

[Cite as *Adlaka v. NY Life Ins. & Annuity Corp.*, 2015-Ohio-605.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SAD ADLAKA, et al.,	)	
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	CASE NO. 13 MA 171
V.	)	
	)	OPINION
NEW YORK LIFE INSURANCE AND	)	AND
ANNUITY CORP., et al.,	)	JUDGMENT ENTRY
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Application for Reconsideration

JUDGMENT: Granted  
Reversed and Remanded

APPEARANCES:  
For Plaintiffs-Appellants Attorney James S. Gentile  
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JUDGES:  
  
Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: January 16, 2015

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PER CURIAM.

{¶1} On December 5, 2014, this court affirmed the judgment of the Mahoning County Common Pleas Court ruling in part that the plaintiff-appellants' fraud and breach of contract claims regarding a 1999 variable universal life insurance policy were barred by the statute of limitations in R.C. 1707.43(B).<sup>1</sup> The contested summary judgment decision was thus upheld in favor of defendant-appellees New York Life Insurance and Annuity Corporation, New York Life Insurance Company, Eagle Strategies LLC, and insurance agent William Mangano. Although one of the claims asserted in the plaintiffs' complaint specifically cited the securities law in Chapter 1707, after being presented with the statute of limitations in that chapter, the plaintiffs then urged that the variable life insurance policy was not a security or that their common law claims for breach of contract and fraud claims were separate from any securities claim and should not be covered by the securities statute of limitations.

{¶2} Thus, the main arguments on appeal concerned whether the issuance of a variable life insurance policy constituted the sale of a security and whether the securities statute of limitations would apply to the breach of contract and fraud claims as they arose out of the sale of securities. This court analyzed the statutory definitions involving the sale of a security in Chapter 1707 and applied federal case law concluding that a variable life insurance policy involves a security. We then moved to the second question and cited Ohio case law in support of a holding that a plaintiff cannot cloak a claim predicated on the sale of securities within a common law action in order to avoid the statute of limitations provided in R.C. 1707.43(B).<sup>2</sup>

{¶3} Plaintiff-appellants filed a timely application to reconsider our decision

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<sup>1</sup>Said statute provides that no action for any recovery based upon or arising out of a sale or contract for sale in violation of Chapter 1707 shall be brought more than two years after the plaintiff knew or had reason to know of the facts showing the actions were unlawful or more than five years from the date of the sale or contract, whichever period is shorter. R.C. 1707.43(B). We noted that the complaint was brought more than five years after the sale, the maximum time for bringing a complaint, without addressing when the plaintiff had reason to know of the facts.

<sup>2</sup> The trial court also granted summary judgment on the claims involving a 1994 whole life policy. We stated that a whole life policy does not involve a security but pointed out that the trial court alternatively granted judgment on the 1994 policy due to a class action settlement pertaining to that policy, which appellants did not assign as error. We also pointed out that appellants abandoned their claim under the Consumer Sales Practices Act by failing to make any arguments on that topic on appeal and their Chapter 1707 claim by failing to present arguments on that claim on appeal (and by asserting that the variable life product was not a security). *Appellants' application for reconsideration did not ask for reconsideration on any of their claims except the common law fraud and breach of contract claims, and as such, this decision is limited to those claims.*

regarding only their common law breach of contract and fraud claims. See App.R. 26(A). That application merely disagreed with the conclusions reached by this court and did not elucidate an obvious error or point to an issue that should have been but was not fully considered. See, e.g., *State v. Adams*, 7th Dist. No. 13MA54, 2014-Ohio-883, ¶5, *State v. Himes*, 7th Dist. No. 08MA146, 2010-Ohio-332, ¶4-5 (where a party merely contests our analysis and conclusion by reiterating arguments similar to those presented in the briefs and considered by this court, reconsideration is not appropriate).

{¶4} Subsequently however, in responding to the application for reconsideration, the defendant-appellees have for the first time provided the key to *the plaintiffs'* argument against applying the statute of limitations contained in R.C. 1707.43(B). The appellees disclose that they recently discovered that their variable life insurance product is not in fact subject to the securities law in Chapter 1707, including the statute of limitations within R.C. 1707.43(B), due to an exception set forth elsewhere, specifically: in the second paragraph of R.C. 3911.011(D). That section provides: "Chapter 1707. of the Revised Code does not apply to any policy, annuity, or other contract providing fixed, variable, or fixed and variable benefits or contractual payments, that is issued by any company, partnership, or association authorized to transact the business of life insurance in this state." R.C. 3911.011(D).

{¶5} Appellees therefore concede that they should not have sought summary judgment on the fraud and contract claims by using the securities statute of limitations, and they consent to the granting of reconsideration on those claims due to the existence of this heretofore uncited statutory provision. Appellees apologize for any inconvenience and explain that they were recently advised of the exemption "by a firm that specializes in insurance regulatory matters." They attach an unreported partial dismissal decision wherein a federal trial court stated that R.C. 3911.011(D) clearly exempts the listed products from the securities regulations contained in Chapter 1707. See *Brainard v. American Skandia*, N.D. Ohio No. 1:03CV1698 (Apr. 8, 2004 Memorandum of Opinion and Order).

{¶6} Notably, in a reported case previously cited in one of appellee's briefs and in the appellants' reply brief, another federal court stated that the court was

unable to find any Ohio law to support an argument that R.C. 1707.43 does not apply to life insurance. See *Levin v. Barry Kaye & Associates, Inc.*, 858 F.Supp. 914, 921 (S.D.Ohio 2012). Appellees also note that Chapter 1707 does not cross-reference R.C. 3911.011(D) or repeat the exception. They add that they did not discover the exemption in their research because the plaintiff first asserted a claim under Chapter 1707 and they were focused on applying the statute of limitations within that chapter to the plaintiffs' other claims. Although the plaintiffs soon abandoned any suggestion that the variable life insurance policy involved a security and argued against applying the statute of limitations in R.C. 1707.43(B), the plaintiffs did not discover the statutory exemption within R.C. 3911.011(D) either.

{¶7} In sum, regardless of the conclusion that a variable life insurance policy involves the sale of a security and regardless of the conclusion that common law claims predicated on the sale of a security are generally subject to the statute of limitations for securities, there exists a specific statutory exemption applicable to the product at issue in this case. All parties agree that the statute of limitations in R.C. 1707.43(B) does not apply to the fraud and breach of contract claims surrounding the sale of the variable universal life insurance policy. Thus, reconsideration is granted as to these claims. The trial court's decision finding that the fraud and breach of contract claims are barred by the statute of limitations in R.C. 1707.43(B) is therefore reversed.

{¶8} After conceding that reconsideration on this basis is appropriate, appellees then ask that we affirm the trial court's grant of summary judgment on alternative grounds. It has been stated that a reviewing court should not reverse a correct judgment merely because it is based upon erroneous reasons. *Stammco, L.L.C. v. United Telephone Co. of Ohio*, 136 Ohio St.3d 231, 994 N.E.2d 408, 2013-Ohio-3019, ¶ 51. However, under the various circumstances of the case before us, we shall not entertain the alternative reasons unaddressed by the trial court at this late stage in the proceedings.

{¶9} Initially, we note that the appellees' final motions below conveyed the impression that the issue being presented to the trial court on reconsideration was

whether the statute of limitations in R.C. 1707.43(B) applied.<sup>3</sup> And, that was the only decision made by the trial court as to the 1999 policy. In reversing summary judgment on the ground utilized by the trial court, we have refrained from considering alternative arguments in the first instance. See, e.g., *Fullum v. Columbiana Cty. Coroner*, 7th Dist. No. 12CO51, 2014-Ohio-5512, ¶ 44-46; *Tree of Life Church v. Agnew*, 7th Dist. No. 12BE42, 2014-Ohio-878, ¶ 27 (although an appellate court reviews a summary judgment decision de novo, we refrain from considering issues raised in summary judgment proceedings that the trial court failed to rule on); *Teeter v. Teeter*, 7th Dist. No. 13CA887, 2014-Ohio-1471, ¶ 38 (where the trial court found an issue presented in appellee's summary judgment motion to be moot, this court remanded for the trial court to address the issue in the first instance after reversing summary judgment on the threshold issue). See also *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 89, 585 N.E.2d 384 (1992) (where in granting summary judgment the trial court declined to address an issue surrounding a release due to another ruling, the Court held that this release unaddressed by the trial court was not properly before the appellate court and could not be used by the appellate court to bolster its decision affirming the trial court); *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360, 604 N.E.2d 138 (1992) (de novo standard still requires a review of what the trial court decided; the trial court's initial ruling and the mandatory duties in making that ruling cannot be replaced or cured by an appellate court's de novo review).

{¶10} “In other words, if a party raises ten arguments in a summary judgment motion, the trial court adopts the first one, and the appellant assigns that position as error, the appellee cannot require this court to address the nine other arguments by arguing that the judgment can be affirmed on other grounds that the trial court never reached.” *Yoskey v. Eric Petroleum*, 7th Dist. No. 13CO42, 2014-Ohio-3790, ¶ 41. See also *Conny Farms, Ltd. v. Ball Resources, Inc.*, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶ 15, 27 (issues raised in summary judgment motions but not considered

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<sup>3</sup> The court's summary judgment decision was the result of a motion for reconsideration, asking the court to change the decision that the claims involving the 1999 policy were premature (because relief should first have been sought in New York where the 1994 policy was subject to a class action settlement) and asking the court to grant summary judgment because all claims were barred by R.C. 1707.43(B). They did reference their prior motions for summary judgment but placed their present emphasis on the securities statute of limitations.

by the trial court need not be ruled upon by the appellate court), citing *Mills-Jennings, Inc. v. Dept. of Liquor Control*, 70 Ohio St.2d 95, 99, 435 N.E.2d 407 (1982) (where the trial court's legal ruling made further decisions on other issues unnecessary, upon reversing that initial legal ruling, the reviewing court need not decide the other issues); *Scalia v. Aldi, Inc.*, 9th Dist. No. 25436, 2011-Ohio-6596, ¶ 15; *Orvets v. National City Bank, Northeast*, 131 Ohio App.3d 180, 194, 722 N.E.2d 114 (9th Dist.1999).

{¶11} In any event, the arguments now presented as reasons to affirm on other grounds were not specified in the appellees' briefs. For instance, appellee Mangano states that we should affirm summary judgment for him on the contract claim because he was not a party to the contract. However, this argument was not presented in his brief as related to the 1999 policy. His reconsideration response also asks us to affirm summary judgment on the fraud claim because there was no evidence of fraudulent misrepresentation or because the statute of limitations for fraud expired as any fraud should have been discovered earlier. Yet, he did not brief the claim that there was no evidence of a fraudulent misrepresentation in procuring the 1999 policy. And, he briefed the statute of limitations for fraud when outlining the 1994 policy, but did not do so for the 1999 policy.

{¶12} Similarly, the reconsideration response filed by the appellee-companies states that we should affirm the summary judgment on the alternative ground that the fraud claim fails as a matter of law on the elements of fraud, but that argument was not set forth in their appellate brief. They also raise the fraud statute of limitations in their response to reconsideration, citing to page 23 of their appellate brief. However, that page falls under the topical heading for the 1994 policy and specifically refers only to the "fraud claim as to the 1994 whole life policy." Later, under the arguments for the 1999 policy (at page 31), they urged that a fraud claim predicated on the sale of a security is subject to the securities statute of limitations *rather than* the fraud statute of limitations, without setting forth an alternative argument. Finally, their reconsideration response sets forth an argument that we should affirm summary judgment on the contract claim for the alternative ground that the contract claim fails as a matter of law as no part of the contract was dishonored and there is an

integration clause. Yet again, this argument was not made in their appellate brief.

{¶13} Hence, the alternative grounds allegedly supporting summary judgment on the 1999 policy were not utilized by the trial court and were not argued in the briefs to this court (but were specified only in response to appellant's application for reconsideration). We add that this is not a situation where the reconsideration proceedings could be seen as providing the sole catalyst for raising the alternative grounds now proposed. For all of these reasons, we refrain from addressing the alternative arguments set forth in the appellees' responses to reconsideration. Rather, the remaining issues are left for the trial court on remand.

{¶14} Finally, we note that at the end of his response to appellants' application for reconsideration, appellee-Mangano requests that we reconsider the rejection of his cross-assignment of error wherein he complained that the trial court abused its discretion in implicitly denying his motion to strike an expert report, which he believed was untimely under the extended discovery deadlines. We stated that he did not explain how the allegedly implicit decision would affect our decision on appeal as it appeared he was attacking an interlocutory decision merged into final judgment (requiring a cross-appeal) rather than merely defending the court's judgment. See App.R. 3(C)(1)-(2).

{¶15} Appellees did not ask for summary judgment due to the lack of an expert report, for instance, and the trial court's order did not utilize any report in ruling. Regardless, a court has broad discretion in regulating and granting extensions of discovery. The court did grant discovery extensions of an order which could be read as including expert reports in the same time-table as general discovery. In any case, appellee-Mangano states that he is asking for reconsideration of his cross-assignment "[t]o the extent that Plaintiffs attempt to rely on the opinions set forth by their 'expert' \* \* \* in briefing on reconsideration." Thus, it appears that his reconsideration request on this topic was made in the event we reviewed his alternative arguments (and considered rejecting them on the merits). Again however, we are reversing and remanding the trial court's decision rather than addressing the merits of arguments not presented to this court in the original briefs.

{¶16} In conclusion, reconsideration is granted. The trial court's decision

applying the statute of limitations in R.C. 1707.43(B) to bar the breach of contract and fraud claims concerning the 1999 life insurance policy is reversed, and the case is remanded for further proceedings on those claims.

Vukovich, J. concurs.

Donofrio, P.J. concurs.

Waite, J. concurs.