is well settled. A motion for summary judgment should be granted when, in light of the pleadings and other documents before the circuit court, there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Ark. R. Civ. P. 56(c) (2017). When reviewing whether a motion for summary judgment should have been granted, this court determines whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Id.* All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Bomar v. Moser*, 369 Ark. 123, 251 S.W.3d 234 (2007). Summary judgment is proper, however, when the statute of limitations bars an action. *Alexander v. Twin City Bank*, 322 Ark. 478, 910 S.W.2d 196 (1995); *IC Corp. v. Hoover Treated Wood Prods., Inc.*, 2011 Ark. App. 589, 385 S.W.3d 880; *Tony Smith Trucking v. Woods & Woods, Ltd.*, 75 Ark. App. 134, 55 S.W.3d 327 (2001).

Hill's first argument focuses on when the three-year statute of limitations (SOL) began to run, which Hill contends was on or after the date of closing, October 15, 2010. Hill argues that it is the actual conveyance of the home that triggers the SOL because the buyers were not actually damaged until then. Hartness argues that any alleged wrongful conduct had to have occurred before closing. Hartness asserts that, at the latest, any alleged wrongs committed by Hartness occurred by mid-September 2010, weeks prior to closing. We hold

that the trial court did not err in deeming the "occurrence rule" to apply and therefore did not err in entering summary judgment because the complaint was filed after the expiration of three years from the occurrence of the alleged wrongful acts.

Arkansas Code Annotated section 16-56-105 (Repl. 2005) provides for a three-year statute-of-limitations period from the accrual of actions based in contract or liability, including unwritten breaches of duty. The statutory-limitations period begins to run when there is a complete and full cause of action and, in the absence of concealment or wrong, when the negligence occurs and not when it is discovered. *Riggs v. Thomas*, 283 Ark. 148, 671 S.W.2d 756 (1984). The same statute applies to claims for negligence, fraud, and breach of fiduciary duty. *See Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996); *Rice v. Ragsdale*, 104 Ark. App. 364, 292 S.W.3d 856 (2009).

Since 1877, our supreme court has consistently held that the three-year limitations period applies to legal malpractice actions, and the accrual is when the negligent act occurs. *Chapman v. Alexander*, 307 Ark. 87, 817 S.W.2d 425 (1991) (citing *White v. Reagan*, 32 Ark. 281 (1877)). Hill argues that *Chapman* is instructive in that it holds that the SOL begins to run for torts upon the occurrence of the last element essential to the cause of action. Hill contends that there were no damages in existence to support a cause of action until the property was conveyed. To accept this argument, however, Arkansas would have to abandon the occurrence rule and adopt the so-called "date of injury" rule. This latter rule provides that the SOL begins to run, not from the occurrence of the negligent act, but rather from the time injury results from the negligent act. Our supreme court has expressly refused to

abrogate the occurrence rule and adopt the "date of injury" rule, and thus the occurrence rule remains. *See Moix-McNutt v. Brown*, 348 Ark. 518, 522, 74 S.W.3d 612, 614 (2002) (holding that although appellant argued that common sense required that a plaintiff actually suffer a loss or damages arising out of the negligent act before a cause of action arose, this was precisely the argument that the supreme court had repeatedly rejected).

In *Chapman*, our supreme court explained the application of the commencement of the SOL in legal malpractice (negligence) actions, stating that it is when the negligent act occurs and not when it is discovered; it declined to adopt the "discovery rule" or "date of injury rule." *Chapman*, 307 Ark. at 91, 817 S.W.2d at 427. The same rule applies to an action brought against an abstractor for damages resulting from an omission in the abstract of title. *St. Paul Fire & Marine Ins. Co. v. Crittenden Abstract & Title Co.*, 255 Ark. 706, 502 S.W.2d 100 (1973). In *Flemens v. Harris*, 323 Ark. 421, 427, 915 S.W.2d 685, 689 (1996), the supreme court applied the occurrence rule when the defendant was an insurance agent alleged to have committed a negligent act "in keeping with our traditional rule in professional malpractice cases." *See also Ford's Inc. v. Russell Brown & Co.*, 299 Ark. 426, 429, 773 S.W.2d 90, 92–93 (1989) (holding that the occurrence rule applied to claim against accountant from date erroneous advice given, not the date a tax-delinquency assessment was made because of erroneous advice). The *Chapman* opinion noted that an abstractor, accountant, architect, attorney, escrow agent, financial advisor, insurance agent, medical doctor, stockbroker, or other such person should not be forced to defend some alleged act of malpractice that occurred many years ago. *Chapman*, 307 Ark. at 88–89, 817 S.W.2d at 426. The *Chapman*

opinion went on to adhere to the traditional "occurrence rule" despite arguments that this rule was too harsh, noting that such a change in the law should come from the legislature and not the courts. *Chapman*, 307 Ark. at 89–90, 817 S.W.2d at 426–427; *see also Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998); *Smith v. Elder*, 312 Ark. 384, 392, 849 S.W.2d 513, 517 (1993); *Tate v. Lab. Corp. of Am. Holdings*, 102 Ark. App. 354, 285 S.W.3d 261 (2008); *Morrow Cash Heating & Air, Inc. v. Jackson*, 96 Ark. App. 105, 239 S.W.3d 8 (2006). Thus, all the tort claims[3] are time-barred as having "occurred" before closing, and Hill's first point on appeal holds no merit.

Hill's second point on appeal is that the trial court erred in finding that Hartness did not breach the written real estate contract. If Hartness was a party to the real estate contract here, then a five-year SOL would apply to allegations of breach of this written contract. *See* Ark. Code Ann. § 16-56-111. The trial court rejected Hill's argument and entered summary judgment on the breach-of-contract claim. Hill's arguments focus on the contentions that (1) Hartness signed the contract as the buyer's agent and representative of the real estate company; (2) the contract disclosed to the seller that Hartness was Hill's agent and responsible to Hill; (3) the contract for the sale of the Nobhill Circle house entitled Hartness to a commission; and (4) Arkansas Real Estate Commission Regulations require agents to exert reasonable efforts to inform their clients of material facts as to the value or desirability of the subject property, which Hartness did not do. Hill adds that the "gist" of the complaint clearly

[3]Hill also argues, in the alternative, that the breach-of-fiduciary-duty claim is predicated on breach of the written contract, meaning that the longer five-year SOL applies. Our discussion of the second point on appeal is dispositive of this issue.

asserted a breach of this written contract, such that the five-year SOL should apply. Thus, Hill argues that Hartness was a party to the real estate contract for the sale of the Nobhill Circle house, was subject to obligations under the contract, and breached the contract, rendering summary judgment inappropriate. We disagree.

The Arkansas Real Estate Commission Regulations require the agent and the principal/supervising broker to sign the offer and acceptance. 076-00-001 Ark. Code R. § 10.12(b) (Weil 2017). The contract itself shows the "Parties" to be appellants Hill as "Buyer" making an offer to the Hesches as "Seller" to purchase their house. The contract provides notice to both the seller and buyer that the real estate agent is responsible to the buyer and that "all real estate agents involved in this Real Estate Contract only represent Buyer." The contract includes a provision in which the "Buyer hereby requests Seller to provide" a written seller's disclosure form about the condition of the property within three business days. The contract provides that "Buyer shall have the right" to conduct a home inspection within ten business days. The contract further provides in its "Disclaimer of Reliance" that the "buyer has not and will not rely on any warranties, representations, or statements of seller, listing firm, selling firm, or any agent, independent contractor, or employee associated with those entities. . . regarding. . . quality, value or condition of the property. . . . Listing firm and selling firm cannot give legal advice to buyer or seller. Listing firm and selling firm strongly urge . . . condition of property . . . should each be independently verified and investigated by buyer or a representative chosen by buyer." This disclaimer is in all capital letters. At the end of the contract, it also states in all capital letters that "[t]he parties signed below waive their

right to have an attorney draft this form and have authorized the real estate agent(s) to fill in the blanks on this form."

It may be that a contract for professional services, written or verbal, exists between Hill and Hartness establishing that Hartness is Hill's buyer's agent, but no such contract is alleged to be the basis for this breach-of-contract claim and we do not presume that such a contract exists. The written contract alleged to be the basis for breach of a written contract here is an offer-and-acceptance contract between the buyer and seller.

To prove breach of contract, there must be a valid and enforceable contract between the plaintiff and defendant. A plain reading of this real estate contract demonstrates that, although this is a written contract that contains the signature of real estate agent Hartness, it was a binding contract for the sale of this particular property that created obligations and rights solely between the buyer and seller.[4] A complaint largely predicated on alleged violations of rules of professional conduct cannot be used as a basis for civil liability. *Compare Allen v. Allison*, 356 Ark. 403, 155 S.W.3d 682 (2004) (holding that those rules are to provide guidance to lawyers and to provide a structure for regulatory conduct through disciplinary agencies; no cause of action should arise from a violation, nor should it create any presumption that a legal duty has been breached). In this case, regardless of whether the complaint as a whole sounds in tort or contract (i.e. whatever the "gist" of the complaint),

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[4]Despite the dissenting opinion's contention to the contrary, our majority opinion has not "created a new substantive rule of contract law in the residential real-estate context." Our holding addresses whether Hartness was entitled to judgment as a matter of law on breach of *this* written offer-and-acceptance contract as alleged by Hill.

Hill could not survive the motion for summary judgment on the contract claim because Hartness was not a party to this written contract.[5]

Affirmed.

GLADWIN, VAUGHT, and BROWN, JJ., agree.

VIRDEN and HARRISON, JJ., dissent.

BRANDON J. HARRISON, Judge, concurring in part and dissenting in part. This appeal should be limited to the law of pleading and statutes of limitations. Instead, the majority opinion has prematurely created new rules of contract and fiduciary law in Arkansas. I therefore respectfully concur with the majority's decision in part, and dissent in part.

I join the decision to affirm the circuit court's entry of summary judgment against the Hills' Deceptive Trade Practices Act claim, negligence claim, and fraud claim for the reasons stated in the majority opinion. I disagree, however, with the decision to affirm the dismissal of the Hills' breach-of-contract and breach-of-fiduciary-duty claims against Hartness and Image Realty LLC. The reasons for my disagreement are essentially the same ones expressed in the dissenting opinion filed in *Farris v. Conger*, 2016 Ark. App. 230, 490 S.W.3d 684 (Harrison, J., dissenting) and our supreme court's subsequent case *Farris v. Conger*, 2017 Ark.

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[5]The "gist of the complaint" argument relied on by the dissenting judges is unavailing. In *Farris v. Conger*, 2017 Ark. 83, 512 S.W.3d 631, the alleged breach of written contract was the "Wealth Management Agreement" executed by Farris (the client) and Conger (the wealth manager). This written agreement, attached to the complaint, set forth the obligations between Conger and Farris relating to the management of Farris's investments. Farris alleged that Conger had failed to perform as promised in the written contract. No comparable written agreement is alleged or presented in this case.

83, 512 S.W.3d 631 (vacating 2016 Ark. App. 230). Though the facts differ somewhat between the *Farris* cases and this one, there is no material difference, from a legal-principles perspective, between those cases and this one. We should be following the message our supreme court sent in *Farris* and reverse the circuit court's decision to time bar the Hills' contract and fiduciary claims.

The contract claim. Hartness and Image Realty LLC—the winning parties below—understood that the circuit court's decision to dismiss the Hills' contract claim was primarily based on the "gist of the complaint" rule—an increasingly mischievous doctrine that was also front and center in *Farris*. Like the appellees here, I believe the circuit court relied primarily on the argument that the Hills' complaint sounded solely in tort and therefore never considered applying a five-year limitations period to either the contract or fiduciary claim. To drive home this important point, here are some statements from the brief the appellees filed in this appeal:

> • "[The Hills'] breach of contract claim in this case is synonymous to a plaintiff asserting such a claim against an attorney or accountant when the allegations are properly characterized as professional negligence. These cases often involve a plaintiff missing the 3-year statute of limitations and attempting to save a cause of action by characterizing it as a breach of contract case." Appellees' Br. 19. (The appellees then go on to discuss a number of the prominent "gist of the complaint" cases, almost all of which were discussed in the *Farris* opinions.)
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> • "In addition, a plain reading of [the Hills'] Complaint demonstrates the allegations under which they predicate their breach of contract claim are identical to the allegations they rely on to establish their negligence claim." Id. at 23.

> • "When looking 'to the actual facts alleged . . . [t]he 'gist' of [the Hills'] complaint is that [the agent] failed to act diligently . . . . Such in action is clearly negligent." Id. at 24 (internal citation omitted).
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> • "[The Hills] cannot transform the nature of their cause of action simply by labeling it a breach of contract claim. . . . Again, the Real Estate Contract, which [the Hills] alleged [the agent] breached, did not place any duty upon [the agent or Image Realty LLC]." Id. at 24–25.

The majority is too dismissive of how the parties themselves characterized the main thrust of this case. It has concentrated on the merits. But what we need to do is ask whether a contract claim was pleaded; the strength of the allegations is not the issue for the purpose of deciding whether the five-year statute of limitations should apply. Ark. Code Ann. § 16-56-111 (Repl. 2005). Under Arkansas law, a party pleads a contract claim if she "assert[s] the existence of a valid and enforceable contract between the plaintiff and defendant, the obligation of the defendant thereunder, a violation by the defendant, and damages resulting to plaintiff from the breach." *Perry v. Baptist Health*, 358 Ark. 238, 244, 189 S.W.3d 54, 58 (2004). And when reviewing whether a complaint sounds solely in tort, we must limit our review to the complaint and the attached contract. *See McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998); *Farris*, *supra*. Given the case law on how one pleads a contract claim, the allegations in ¶¶ 1–31 of the Hills' complaint, which must be deemed true at this point, asserted a contract claim for the purpose of determining whether the five-year limitations period applies. I therefore respectfully disagree with the circuit court's decision that the Hills' complaint sounded solely in tort such that the contract claim (and the related fiduciary claim) were time barred on the face of their complaint.

The deepest problem with the majority's contract-claim analysis is that it parses provisions, interprets language, relies on an Arkansas Real Estate Commission Regulation, and applies substantive contract law to conclude that neither Hartness nor Image Realty LLC could possibly be promisors under the real-estate contract. This is a curious tack because whom the parties understood to be bound by the contract—and what a certain paragraph or paragraphs mean, and what type of conduct the contract may or may not cover—is often *the* merit question in a contract case. *See, e.g.*, *Prochazka v. Bee-Three Dev., LLC*, 2015 Ark. App. 384, 466 S.W.3d 448; *Farris*, *supra. See also* Restatement (Second) of Contracts § 1(c) (1981) (a contract may be a "set of promises," meaning there may be multiple promisors and multiple promisees in one set.) Maybe the contract on which the Hills rely does not create a promise that can be enforced against either Hartness or Image Realty LLC. Maybe it does. Whatever the answer, the majority's opinion should be deciding a pleading and statute-of-limitations issue at this point. Instead, it has decided the merit of the Hills' contract claim and created a new substantive rule of contract law in the residential real-estate context.

The majority has decided—as a matter of substantive contract law while reviewing a summary-judgment order—that a buyer may *never* sue his or her own agent on a breach-of-contract theory for failing to hand over a seller's property disclosure if the claim is based on the form real-estate contract that is used throughout this state in scores of residential-property transactions. This is so although the claim is based on a real-estate contract that the buyer, the buyers' agent, and the selling firm all signed and which contains disclosure provisions; and the majority does so despite the fact that the buyers' agent failed to timely inform the buyers

of the existence and content of a seller's property-disclosure form that the agent actually received and which disclosed potentially adverse conditions on the property that the buyers considered and in fact bought.

The fiduciary-duty claim. Moving to the dismissal of the Hills' fiduciary-duty claim, that decision should also be reversed. No one has pointedly disputed that a breach-of-fiduciary-duty claim based on a written contract has a five-year limitations period. *See* Howard W. Brill & Christian H. Brill, 1 *Arkansas Law of Damages* § 15:3 (a "claim [for breach of a fiduciary duty] arising out of a written contract will have a five-year statute of limitations. Claims for breach of a fiduciary relationship not based on a writing are subject to a three-year statute."). The written contract that the Hills argue supports their fiduciary claim is the real-estate contract, which contains an entire section on what type of agency relationship existed between the parties as the transaction unfolded. Because I would reverse the dismissal of the contract claim, I would also reverse the dismissal of the related fiduciary claim.

Here again the majority is too dismissive. All it writes is that its "discussion of the second point on appeal is dispositive of this issue." Majority Op. at 7, n. 3. Though it does not say so, I presume the reasoning goes like this: Hartness and Image Realty LLC are not, as a matter of substantive contract law, parties to the real-estate contract on which the Hills have sued. Therefore, the Hills cannot use the real-estate contract to support a fiduciary-duty claim based on a written contract against the appellees. But is this proposition so self-evident?

Hartness and Image Realty LLC signed the real-estate contract.[1] And again, no one disputes that Hartness was solely the Hills' agent. The contract so states in Paragraph 4.D., which is the "AGENCY" section of the contract. The implication here is opposite the majority's position. Assuming for the sake of argument that the merit of the Hills' contract claim should be reached and fails under contract-law principles, it does not necessarily follow that the fiduciary claim fails too. The majority's new rule holds that the real-estate contract that creates a written agency relationship between Hartness, Image Realty LLC, and the Hills cannot, as a matter of law, support the Hills' breach-of-fiduciary-duty claim. But the circuit court did not make such a ruling; nor was it asked to. Whether a fiduciary duty exists between parties is a question of law that courts decide. *Long v. Lampton*, 324 Ark. 511, 514, 922 S.W.2d 692, 695 (1996); *Johnson v. Walker*, 2015 WL 11121363, at *1 (W.D. Ark. June 10, 2015) (applying Arkansas law). *See also* Brill, *supra*. But this court does not decide issues for the first time on appeal. Yet that is what the majority has practically done, and on a far reaching point of law.

Conclusion. The circuit court mistakenly couched the complaint as sounding solely in tort and therefore dismissed the negligence, fraud, fiduciary duty, and contract claims based on a three-year limitations analysis. But the Hills' contract and fiduciary claims are not time barred based on the face of their complaint when the law of pleading and limitations is properly applied. Consequently, the circuit court's dismissal of those two claims should be

[1]According to the complaint, "Defendant Hartness is the principal broker of Defendant Image Realty as well as a member of Defendant Image Realty." Hills' Compl. ¶ 4. The joint answer from Hartness and Image Realty LLC admits the allegations in Paragraph 4 of the Hills' complaint. Hartness/Image Realty LLC's Answ. ¶ 3.

reversed and the case remanded for further proceedings. I express no opinion, however, on the merit of those claims. This reservation includes remaining silent on the question of whether a fiduciary duty arose from the form real-estate contract in the circumstances. That novel question of fiduciary law must first be raised and answered in the circuit court, not here.

VIRDEN, J., joins.

Lyons & Cone, P.L.C., by: *Jim Lyons*, for appellants.

Barber Law Firm PLLC, by: *Scott M. Strauss* and *Breana Ott Mackey*, for appellees.