NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

CHASITY TRAVIS, individually and on behalf of her minor children; MICHAEL LAVINE, individually and on behalf of his minor children; INEZ RUSSELL-TRAVIS; JASMIN SMITH; and DEANGELO BROWN,

Plaintiffs/Appellants,

vs.

JUDE OFFIAH; WOODMEN FINANCIAL RESOURCES, LLC and ASSURITY LIFE INSURANCE COMPANY,

Defendants/Appellees.

Case No. 120,852

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ANTHONY L. BONNER, TRIAL JUDGE

AFFIRMED

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For Defendant/Appellee Assurity Life Insurance Company

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

All plaintiffs appeal the summary judgment stating that their claims for fraud, breach of contract, and breach of fiduciary duty against all defendants were barred by the applicable statute of limitations. On review, we affirm the decision of the district court.

BACKGROUND

This matter began in 2011, when Jude Offiah, an insurance broker and alleged financial advisor, allegedly suggested to plaintiff Chasity Travis that it would be to her advantage to purchase a policy of whole life insurance. However, the policy Offiah actually offered in August 2011, and the policy Travis purchased, was a universal life policy, not a whole life policy. In 2012, Travis purchased additional policies for two of her children, and, in 2015, purchased a policy for a third child. In each case, the policy actually provided was for universal life insurance. In each case, Travis claims to have believed that the policies were for whole life insurance based on Offiah's statements.

Plaintiff Inez Russell-Travis also purchased two policies from Offiah in 2011. The allegations are the same: that the policies were sold as whole life policies but were in fact universal life policies. Russell-Travis assigned one of these policies to Chasity Travis and, in 2012, cancelled the other. She also purchased a term life policy from Offiah in 2015. In 2016, she agreed to convert that policy to what she believed was a whole life policy. In common with the other allegations, she actually received a universal life policy. In 2017, Russell-Travis also transferred ownership of this policy to Chasity Travis.

The allegations of the other plaintiffs were similar. In 2012, plaintiff Michael Lavine purchased policies for himself and his minor child. He alleged that he was told he was purchasing whole life policies, but Offiah sold him universal life policies. In 2016, plaintiff Jasmin Smith purchased a policy. She alleged that she was told she was purchasing a whole life policy, but Offiah sold her a universal life policy. Plaintiff DeAngelo Brown purchased term life insurance from Offiah in 2016. In 2017, he was told he could convert this policy to either whole or universal life coverage. He alleges that his policy was converted to universal life although Offiah told him it would be converted to whole life.

In May 2019, the five plaintiffs filed suit against Offiah, his company Woodmen Financial Resources LLC, and Assurity life Insurance Company, the issuer of the policies. The petition stated that a total of seventeen individual policies had been sold as whole life policies which turned out to be universal life policies. The petition raised claims for breach of contract, fraud, negligence, and breach of fiduciary duty against Offiah and Woodmen. It also claimed that Assurity Life Insurance Company was liable because it had a "policy, pattern, and/or practice of encouraging its agents to solicit the sale of Universal Life insurance policies."[1]

In November 2021, Offiah and Woodman filed a motion for summary judgment against all plaintiffs on numerous grounds. Assurity later joined in this motion. The court ruled for Offiah on statute of limitations grounds against

[1] We express some doubt as to whether the petition states a claim against Assuirty. Encouraging agents to sell a certain type of policy is not generally tortious.

all claims except DeAngelo Brown's contract claim. The court essentially held that there was no evidence of a written contract for Offiah to provide whole life insurance, and the three-year statute of limitations on an oral agreement had expired before suit in all cases except DeAngelo Brown's.

The court also held that the two-year statute of limitation on fraud claims had expired as to all plaintiffs and that the limitation period was not tolled by the discovery rule because each plaintiff should have known that they did not receive whole life insurance at the time they received policies which were clearly identified as universal life policies. DeAngelo Brown dismissed his remaining claim without prejudice, rendering the court's decision a final order as to his claims. All plaintiffs now jointly appeal.

STANDARD OF REVIEW

Summary judgment settles only questions of law. *Pickens v. Tulsa Metro. Ministry,* 1997 OK 152, ¶ 7, 951 P.2d 1079, 1082. The standard of review of questions of law is *de novo. Id.* Summary judgment will be affirmed only if the appellate court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* Summary judgment will be reversed if reasonable people might reach different conclusions from the undisputed material facts or a party is not entitled to judgment as a matter of law. *See Runyon v. Reid,* 1973 OK 25, ¶ 15, 510 P.2d 943, 946. All reasonable inferences are taken in favor of the nonmovant. *Jennings v. Badgett,* 2010 OK 7, ¶ 4, 230 P.3d 861, 864.

ANALYSIS

The Motion to Dismiss

The defendants asked the Supreme Court to dismiss this appeal as a sanction pursuant to Supreme Court Rule 1.6(c)(1)[2] because plaintiffs had failed to timely file the record on appeal at the same time as the petition in error, pursuant to Supreme Court Rule 1.36(c). Plaintiffs did fail to file the record on November 16, 2022, the date on which they filed their petition in error. On November 30, 2022, the Supreme Court ordered plaintiffs to file a record. Plaintiffs did so on December 1, 2022, but the record filed included some documents in digital form on USB drives. On December 14, the Court noted that this was not an approved form of record, directed the appellate clerk to return the USB drives to the district court clerk, and permitted plaintiffs to resubmit any record that was on the USB drives in proper form, not later than December 30.[3] On December 21, before this deadline had expired, the defendants filed a motion to dismiss on the grounds that the record had not been timely filed, or

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[2] Rule 1.6 (c)(1), "Grounds for Dismissal," states:

> The Court may dismiss an appeal, counter-appeal or cross appeal either on its own motion or on the motion of the parties at any stage of the appellate process. An appeal may be dismissed because of untimeliness of the appeal, absence of an appealable order, mootness, waiver, abandonment or acquiescence in the judgment, failure to comply with these rules or order of the Court, or other grounds deemed appropriate by the Court. An alleged absence of substantive merit will not be regarded by the Court as grounds for dismissal on motion but may be raised in the brief of a party for consideration at the decisional stage.

[3] The paper record transmitted to us is stamped as being received on December 1, 2022, and the appellate docket sheet does not show a subsequent refiling of anything that might have been on the USB drives.

alternatively, to strike the record. The Supreme Court deferred this motion and assigned the matter to this Court for decision.

We note that the acts or omissions defendants complain of do not impact the jurisdiction of this Court to hear the appeal.[4] Oklahoma public policy favors resolution of actions on their merits. *Nelson v. Nelson,* 1998 OK 10, ¶ 23, 954 P.2d 1219, 1228. Dismissal of an action as a sanction generally should be imposed only when the party's conduct was willful or in bad faith. *Payne v. DeWitt,* 1999 OK 93, 995 P.2d 1088; *Moor v. Babbitt Products, Inc.,* 1978 OK 22, 575 P.2d 969. Although these cases concern sanction dismissals in the district court, we see no reason why the same public policy should not color appellate dismissal questions. The Court's order of November 30 granted defendants extra time to respond on account of the late filing. Defendants do not therefore show that they suffered any detriment by the filing of a record they were familiar with some fifteen days after it was due under Rule 1.36(c). The appellees' joint motion to dismiss or strike the record is denied.

The Summary Judgment

The claim here is that the plaintiffs were sold universal life insurance instead of the whole life insurance they requested and were led to believe they were purchasing.[5] Pursuant to this record, questions of fact remain as to

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[4] The Supreme Court ordered plaintiffs to file a record after they had failed to file it with the petition. It would not have done so if the initial failure to file deprived the Court of jurisdiction to hear the appeal.

[5] The record is unclear regarding what harm the plaintiffs thereby suffered. Whole life insurance and universal life insurance are the "two most common types of 'permanent' insurance," but they "differ with respect to features and benefits." *Rosenberg v. PHL Variable Ins. Co.*, CV 21-2673-KSM, 2023 WL 115297, at *2 (E.D. Pa. Jan. 5, 2023). Whole life policies

whether a fraud was committed or a verbal contract was breached. However, the basis for summary judgment here was not the absence of evidence of fraud or breach of contract but the statute of limitations.

Contract claims. The court found no evidence of a written and found that the three-year statute of limitations on an oral contract had expired in all cases except DeAngelo Brown's. Although the plaintiffs asserted the discovery rule, the discovery rule does not apply to an action for breach of contract under Oklahoma law. "The claim accrues when the contract is breached, regardless of whether the plaintiff knows, or in the exercise of reasonable diligence, should have known of the breach." *Morgan v. State Farm Mut. Auto. Ins. Co.*, 2021 OK 27, ¶ 31, 488 P.3d 743, 753. Hence, it is only plaintiffs' fraud claims that may be tolled by the discovery rule. As all contract claims except DeAngelo Brown's were filed well after the three-year limitation period for an oral contract, we find no error in summary judgment on the contract-based claims.

Fraud claims. The court held that, at the latest, each plaintiff knew or should reasonably have known they received universal life insurance at the time

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"are more rigid and provide more certainty because they require fixed, periodic premiums be paid in exchange for fixed benefits and guaranteed cash value accumulation." *Id.* Universal life policies, by contrast, are "more flexible but have less certainty because they allow the policyholder to vary the timing and amount of premiums and permit the insurer to periodically adjust the cost of insurance rates and credited interest rates that can impact the cash value accumulation and the amount of premiums needed to maintain coverage." *Id.* Whole life insurance is usually priced above term life insurance given that part of the regular premium funds the cash value component in addition to the death benefit. *Mann Constr., Inc. v. United States,* 539 F. Supp. 3d 745, 748 (E.D. Mich. 2021). The primary difference appears to be that, because of the fixed premiums, the whole life policy will have a known cash value at any given time, while the cash value of the universal life varies according to market conditions and payment amounts and may be zero at any given time. This appears to be what plaintiff Travis found when she attempted to cash in her policy. There is no allegation that the plaintiffs paid premiums associated with whole life policies.

they received the policies, instead of the whole life insurance they had expected, and the statute of limitations for fraud started to run at that time. Hence, the discovery rule did not apply, and all claims for fraud were made outside of the limitations period. A vital question on appeal is, therefore, whether the trial court was correct that the plaintiffs should have known with the "exercise of due diligence," that they had been sold a different policy from that they claim they had been promised at the time they received the policies. *Calvert v. Swinford*, 2016 OK 100, ¶ 11, 382 P.3d 1028, 1033. The trial court found it undisputed that, in each case, the policy applications and illustrative materials, and the policies actually received, all stated that the polices were universal life policies, and this was sufficient to put plaintiffs on notice of their injury.

Plaintiffs' primary argument is that even though their application materials and policies all stated that they were for universal life, none of them understood at the time that there was any substantive difference between whole and universal life insurance, and hence they should not have reasonably recognized the alleged fraud.

"A plaintiff is chargeable with knowledge of facts which he ought to have discovered in the exercise of reasonable diligence." *Daugherty v. Farmers Co-op. Ass'n*, 1984 OK 72, ¶ 12, 689 P.2d 947, 951. "Properly limited, a discovery rule should encompass the precept that acquisition of sufficient information which, if pursued, would lead to the true condition of things will be held as sufficient knowledge to start the running of the statute of limitations." *Id.* (*citing Young v. International Paper Co.*, 155 So. 231, 179 La. 803 (1934)). "[I]f the means of

knowledge exist, and the circumstances are such as to put a reasonable man upon inquiry, it will be held that there was knowledge of what could have been readily ascertained by such inquiry." *Id.* We agree with the district court that a party who actively seeks a whole life policy and received a policy titled "universal life insurance" is put on a duty of inquiry. As such the statute of limitations began to run—at the latest[6]—when the policies were received.

Active Concealment. The second question is whether the plaintiffs were still prevented from otherwise discovering that that they had been sold the wrong policy by some affirmative misrepresentation by Offiah. Fraudulent concealment constitutes an implied exception to the statute of limitations, and "a party who wrongfully conceals material facts and thereby prevents a discovery of his wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud." *Masquat v. DaimlerChrysler Corp.*, 2008 OK 67, ¶ 18, 195 P.3d 48, 54–55.[7]

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[6] The summary judgment record contains several applications and numerous other documents, signed by the various plaintiffs prior to the receipt of the policies, that reference universal life insurance. *See, e.g.*, Doc. 15, *Motion for Summary Judgment*, Exhibit 3, *Application for Insurance*, pg. 4 (wherein "Premier Universal Life" is checked as the "Plan of Insurance" in the "UNIVERSAL LIFE PRODUCT SECTION"). It could be that the statute began to run as of the date of the applications. For purposes of this opinion, we have presumed that the statute began to run upon receipt of the policy documents themselves.

[7] *See, e.g., Watkins v. Cent. State Griffin Memorial Hosp.*, 2016 OK 71, ¶ 27, 377 P.3d 124, 131, where a hospital attempted to prevent a victim from recognizing a tortious assault by falsely telling the victim that the assault was actually a routine medical procedure. The Supreme Court found this sufficient to prevent the hospital from raising the statute of limitations.

Plaintiff Travis's response to the defendants' motion for summary judgment identifies, at paragraph nine, several statements allegedly intended to cover up the fraud and lead the plaintiffs to believe they had actually received whole life policies, rather than universal life policies. The response alleges that, during the application process, Offiah "actively concealed his deception" by handing the plaintiffs blank applications marked with an "X" to sign so he could complete the application outside their presence, which he did while "often riddling the applications with errors." The response also alleges that Offiah falsified signatures, alleging that, on or about April 3, 2013, Offiah submitted a fraudulent signature to Assurity as part of plaintiff Travis's application for changes to a policy and that, on March 7, 2018, Offiah also submitted fraudulent signatures to Assurity as part of plaintiff Brown's application for conversion of a policy.

Although these alleged facts could show fraud in the application process, the question is not whether the policies were fraudulently sold or procured, which may be assumed for the purposes of this inquiry, but *when* plaintiffs should have reasonably discovered the fraud. None of these allegations would have prevented plaintiffs from *subsequently discovering* that their universal life policies were not whole life insurance policies. Nor do the various depositions cited in paragraphs eight, nine, or ten of the response show any active misdirection by Offiah to prevent discovery *after the policies were received.* None of these citations to evidence show that the plaintiffs queried the matter with

Offiah after receiving universal life policies and received assurances that the polices were actually for whole life.[8]

Paragraph eleven of the response more specifically alleges that plaintiff Lavine did notice the word "universal" on his policy application, queried Offiah whether he was getting whole life, and was told not to worry—he was getting whole life. This claim is supported by Lavine's deposition testimony. The paragraph also alleges that Offiah did the same when queried by plaintiffs Travis and Russell. The response cites an Assurity employee's "call note" of a call Travis made to Assurity in 2018, some seven years after the policy was sold. The note stated that Travis told Assurity that "she was advised [the policies] were whole life" but the note does not say *when* this advice occurred. The cited portions of Russell's deposition state only that she did not understand that there was any difference between whole and universal life insurance.

Paragraph twelve of the response states that Offiah continued to misrepresent the policies by claiming they were whole life policies during yearly communications after the sale. Although this might be sufficient to toll the time of reasonable discovery, the cited evidence does not support this claim.[9]

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[8] The cited deposition testimony of Chasity Travis discusses only what she was told when buying the policy. The same is true of Michael Lavine's deposition testimony. Inez Travis-Russell testified that she thought she had whole life coverage because that was what she and Offiah had talked about. Jasmine Smith testified that she was told she was getting whole life insurance but did not testify that she queried Offiah or received any after-sale assurance that the universal life policy was somehow a mistake or was actually whole life insurance. DeAngelo Brown testified that Offiah left a lot of details vague, explained that he was experienced, and Brown could trust him, and discussed whole life insurance, not universal.

[9] The reference to Offiah's supplemental discovery responses shows only that Offiah held regular meetings with clients. Exhibits 9-10 show only that Offiah held regular client

Paragraphs fourteen through sixteen of the Response state that Offiah eventually admitted that he had knowingly sold universal life policies instead of whole life policies, apparently because he thought the clients would reject whole life policies.[10] These paragraphs follow the now familiar argument that, if the plaintiffs can show Offiah committed fraud when he sold the policies, this establishes some form of "continuing fraud" that creates tolling under the discovery rule. Simple fraud in the sale of the policies does not amount to a subsequent active attempt by Offiah to prevent discovery of the fraud, however.

The only possible active attempt to prevent discovery alleged in these paragraphs is the statement by Offiah, made after Assuirty had informed Travis that she had a universal life policy, that Assurity sometimes "makes mistakes." One could argue that this statement could be reasonably interpreted as "Assurity is wrong about the policy that you have, which is in reality a whole life policy." The Assurity-makes-mistakes statement was made in November 2018, however, and Travis purchased policies in 2011, 2012 and 2015. By the time Offiah made the November 2018 statement, the limitations period on all Travis's fraud claims had already expired.

The remainder of the response lists various alleged unpleasant characterizations of Offiah and alleges generally that Offiah behaved offensively

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meetings with Travis and Lavine. Pages 102-103 of the Travis deposition state only that Travis believes that Offiah misrepresented the policy *prior to her receiving it.* Page 162 of the Lavine deposition states only that Lavine and Offiah held yearly meetings.

[10] Why this would be so remains uncertain. The response simply quotes Offiah as saying that he did not offer whole life because plaintiff Travis would have "told him to go to hell." That this was related to the relative cost of a whole life policy seems likely but remains unknown.

to Travis when the fraud was discovered. It further details numerous inappropriate actions by Offiah as an insurance broker. These alleged facts, though disturbing, are not relevant to the question before us and are more properly addressed to the relevant regulatory authority. As we have stated before, the question is not whether Offiah committed fraud, or any other offense, but whether the appropriate limitations period had expired at the time of the petition in this case.

In summary, we find no evidence that Offiah actively assured the plaintiffs that their policies were, in fact, whole life policies after they received them. Nor could we ignore the fact that, even if Offiah had attempted such deception, the policy documents that the plaintiffs had in their possession would have clearly belied any such assurances.[11] There is no allegation that Offiah doctored the policies, which were delivered directly from Assurity, and which clearly show on their face, they are for Universal Life Insurance.[12]

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[11] *See, e.g.*, Doc. 15, *Motion for Summary Judgment*, Exhibit 5, Universal Life Insurance Policy, pg. 1 (wherein, on the cover page of one of Ms. Travis's policies the following words are printed in bold, capital letters: "UNIVERSAL LIFE INSURANCE POLICY").

[12] The plaintiffs cite *Business Interiors, Inc. v. Aetna Casualty & Surety Co.*, 751 F.2d 361 (10th Cir. 1984) for this statement: "Under Oklahoma law, an insured has no duty to read his written policy and notice discrepancies between it and previous representations of a soliciting agent." *Id.* However, that case cites *Commercial Casualty Insurance Co. v. Varner*, 1932 OK 696, 16 P.2d 118 and *Warner v. Continental Casualty Co.*, 1975 OK CIV APP 19, 534 P.2d 695, each of which concern attempts to reform a policy due to mutual mistake. *Commercial Casualy*, ¶ 0 ("Accident insurance policy, if not expressing real contract entered into because of mutual mistake, may be reformed to express the intention of the parties." (Court's syllabus)); *Warner*, ¶ 23 (concluding that "mutual mistake existed between plaintiff and defendant.") In this case, plaintiffs do not claim that Offiah, Woodman, or Assurity also believed they were selling whole life insurance policies and some misunderstanding existed between the parties. We find *Business Interiors* inapplicable to these facts.

Other claims. The plaintiffs also raised claims of unjust enrichment and sought "equitable restitution" and a constructive trust. The trial court correctly noted that a party is not entitled to pursue these equitable remedies when it has an adequate remedy at law. *Krug v. Helmerich & Payne, Inc.*, 2015 OK 74, ¶ 6, 362 P.3d 205, 209.

Finally, we note that paragraph 18 of the petition also appeared to raise a claim of breach of fiduciary duty. Offiah denies that he acted as part of any advisory or fiduciary relationship, and hence this relationship presently remains an undecided question of fact. The trial court could therefore grant complete summary judgment only if the statue of limitations on the claims of breach of fiduciary duty had also expired. But the relevant inquiry regarding notice to the plaintiffs under any claim for breach of fiduciary duty are the same as any other tort. *See Smith v. Baptist Found. of Oklahoma*, 2002 OK 57, ¶ 8, 50 P.3d 1132, 1137; *Woods v. Prestwick House, Inc.*, 2011 OK 9, ¶ 26, 247 P.3d 1183, 1190; and *Hebble v. Shell W. E & P, Inc.*, 2010 OK CIV APP 61, ¶ 12, 238 P.3d 939, 944, *cert. denied.* As such, the same analysis applies to this claim as applies to the fraud claims, and the trial court was correct to grant summary judgment based on the statute of limitations.

CONCLUSION

Plaintiffs stated *prima facie* cases for fraud and breach of contract but could not show, even presuming all factual inferences in their favor, that their claims were brought within the applicable statute of limitations. As such, summary judgment was appropriate.

AFFIRMED.

FISCHER, J., and HUBER, J., concur.

October 2, 2023