Affirmed; Opinion Filed May 8, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01433-CV

AMERICAN REALTY TRUST, INC. AND ART MIDWEST, INC., Appellants
V.
ANDREWS KURTH, LLP, Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-04-05724

MEMORANDUM OPINION

Before Justices Bridges, Evans, and Whitehill
Opinion by Justice Evans

American Realty Trust, Inc. and ART Midwest, Inc. (collectively ART) appeal from the trial court's take-nothing summary judgment on legal malpractice claims they asserted against Andrews Kurth, LLP (AK). The summary judgment was based on AK's affirmative defense of limitations. In two issues, ART asserts the trial court erred in granting summary judgment because (1) when liberally construed, their first amended petition timely asserted a claim based on AK's March 1999 actions relating to the termination of real estate transaction, and (2) the *Hughes*[1] tolling doctrine applies to their March 1999 termination claims and, therefore, those claims were timely asserted in their second amended petition. Because we resolve both issues against ART, we affirm the trial court's judgment.

[1] *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991).

BACKGROUND

In 1997, ART retained AK to represent them in acquiring numerous apartment complexes in several states from David Clapper and related business entities (Clapper). AK provided advice and drafted documents in furtherance of ART's acquisition. Specifically, in November 1998, AK drafted a first amendment to the contract between ART and Clapper. In March 1999, however, ART discussed with AK the possibility of terminating the Clapper deal. According to ART, AK advised that ART could terminate the transaction without breaching the contract because Clapper had previously breached the contract. AK then drafted a termination letter on ART's behalf which was sent to Clapper on March 22, 1999. Clapper responded with a letter dated March 24, 1999, asserting ART's termination was wrongful. Nevertheless, in both letters, the parties continued to express willingness for ART to acquire the properties if they could agree on the terms.

Ultimately, the dispute between ART and Clapper resulted in litigation.[2] In January 2001, ART and AK signed a tolling agreement with respect to legal malpractice claims ART could potentially assert against AK. On appeal, ART asserts the tolling agreement did not apply to claims arising from AK's actions in November 1998 because limitations had expired on those claims before the tolling agreement was executed. ART further stated that the purpose of the tolling agreement was to extend the deadline to file any claims based on the March 1999 termination advice and actions until March 24, 2005.

On March 24, 2005, the last day before the tolling agreement expired, ART filed their first amended petition in a lawsuit against AK asserting malpractice claims pertaining to its handling of the Clapper transaction. It was not until August 2014, however, shortly after the federal trial court rendered final judgment against them, that ART filed a second amended petition specifically

[2] Although ART initially prevailed in the federal trial court, the 5th Circuit reversed the trial court's judgment in 2007 and the case was remanded. After a second trial and another appeal, the trial court rendered a final judgment against ART in 2014.

addressing and detailing their complaints about AK's termination advice and actions. AK filed its first summary judgment motion based on limitations in August 2015. In their response to the first motion for summary judgment, ART argued AK was wrongfully conflating two separate, distinct and mutually exclusive acts of legal malpractice: the November 1998 faulty drafting of the first amendment to the Clapper contract that they admitted was time barred, and the March 1999 negligent advice and actions relating to the termination of the Clapper deal which was not.[3] ART does not appeal the trial court's first summary judgment rendered on February 8, 2016, dismissing the November 1998 claims based on limitations.[4]

AK filed a second motion for summary judgment in July 2016 arguing that ART's termination claims were also time barred because their first amended petition complained only of negligent drafting, all of which occurred in 1998, and did not mention "termination" or discuss anything about AK's termination–related advice. ART countered that their broadly worded first amended petition adequately pled negligence in AK's representation of ART with respect to the entirety of the Clapper transaction. They further argued their use of the term "transaction documents" in the first amended petition necessarily included AK's March 1999 termination letter and related correspondence conveying AK's advice to ART throughout the Clapper transaction. As an additional basis to defeat summary judgment, ART asserted the *Hughes* equitable tolling rule applied to their claims. The trial court granted AK's motion and rendered judgment that ART take nothing by their claims. ART filed this appeal.

[3] ART filed its third amended petition in October 2015 removing all malpractice claims against AK arising in November 1998 and alleging malpractice claims only with respect to AK's termination advice and letter that occurred in March 1999.

[4] The February 8 order denied summary judgment on ART's claims based on the March 1999 termination advice and actions.

ANALYSIS

A. Standard of Review

We review the trial court's summary judgment under well-known standards. *See Diaz v. Westphal,* 941 S.W.2d 96, 97–98 (Tex. 1997). A defendant who moves for summary judgment based on limitations must establish the defense as a matter of law, and thus, must conclusively negate any relevant tolling doctrines the plaintiff asserted in the trial court. *Id*. at 98.

B. Clapper Deal Termination Claims

In their first issue, ART contends the trial court erred by granting AK's second motion for summary judgment on limitations because their first amended petition sufficiently notified AK that they were asserting malpractice claims generally based on AK's representation of ART in the Clapper deal which necessarily included advice and actions related to their termination of the deal. We do not agree.

We begin our analysis with ART's relevant pleading allegations. ART's first amended petition set forth the factual basis for their malpractice claims against AK arising from the Clapper deal in paragraphs 3.28 through 3.32. They alleged AK was retained to assist them in "structuring and negotiating the overall purpose, intent and effect of the transactions with Clapper" and "charged with drafting, negotiating and obtaining the ultimate execution of documents to effectuate [ART]'s intent." According to ART, after the execution of the documents negotiated and/or drafted by AK, litigation ensued between ART and Clapper about the meaning, intent, and legal effect of certain documents drafted by AK. In the petition, ART acknowledged that litigation was still pending and that, to date, ART had been successful in their construction of transaction documents. ART further asserted that, should any documents be construed to not give the intent and legal effect ART intended, AK would be liable for professional malpractice. Although the

petition addresses events occurring in 1998, the petition is completely silent about any event or action AK took in March 1999, the time of AK's termination advice and letter.

ART asserts the question before us is whether their first amended petition, when construed in the light most favorable to ART, contained a factual basis for claims related to AK's termination advice and letter.[5] ART maintains that, in the absence of special exceptions, their first amended petition must be broadly construed to include their malpractice claims arising out AK's advice and actions with respect to the termination of the Clapper deal. They further argue the termination letter is a transaction document embodying the entirety of the negligent advice given by AK in 1999 and the document immediately preceding the litigation that resulted between ART and Clapper.

We agree that ART's petition must be liberally construed in their favor absent special exceptions. *See Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases its claim. *Id*. at 810. Even construing ART's first amended petition liberally, however, there is nothing in the pleading to suggest that they are asserting a negligence claim based on AK's advice regarding the termination of the Clapper deal or the termination letter AK drafted and sent to Clapper on ART's behalf.

The relevant paragraphs involving the "Clapper Claims," only address the structuring, negotiating, drafting, and/or execution of documents that "effectuat[ed] [ART's] intent" with respect to the Clapper transaction. In their first amended petition, ART acknowledges that the documents had been construed as ART intended in underlying litigations to date, and that "if it is determined that the transaction documents . . . have a meaning or legal effect other than that as intended . . . [AK] would have failed to provide the services contemplated by their representation

[5] ART contends this is not an instance of attempting to add untimely claims after limitations has run, because their termination claims were "always present" in their first amended petition and AK was "always aware of" these claims.

agreement with [ART] and insodoing[sic] would have failed to meet the minimum standards of care owed to [ART]." ART's complaint specifically addresses whether the transaction was structured, negotiated, drafted and executed as ART intended. Although the petition alleges AK failed to properly structure, negotiate, draft and execute the transaction as contemplated by ART, there are no allegations of negligence with respect to AK's advice or actions in terminating the transaction.

Although ART asserts the termination letter is a transaction document "expressly intended to affect the Clapper Transaction," there is no factual basis or any specific act of negligence in the first amended petition for a claim related to AK's allegedly negligent termination advice and letter. Despite ART's assertion that the termination letter was a transaction document necessarily encompassed by the allegations in their first amended petition, it is clear that ART's complaint was not directed to all transaction documents, but rather those that because of drafting errors, fundamentally altered the structure of the transaction and thus, had or potentially could have a meaning, intent, or legal effect contrary to the meaning, intent or legal effect sought by ART and their instructions to AK. ART's termination advice and subsequent letter simply are not included in this specific category of alleged malpractice.

In reaching our conclusion, we also reject ART's position that their first amended petition was broadly worded and, thus, necessarily covered all malpractice claims against AK stemming from the inception of its representation of ART to the termination of the Clapper deal. ART's pleading does not contain any broad language generally complaining that AK committed negligence during its representation of ART relative to the Clapper deal as illustrated by the above petition allegations. Moreover, ART's reliance on evidence outside the allegations contained in the first amended petition, such as the parties tolling agreement or AK's discovery requests, does not support its contention that the pleading asserted a malpractice claim based on the termination

advice and letter. The tolling agreement attached to the amended petition simply contemplates when malpractice claims may be raised and makes no reference as to what claims are to be raised. Additionally, ART does not cite us to any authority, and we have found none, that would permit us to look beyond the first amended petition and examine AK's discovery requests to determine whether ART pleaded a separate claim for AK's termination advice and termination letter. *See Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979) (fair notice inquiry limited to a review of pleadings alone without resorting to information from other sources). Because the allegations in ART's first amended petition did not give fair notice to AK of a malpractice claim based upon AK's advice and actions regarding the termination of the Clapper deal, we resolve ART's first issue against them.

C. *Hughes* Tolling Doctrine

In their second issue, ART argues that even if their first amended petition did not raise claims based on AK's advice and actions related to termination of the Clapper deal, these claims were asserted timely in their second amended original petition filed on August 11, 2014 pursuant to the tolling rule announced in *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991). ART presents two arguments relative to this issue. ART asserts that its 1999 termination claims are tolled by *Hughes* because the termination letter drafted by AK is not only a transaction document but also "a notice letter drafted and sent by AK 'in the prosecution . . . of a claim that result[ed] in litigation' namely [ART]'s claims that they had a proper contractual basis for terminating the Clapper Transaction."[6] ART also argues the *Hughes* tolling doctrine should be

[6] In oral argument and a post-submission letter brief, AK responds that ART's issue in the trial court and in its original appellate brief was limited to ART's second argument whether *Hughes* should be extended or expanded to include transactional malpractice. Accordingly, AK argues ART's first argument has been waived. The issue of the applicability of the *Hughes* tolling doctrine was presented to the trial court in ART's response to AK's summary judgment in general statements that encompass both its arguments as well as in specific statements articulating ART's second argument. *See Adams v. Starside Custom Builders, LLC*, No. 16-0786, 2018 WL 1883075, at *5 n.2 (Tex. Apr. 20, 2018) (general argument that mentioned other terms in a statute not specifically argued to trial court preserved

extended to include transactional malpractice such as their termination claims here. We will decide each argument in turn.

Hughes tolls the statute of limitations in the limited circumstances when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation until all appeals on the underlying claim are exhausted. *See Murphy v. Mullin, Hoard and Brown, L.L.P.*, 168 S.W.3d 288, 291 (Tex. App.—Dallas 2005, no pet.). We do not view the Clapper deal termination advice and subsequent letter as falling within the category of legal malpractice cases encompassed within *Hughes*'*s* definition. Specifically, AK did not provide its termination advice or draft its termination letter "in the prosecution or defense of a claim that result[ed] in litigation." *Hughes*, 821 S.W.2d at 157. Instead, AK's termination advice and letter were merely the realization of its construction of what the transaction documents AK had previously drafted permitted ART to do in the circumstances presented. ART asserts they were exercising their right

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issue for appeal). On appeal, ART's original brief primarily urged its second argument to extend the *Hughes* rule to include their claims. But ART made broad statements such as this summary of its appellate position regarding *Hughes*:

> [ART] asserted below and assert here that the equitable tolling doctrine set forth in *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156-57 (Tex. 1991), applies to their claims in this case. If it does, then even the later-filed but more specific Second Amended Original Petition is timely to assert [ART's] claims against AK relating to its advice in terminating the Clapper Transaction.
>
> The Texas Supreme Court has held some claims such as Plaintiffs are covered by *Hughes*. Indeed, *Hughes* itself involved legal malpractice unrelated to a pending lawsuit. Some federal district courts have also applied Hughes to claims like those alleged here.

(Appellants' Brief at 19). In its formal argument, ART contended,

> Plaintiffs asserted, both in their Second Amended Petition . . . and in their response to AK's Second Motion for Summary Judgment on Limitations . . . , that *Hughes* applied to toll limitations as to its claims arising from AK's March 1999 advice and work concerning the termination of the Clapper Transaction. As a result, Plaintiffs [sic] Second Amended Petition, which alleged those claims with more specificity, was not barred by limitations.

(*Id*. at 32–33) (citations to record and appendix omitted). AK does not dispute that ART clearly asserted its first argument in its reply brief that the *Hughes* rule applies as it currently exists, without the need for extension. We cannot consider issues raised for the first time in a reply brief. *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 104 (Tex. 1986) (per curiam). But the distinction between issues and arguments is not always clear. *See Adams*, 2018 WL 1883075, at *5 ("[Appellant] was not required on appeal or at trial to rely on precisely the same case law or statutory subpart that we now find persuasive.") (citing *Greene v. Farmers Ins. Exchange*, 446 S.W.3d 761, 764 n.4 (Tex. 2014) ("We do not consider *issues* that were not raised in the courts below, but parties are free to construct new *arguments* in support of issues properly before the Court."). Because both of ART's arguments contend *Hughes* applies or should apply to ART's claims, we address them both.

to termination under the contract after Clapper breached its obligations under the contract. But exercising such rights under a contract does not equate with prosecuting or defending a claim of breach of contract. In fact, the termination letter at issue actually states that notwithstanding the termination, it was still ART's intention to "discuss a possible restructuring of the transactions contemplated" by the agreements. The letter went on to indicate that if an agreement could not be reached, ART expected Clapper to repurchase the Indiana properties.

ART's reliance on alleged factual similarities between this case and *Hughes* and *Gulf Coast Inv. Corp. v. Brown*, 821 S.W.2d 159 (Tex. 1991) (per curiam) is misplaced. In *Hughes,* the attorney was retained to assist clients with the adoption of a child. *Id*. at 155. The alleged negligence occurred in connection with an affidavit of relinquishment needed to prosecute the adoption. *Id*. In *Gulf Coast*, a property owner sued a creditor for wrongful foreclosure alleging the foreclosure sale was invalid because the foreclosure notice was improper. *Id*. at 160. After the wrongful foreclosure suit settled, the creditor sued the law firm that represented it in the foreclosure sale. *Id*. The Texas Supreme Court held "when an attorney's malpractice in conducting a non-judicial foreclosure sale of real property results in a wrongful foreclosure action against the client, the statute of limitations on the malpractice claim is tolled until the wrongful foreclosure action is finally resolved." *Id*. *Gulf Coast*, like *Hughes,* involved the prosecution of a claim; specifically, the law firm prosecuted a claim by conducting the foreclosure sale. *See J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189, 198 n.5 (Tex. App.—Houston [14th Dist.] 2006, no pet.). In the case before us, AK's termination advice and letter were not for the purpose of prosecuting a claim or defense. Instead, the termination letter stated it was still the intention of ART to meet with Clapper to discuss a possible restructuring of the transaction. Accordingly, any alleged malpractice claims arising out AK's termination advice and letter are not covered by *Hughes*.

ART further argues that if the *Hughes* doctrine in its current iteration does not toll limitations for their termination claims, the doctrine should be extended to include such transactional malpractice. In *Murphy*, we declined to apply the *Hughes* rule to claims of negligent drafting and/or review of agreements creating family limited partnerships, reasoning that because such claims were not "attorney malpractice committed during 'the prosecution or defense of a claim that results in litigation'" the claims were not within the category of cases to which *Hughes* applied. *Id*. at 293. Aware of our rulings in *Murphy* and subsequent cases such as *Won Pak v. Harris*, 313 S.W.3d 454, 459–60 (Tex. App.—Dallas 2010, pet. denied) rejecting the applicability of *Hughes* in malpractice cases involving transactional work such as negligent drafting and/or review of agreements creating family limited partnerships or merger transactions, ART nevertheless invites us to revisit this issue and overrule *Murphy* and any of our prior opinions holding to the contrary. We decline ART's invitation.

To the extent ART asserts the policy considerations underlying *Hughes* also apply to their transactional malpractice claims, we note the supreme court has expressly cautioned us that we should apply the *Hughes* tolling rule only to cases that fit within the specific circumstances it has articulated rather than engage in an independent analysis of certain policy considerations underlying the rule. *See Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 122 (Tex. 2001). Indeed, since the announcement of the *Hughes* tolling rule almost twenty-seven years ago, the supreme court has yet to apply it to circumstances such as those presented here. ART's reliance on two federal district court opinions from 1998 and 2004 are equally unavailing. *See UNC, Inc. v. Hall*, 3:96-CV-2456-P, 1998 WL 118151 (N.D. Tex. Mar. 5, 1998); *Woolley v. Clifford Chance Rogers & Wells, L.L.P.*, 3:01-CV-2185-D, 2004 WL 57215 (N.D. Tex. Jan. 5, 2004). ART concedes these cases are not binding precedent. Moreover, *Hall*'s analysis was based improperly on policy considerations rather than the nature of the malpractice claim at issue. *See Hall*, 2004 WL 118151

at *4–8. In *Woolley*, the court simply applied the *Hughes* rule to alleged malpractice arising out of the drafting of a lawsuit settlement agreement, concluding it was done in the prosecution or defense of a claim that resulted in litigation. *See Woolley*, 2004 WL 57215, at *7.

Because ART's claims based on AK's advice and actions related to termination of the Clapper deal rather than alleged malpractice in the prosecution or defense of a claim that results in litigation, the "bright-line rule" articulated in *Hughes* does not apply. Accordingly, the *Hughes* tolling rule did not preclude the trial court from granting summary judgment to AK based on limitations. We resolve ART's second issue against them.

CONCLUSION

Based on the record before us, we affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

AMERICAN REALTY TRUST, INC. AND ART MIDWEST, INC., Appellants	On Appeal from the 44th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-04-05724.
No. 05-16-01433-CV V.	Opinion delivered by Justice Evans, Justices Bridges and Whitehill participating.
ANDREWS KURTH, LLP, Appellee	

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Andrews Kurth, LLP recover its costs of this appeal from appellants American Realty Trust, Inc. and Art Midwest, Inc.

Judgment entered this 8th day of May, 2018.