

STATE OF MICHIGAN
IN THE SUPREME COURT

RANDY H. BERNSTEIN, D.P.M.,

Plaintiff-Appellee,

Supreme Court No.: 149032

-vs-

Court of Appeals Docket No.: 313894

SEYBURN, KAHN, GINN,
BESS AND SERLIN, PROFESSIONAL
CORPORATION, a Michigan
Professional Corporation,
and Barry R. Bess, Individually,
Jointly and severally,

Defendants-Appellants

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149032

**PLAINTIFF-APPELLEE'S
RESPONSE TO DEFENDANTS' APPLICATION FOR
LEAVE TO APPEAL**

EXHIBIT LIST

PROOF OF SERVICE

FILED
APR 23 2014
LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

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**STATEMENT IDENTIFYING THE ORDER APPEALED
FROM AND RELIEF SOUGHT**

Defendants-Appellants, Seyburn, Khan, Ginn, Bess & Serlin, P.C. and Barry R. Bess, seek leave to appeal from the February 20, 2014, opinion of the Court of Appeals reversing the trial Court's November 29, 2012, opinion and order granting Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(7). (Exhibits A and I). This Honorable Court has jurisdiction over this matter pursuant to MCR 7.301(A)(2) and Defendants' timely filed Application for Leave to Appeal. See MCR 7.302(C)(2)(a). However, Defendants' Application for Leave to Appeal should be denied.

Plaintiff, Randy Bernstein, DPM ("Bernstein"), and Kenneth Poss, DPM ("Poss") were associated in the practice of podiatry. In the early 1990's, Poss had a thriving podiatry practice and Bernstein was a young podiatrist who had worked for Poss previously for a short period of time. Poss was facing suspension of his license to practice podiatry due to insurance fraud. In order to save his practice and his income, Poss entered into an agreement by which Bernstein would take over his practice by incorporating and practicing podiatry under the auspices of Foot Health Centers, P.C. ("FHC"). The parties entered into a separate agreement which provided that Poss would provide administrative services, with the profits to be divided 50/50. Poss had a previous relationship with Defendant attorney Barry Bess and his law firm Seyburn, Kahn, Ginn, Bess & Serlin, P.C. (hereinafter "Defendants" or "Bess") and recommended Bess to incorporate FHC to which Bernstein agreed. After the incorporation of FHC, Bess continued to serve as counsel to Bernstein and Poss, individually, and also served as corporate counsel to the various corporate entities that were formed to carry out the podiatry practice. Bess, and others at his direction, assisted Poss in the corporate transfers which are the subject of this litigation. (Exhibits J and K).

In brief, the Complaint alleges Bess surreptitiously dissolved FHC of which Bernstein was the sole shareholder and incorporated Foot & Ankle Health Centers, P.C. ("FAHC") with Poss as a 98% shareholder and Bernstein as a 2% shareholder, effectively shifting the assets of the podiatry practice from a corporation in which Bernstein owned 100%, and pursuant to contract was entitled to 50% of the profits, to a corporation in which Bernstein owned 2%. Defendants lied to Bernstein and documents were forged in order to carry out the transfer. Eventually Bernstein was forced out of the business and has received nothing for his 100% share of Foot Health Centers, P.C. and the 50% of Foot and Ankle Health Centers, P.C. that he was supposed to own. Defendants were also complicit in Bernstein being deprived of his 50% interest and capital contribution in a separate business entity, Sunset Boulevard, LLC, which owned the principal building that housed the podiatry practice. The Defendants' representation of the various corporate entities as well as Bernstein and Poss individually did not cease until sometime after April 28, 2006. (Exhibit K; Exhibit B, Ex 31).

Plaintiff filed the original Complaint against Defendants on April 28, 2008. (Exhibit J). The Complaint alleged that Bess committed legal malpractice and breached his fiduciary duties to Bernstein as a shareholder in a very closely held corporation. (Exhibits J and K).

On or about October, 2012, Defendants filed a motion for summary disposition asserting that Plaintiff's complaint was barred by the statute of limitations. (Exhibit B). Plaintiff opposed the motion arguing that the documentary evidence in this case established that the lawsuit was timely filed as to both counts of the complaint. (Exhibit C). The trial court, however, granted Defendants' motion for summary disposition. (Exhibit A).

Plaintiff appealed this decision and the Court of Appeals reversed the trial court. (Exhibit I). In reaching this decision the Court of Appeals held that Defendants did not discontinue

providing Plaintiff with general legal services until April 28, 2006, and as such, Plaintiff's complaint was timely. (Exhibit I, p 5). The Court of Appeals further held that Plaintiff's claim for Breach of Fiduciary Duty was not subsumed in Plaintiff's legal malpractice claim, and that because, the gravamen of Plaintiff's complaint asserted that the Defendants fraudulently concealed the existence of Plaintiff's claim for Breach of Fiduciary Duty, Plaintiff is permitted to pursue his claim. (Exhibit I, pp 5-6).

Pursuant to MCR 7.302(B) there are no grounds upon which this Honorable Court should grant leave to appeal and/or reverse the Court of Appeals' decision in this matter. The Court of Appeals' decision was not clearly erroneous either factually or legally nor does it conflict with the Michigan Court Rules or any prior decisions of the Court of Appeals or the Supreme Court. Indeed even a cursory review of the Court of Appeals' decision establish that the opinion relied on and was consistent with other Michigan Appellate Court decisions and Michigan Statutes including: MCL 600.5838(1); *Kloain v Schwartz*, 272 Mich App 232; 735 NW2d 671 (2006); *Maddox v Burlingame*, 205 Mich App 446; 517 NW2d 816 (1994); *Levy v Martin* 463 Mich 478; 620 NW2d 292 (2001); *Nugent v Weed*, 183 Mich App 791; 455 NW2d 409 (1990). (Exhibit I).

There is no unfair prejudice to the Defendants in defending this cause of action. While the Defendants' assert that the claim is stale and as a matter of policy should not be allowed, it was filed timely pursuant to MCL 600.5838(1). MCL 600.5838(1) is the codification of the last treatment rule, and as such the legislature has made the determination that this expansion of time for filing professional negligence claims other than medical malpractice claims is proper. Policy arguments for changing the statute should be addressed by the legislature. *See Levy, supra* at 490.

The Court of Appeals' holding that Plaintiff's Breach of Fiduciary Duty claim was not subsumed by his legal malpractice claim and may be timely was not in error. It was consistent

with Michigan Law and the pleadings in this matter as expressly laid out by the Court of Appeals.
(Exhibit I, p 6).

For these reasons and those set forth more fully below, Plaintiff respectfully requests that
this Honorable Court Deny the Defendants' Application for Leave to Appeal.

STATEMENT OF QUESTIONS INVOLVED

- I. Did the Court of Appeals Properly Find that Plaintiff's Legal Malpractice Claim Was Not Barred by the Statute of Limitations as Set Forth in MCL 600.5805(6) and MCL 600.5838 Where Plaintiff's Complaint Was Filed Within Two Years of the Defendants' Last Date of Service?

Plaintiff-Appellee's Answer.....YES.

Defendants-Appellants' Answer.....NO.

Court of Appeals' Answer.....YES.

- II. Did the Court of Appeals Properly Reverse the Trial Court's Order Granting Summary Disposition As to Plaintiff's Breach of Fiduciary Duty Claim Where the Claim Was Not Subsumed by Plaintiff's Legal Malpractice Claim and Was Otherwise Timely Filed?

Plaintiff-Appellee's Answer.....YES.

Defendants-Appellants' Answer.....NO.

Court of Appeals' Answer.....YES.

STATEMENT OF FACTS

Poss initially practiced podiatry as Metro Health Center, P.C., d/b/a Foot Health Centers. In the late 1980's and early 1990's, Poss was under investigation, and was then convicted of fraudulent billing practices. His license to practice podiatry was suspended. (Exhibit C, Ex. 1). In order to retain the economic benefit of the successful practice, in the face of Poss' conviction and suspension, an agreement was reached between Poss and Bernstein, memorialized by notes (Exhibit C, Ex. 2), transactional documents, and testimony. Poss and Bernstein agreed that until Poss' legal problems were resolved that Bernstein would own 100% of the professional practice but that they would split profits 50-50 and that Poss would provide administrative services. They further agreed that when Poss' legal problems were resolved they would be 50-50 shareholders in the corporate entity. (Exhibit B, Ex. 9, Bernstein dep. pp 44-51, Exhibit C, Ex. 4, Poss deposition 8-30-04, p 5). Bernstein agreed to retain Bess to incorporate FHC. Plaintiff alleges that Bess served as his individual attorney and the corporate attorney from the time of incorporation of FHC until sometime after April 28, 2006.

Defendants did not incorporate FHC and then disappear for years on end, but instead, continuously acted as corporate and individual counsel to the various entities through which Dr. Bernstein and Dr. Poss practiced podiatry. Defendants continuously served as counsel for Dr. Bernstein and Dr. Poss individually related to their partnership to practice podiatry, which partnership ended in July 2006 when Dr. Bernstein formed a separate corporation and opened his own podiatry practice. During this time Bernstein also retained Bess for estate planning services. On January 17, 1996 Bernstein transferred all of his stock in FHC to his irrevocable trust. The document indicates that he appointed the Defendant law firm to transfer the stock. The document is signed by Bess. (Exhibit C, Ex. 24). On February 14, 1996 Bess wrote a letter to Dr. and Mrs.

Bernstein which enclosed all of the estate planning documents they had signed on January 17, 1996. (Exhibit C, Ex. 25). The documents were all prepared by the Defendants. On November 4, 1998 Bess sent another letter to Dr. and Mrs. Bernstein regarding changes in the tax laws which may significantly impact their "financial, estate and retirement planning programs." (Exhibit C, Ex. 26).

The following demonstrates the parties' history culminating into the present lawsuit.

On August 8, 1991 Defendants filed paperwork terminating the assumed name Foot Health Centers. (Exhibit C, Ex. 5). On August 15, 1991 Defendants filed paperwork incorporating FHC and naming Bernstein as the sole incorporator. (Exhibit C, Ex. 6).

While prohibited from practicing podiatry, Poss was able to participate in the business and administrative aspects of the practice. He did so by establishing Diversified Medical Consultants, Inc. ("DMC"). DMC was established the same day as the Foot Health Center assumed name was terminated, August 8, 1991. The legal work was done by the Defendants. Poss was the sole incorporator/shareholder in DMC. (Exhibit C, Ex. 7).

DMC entered into a management services agreement with FHC and Bernstein, individually (Exhibit C, Ex. 8). Under this agreement, Bernstein was responsible for practicing Podiatry and DMC (Poss) was responsible for managing FHC. They were each supposed to receive 50% of the profits of FHC. The management services agreement was drafted by the Defendants. (Exhibit B, Ex. 9, Bernstein dep., pp 22-24). The agreement gave DMC the sole authority to "select" FHC's professional advisors for legal and accounting services. (Exhibit C, Ex. 8, ¶2 [m]). The agreement did not give DMC the right to interact with, control, or direct the services performed

by the professional advisors for FHC, a corporation in which Bernstein was the sole shareholder, officer and director.¹

The agreement also provided that the president of DMC (Poss) was designated as the attorney-in-fact, coupled with an interest, to effectuate dissolution and liquidation of FHC, "upon termination of this agreement for any reason..." The agreement expressly stated the circumstances under which it can be terminated. The agreement provided for an initial term of five years and automatic renewal for successive five year terms, unless DMC provides written notice of DMC's intent to terminate "not less than six (6) months prior to the end of the then current five year term and each succeeding term thereafter." (Exhibit C, Ex. 8, ¶6,7). DMC (Poss) could only dissolve and liquidate FHC if the management services agreement was terminated. The management services agreement was never terminated and therefore DMC (Poss) never had the authority to terminate and liquidate FHC.²

During the 1991 to 1998 time frame, the Defendants were counsel to FHC and Bernstein individually. For example, Defendants filed the 1997 annual report for FHC. The report shows that Barry Bess is the resident agent for the corporation. It shows that the purpose of the corporation is the practice of podiatry. It shows that Bernstein is the sole shareholder, officer and director. It is signed by Bernstein as president. (Exhibit C, Ex. 9). The 1998 update shows that there were no changes and it was signed by Bess as an authorized officer or agent of the corporation. (Exhibit C, Ex. 10).

¹ Thus, Defendants' statement that "[i]t is undisputed that Poss was the only individual duly authorized to retain and instruct legal counsel for the three corporate entities" (Defendants' App For Leave, p viii), is completely inaccurate.

² Defendants' statement that "[t]he Management Service Agreement expressly and irrevocably designated Poss as the attorney-in-fact for Bernstein and FHC for the purposes of dissolution and liquidation of FHC" is grossly inaccurate.

Poss' legal problems resulted in his license being suspended in March of 1992. (Exhibit C, Ex. 1). The suspension was for a total of 45 days. (Exhibit B, Ex. 9, Bernstein dep., p 45). In 1992, after Poss' legal problems were resolved, it was contemplated that the structure of the deal would be finalized as initially agreed to by Bernstein and Poss. Bess wrote a memo dated June 24, 1992 in which he stated:

It is appropriate at this time to complete the corporate structuring on this entity by having Dr. Bernstein be issued stock for 1,000 shares at a price of \$1,000 as of the date of incorporation. The officers for that initial year will be Dr. Bernstein as the sole officer and director. As of June 1, 1992, Dr. Poss shall purchase stock in the corporation of 1,000 shares for \$1,000 and will become a 50% shareholder.

(Exhibit C, Ex. 11).

This document shows that the agreement between Bernstein and Poss called for them to be 50-50 shareholders after Poss' legal problems were solved. It also shows that Bess was aware of that agreement. (Exhibit C, Ex. 2)

Despite the fact that Poss regained his license and his ability to practice podiatry in 1992, and despite the June 24, 1992 memo (Exhibit C, Ex. 11), there were no changes to the corporate structure or the management services agreement until the end of 1998.³

Unbeknownst to Bernstein at the time, on December 17, 1998, the Defendants filed the necessary paperwork to establish Foot & Ankle Health Centers, P.C. ("FAHC"). Poss was the sole incorporator. The address of the registered agent was the address of the Defendant law firm

³ Defendants claimed, at page 4 of their brief in support of their motion for summary disposition, that as of June 1, 1992, Poss served as the sole member of the board of directors for FHC, as well as serving as the corporate president and secretary and that Bernstein served as vice president and treasurer. Defendants also claimed that as of June 1, 1992, Poss became a 50% shareholder. The Defendants relied upon their Exhibit B, Ex. 5 and Exhibit B, Ex. 6. Ex. 5 clearly shows that it is a draft and on 12-18-92 it is written on the document "Poss will not be a SH at this time per BRB (Bess)." The document is not signed. Ex. 6 is a memorandum that was never carried out. Bernstein will testify that Poss was going through a divorce and did not want to be a shareholder while the divorce was taking place.

and Barry Bess was designated as the registered agent. (Exhibit C, Ex. 12). Shortly thereafter, on January 21, 1999, Defendants filed a document changing the name of FHC to Sharon Foot Centers, P.C. (Exhibit C, Ex. 13). The document contains the purported signature of Randy Bernstein on January 15, 1999. Bernstein testified that he never heard the name Sharon Foot Centers, P.C. until approximately a year prior to his deposition, which was taken on May 26, 2010. He further testified that the signature on the document was not his signature. (Exhibit C, Ex. 3, pp 63-64).

On February 10, 1999, the Defendants filed a Certificate of Amendment-Corporation for Sharon Foot Centers, P.C. which terminated the existence of the corporation as of February 11, 1999. (Exhibit C, Ex. 14). This document also contains the purported signature of Randy Bernstein. Bernstein testified that this is not his signature and that he had never heard of Sharon Foot Centers, P.C. (Exhibit B, Ex. 9, Bernstein dep., pp 68-69). As of February 11, 1999, Defendants terminated the existence of the professional corporation of which Randy Bernstein was the sole shareholder without ever discussing it with him and obtaining his consent.

On January 21, 1999, the Defendants filed a certificate of assumed name signed by Poss which indicates that FAHC is going to conduct business under the name of Foot Health Centers, P.C., the same corporate name of the Corporation in which Bernstein was the sole shareholder prior to dissolution. (Exhibit C, Ex. 15). On May 7, 1999 Bess signed a corporation information update for FAHC which indicates that Bernstein is the President, Secretary, and Treasurer and that Bernstein is the sole director. (Exhibit C, Ex. 16). On May 10, 2000 Bess signed another corporation information update which indicated that Poss was now the President, Secretary, and Treasurer along with being the sole Director. Bernstein was listed as the Vice President. (Exhibit C, Ex. 17). The stock certificates for FAHC, which were prepared by the Defendants, indicate that

Poss owns 98% of the shares in FAHC and Bernstein owns 2% of the shares in FAHC.⁴ (Exhibit C, Ex. 18). The stock certificates are dated January 1, 1999 and they are signed by Poss but they are not signed by Bernstein.

All of these actions were taken without Bernstein's knowledge or consent. Bernstein testified that he believed the name was being changed to Foot & Ankle Health Centers to reflect the fact that he (Bernstein) was board certified in foot and ankle surgery, was seeing a lot of ankle cases, and for better advertising. He believed that FHC was still a viable corporation and FAHC was the assumed name. (Exhibit B, Ex. 9, Bernstein dep., pp 61-63). From 1999 to 2006, Plaintiff believed that all profits from the podiatry practice were being divided 50-50 in accord with their agreement and that technically he was still the sole shareholder in the corporation.⁵ (Exhibit, Ex. 9, Bernstein dep., pp 76-79).

Bess signed corporate updates for FAHC in 2001, 2002, 2003, 2004, 2005, and 2006. (Exhibit C, Ex. 19). In 2004 Bess signed a Certificate of Renewal of Assumed Name for FAHC to continue to do business as Foot Health Centers, P.C. through December 31, 2009. (Exhibit C, Ex. 20).

During this time period, the Defendants also did the legal work to establish an entity known as Sunset Boulevard, LLC ("Sunset"). Sunset was established on May 15, 2002. Sunset purchased the building that served as the main location of the three podiatry offices operated by FAHC. (Exhibit B, Ex. 9, Bernstein dep., pp 83-87, 117-119). All of the corporate filings for

⁴ We know that the stock certificates were prepared by the Defendants because at the bottom of the Foot & Ankle Health Centers, P.C. Record of Stock Issued is a computer tag line showing SKG, i.e, Seyburn,Kahn, Ginn, and the initials BRB for Barry R. Bess.

⁵ It is undisputed by Plaintiff that the agreement between him and Poss always called for the stock to be split 50/50 and that Plaintiff would have agreed at any time to establishing a corporate arrangement in which he and Poss were 50/50 shareholders had he ever been asked by Bess. The fact is that neither Bess or Poss ever approached him to change the stock ownership after the initial formation of FHC. (Exhibit 2).

Sunset were done by the Defendants and Bess was the registered agent for the corporation throughout the relevant time period. (Exhibit C, Ex. 27). Bernstein has testified that he had a 50% interest in Sunset. This is consistent with a K-1 from 2005 which indicates that he has a 50% interest in Sunset and that his capital interest at the end of 2005 was \$119,495. (Exhibit C, Ex. 8).

Year end corporate meetings were held between 1991 and 2005, wherein Bess, Poss, Bernstein and the accountant would meet to discuss the previous year as well as other related issues with respect to the podiatry practice.

In late 2004 Poss was being very secretive with the receipt book and the deposit book for the corporation. Bernstein discussed this with Bess and Bess indicated that he would talk to Poss about the situation. Bernstein testified:

Q. So you're talking about you brought this up with Bess? Is that what you're saying?

A. Yes.

Q. You lost me.

A. Actually he called me, because what happened is I got into a fight with Poss and I said—he said, well, if you think—I took some days off that he didn't want me to take off, and so the next thing I know I got a call from Barry Bess. He goes, he wants to terminate your relationship. So he started it. He wants to terminate your relationship, you guys' relationship. I'm trying to smooth things out. So we had a couple meetings with Bess regarding this stuff. He said he would take care of it and he never told me about the inequity between the ownership. He never steered me in any direction whatsoever to make me think that anything but—you know, being a 50 percent partner.

(Exhibit B, Ex. 9, Bernstein dep., pp 95-97).

In late 2005, Bernstein began to become suspicious of everything regarding the corporation. He retained attorney Ken Gross to contact Bess and request copies of all the corporate documents. Gross called Bess twice in late 2005 requesting copies of the corporate records. Bess did not respond to either call and then Gross was instructed to hold off until after the 2005 corporate meeting. (Exhibit C, Ex. 30, Gross dep., pp 36-38). At the 2005 corporate meeting Bernstein was told by Dr. Poss that he was only a 2% shareholder in the corporation, but he still did not receive any documents supporting Dr. Poss' claim. The only document he was shown was a financial statement. (Exhibit B, Ex. 9, Bernstein dep., pp 112-116).

In early 2006, Plaintiff was advised that he did not have an interest in Sunset. Again, Defendants failed to provide Plaintiff with any documentation supporting this claim. As of at least June of 2006 all documents in Plaintiff's position, indicated that Bernstein was a 50% shareholder. (Exhibit C, Ex. 28 and 32). Apparently, Dr. Poss executed a Promissory Note and Mortgage on behalf of Sunset in favor of himself without any resolution or consent signed by Dr. Bernstein. Poss claimed that as a result of the Promissory Note and Mortgage, Dr. Bernstein no longer had any equity interest in Sunset. (Exhibit C, Ex. 29).

In April of 2006 Bernstein began questioning his continued employment with the P.C. and his continued partnership with Poss and discussed these issues with Bess, his attorney. In response, Bess wrote a letter to Bernstein dated April 28, 2006 outlining Bernstein's legal obligations to the P.C. (Exhibit C, Ex. 31). The letter shows that Bess is still representing the P.C. and he is representing Bernstein. The last sentence of the letter indicates "if you have any questions or require clarification on the above, please contact the undersigned." The letter does not say anything about Bernstein obtaining his own counsel. Attorney Gross responded on

Bernstein's behalf on June 5, 2006, which was a direct response to Bess' April 28, 2006 letter. (Exhibit C, Ex. 32).

The parties attempted to negotiate a resolution of their differences throughout the summer of 2006. In June, Poss retained attorney Peter Alter to represent him individually and Bess continued to represent the corporation. On June 27, 2006, Bernstein was finally provided with copies of the incomplete stock certificates signed by Poss, but not Bernstein, showing Poss with an ownership interest of 98% and Bernstein 2% in FAHC. (Exhibit C, Ex. 33). Gross continued to correspond with Alter and Bess throughout July and August of 2006. (Exhibit C, Ex. 34). Ultimately, the negotiations went nowhere and Bernstein has not received anything for his equity interest in FHC, FAHC, or Sunset Boulevard. (Exhibit B, Ex. 9, Bernstein dep., pp 127-128).

Bernstein testified that he looked to Bess as his attorney during the time period that he was engaged in the practice of podiatry with Dr. Poss, which began in 1991 and continued until July of 2006 when Dr. Bernstein severed his association with Dr. Poss and started his own podiatry practice. (Exhibit B, Ex. 9, Bernstein dep., pp 178, 163, 128, 100)

Bernstein filed the initial lawsuit in this case on April 28, 2008. It was assigned case #08-091154NM. (Exhibit J) A stipulated order of voluntary dismissal was entered on December 1, 2008. The order indicated that "IT IS FURTHER ORDERED that any defenses that may arise because of this dismissal or because of the passage of time between this dismissal and a subsequent re-filing are hereby waived contingent upon the re-filing occurring within 30 days of the date of this order." (Exhibit C, Ex. 35). The case was re-filed on December 4, 2008 within the 30 days allowed by the voluntary order of dismissal. (Exhibit K) Therefore, for statute of limitations purposes, this case was commenced on April 28, 2008.

The first claim in the complaint is for legal malpractice. (Exhibit K, Count I). The second claim in this case is for breach of fiduciary duty. (Exhibit K, Count II). The Complaint alleges Defendants assisted Poss in fraudulently converting Bernstein's 100 percent interest in FHC into a 2% interest in FAHC. Defendants lied to Bernstein and documents were forged in order to carry out the transfer. Eventually Bernstein was forced out of the business and has received nothing for his 100% share of Foot Health Centers, P.C. and the 50% of Foot and Ankle Health Centers, P.C. that he was supposed to own. Defendants were also complicit in Bernstein being deprived of his 50% interest and capital contribution in a separate business entity, Sunset Boulevard, LLC, which owned the principal building that housed the podiatry practice. (Exhibit K).

On September 11, 2012 Defendants' filed an Amended Motion for Summary Disposition, alleging that they were entitled to summary disposition as the claims set forth in the Complaint were barred by the statute of limitations. (Exhibit B). The Defendants argued that the specific acts of malpractice alleged by the Plaintiff occurred in 1998, 1999, 2000, and 2002 and therefore the complaint had to be filed no later than December 2, 2004. The Defendants further argued that the breach of fiduciary duty claim is subsumed by the legal malpractice claim and that the same statute of limitations applies. Alternatively, Defendants argued that any independently perfected claims of breach of fiduciary duty are barred by the three year statute of limitations in MCL 600.5805, and accrued when the alleged wrong was committed and therefore the Complaint had to be filed by December 2, 2005. (Exhibit B).

Plaintiff responded on October 10, 2012, arguing that the documentary evidence in this case established that the lawsuit was timely filed as to both counts of the complaint. (Exhibit C). Plaintiff argued that the facts establish the existence of an ongoing attorney-client relationship between Defendants and Bernstein that did not end until sometime after April 28, 2006, making

Plaintiff's April 28, 2008 Complaint alleging legal malpractice timely. (Exhibit C). Plaintiff also set forth facts and case law establishing that the legal malpractice and breach of fiduciary duty claims were separate and distinct, subject to individual consideration as to when the claim accrued under the specific facts of this case. Plaintiff asserted that the breach of fiduciary duty claim was timely as Plaintiff did not and could not have discovered this claim until December 16, 2005. (Exhibit C, p 17). This was due to the Defendants' conduct in concealing the relevant facts from Plaintiff as set forth in Plaintiff's complaint. (Exhibit K, ¶¶ 25, 26, 32, 48)

Defendants filed a reply brief on October 17, 2012. (Exhibit D). Oral argument was held on October 24, 2012. The Court took the matter under advisement. (Hearing Transcript, pp 1, 49). Plaintiff filed a response to Defendants reply on October 25, 2012. (Exhibit E). Defendants filed a reply to Plaintiff's response on November 15, 2012. (Exhibit F).

The Court issued a written opinion and order granting Defendants' motion for summary disposition on November 29, 2012. (Exhibit A).

In granting Defendants' motion as to the legal malpractice claim the Court stated:

Defendants discontinued serving Plaintiff as to the matters out of which these claims arose no later than May 15, 2002, when Sunset Blvd was formed. Plaintiff has not shown any relationship between the generalized corporate legal services provided after that date and the specific legal services out of which his malpractice claim arose. Assuming arguendo that Plaintiff could show an ongoing attorney/client relationship dealing with the specific legal services, that relationship would have ended in 2005 when he retained another attorney to investigate the specific legal services and he would have had until 2007 to file a lawsuit. Therefore the Court finds that Plaintiff's legal malpractice claims are barred by the statute of limitations because he failed to file them within 2 years after they accrued.

Id. p 2

With respect to Plaintiff's breach of fiduciary duty claim the Court stated:

The Court agrees with Defendants. The proper test for determining when a claim for breach of fiduciary duty accrues is when the alleged wrong was committed. Plaintiff's claim for breach are clearly untimely having been filed more than 3 years after each breach allegedly occurred.

Id. p 3

Plaintiff appealed the trial Court's order granting Defendants' motion for summary disposition arguing that his claims were both timely. Plaintiff asserted that: his legal malpractice claim was timely as it was filed within two years of the date Defendants discontinued service; his fiduciary duty claim was not subsumed by his legal malpractice claim, and was therefore timely as it was filed within three years of discovering the claim, and that plaintiff's complaint was timely pursuant to MCL 600.5855 where the Defendants fraudulently concealed discovery of the claim. The Defendants argued that the trial court's decision to grant summary disposition was proper. Defendants asserted that: the legal malpractice claims were filed more than two years after each specific act on negligence, Plaintiff's legal malpractice claim subsumed Plaintiff's fiduciary duty claim, and that Plaintiff's fiduciary duty claim was untimely and Plaintiff failed to preserve the issue of fraudulent concealment.

The Court of Appeals reversed and remanded this matter back to the trial court. In reaching this decision the Court of Appeals held that Defendants did not discontinue providing Plaintiff with general legal services until April 28, 2006, and as such, Plaintiff's complaint was timely. (Exhibit I, p 5). The Court of Appeals further held that Plaintiff's claim for Breach of Fiduciary Duty was not subsumed in Plaintiff's legal malpractice claim, and that because, the gravamen of Plaintiff's complaint asserted that the Defendants fraudulently concealed the

existence of Plaintiff's claim for Breach of Fiduciary Duty, Plaintiff is permitted to pursue his claim. (Exhibit I, pp 5-6).

Defendants-Appellants now seek leave to appeal from the Court of Appeals' decision. In their application for leave, the Defendants assert that the Court of Appeals decision was clearly erroneous, conflicts with Michigan law, and if left intact would cause material injustice. Defendants' assertions are disingenuous and are based on their misrepresentation of the state of Michigan Law. Contrary to the Defendants' assertions, the Court of Appeals' decision was not factually or legally erroneous. The Court of Appeals' decision was well grounded in Michigan law and results in no material injustice. As such, Defendants' Application for Leave to Appeal must be denied.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY FOUND THAT PLAINTIFF'S LEGAL MALPRACTICE CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS AS SET FORTH IN MCL 600.5805(6) AND MCL 600.5838 WHERE PLAINTIFF'S COMPLAINT WAS FILED WITHIN TWO YEARS OF THE DEFENDANTS' LAST DATE OF SERVICE.

A. STANDARD OF REVIEW

This Court reviews a decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Pursuant to MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred by the applicable statute of limitations. A motion pursuant to MCL 2.116(C)(7) may be supported by affidavits, depositions, admission, or other documentary evidence so long as the evidence would be admissible. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The allegations set forth in the Complaint must be accepted as true unless contradicted by other evidence. *Id.* "In the absence of disputed fact, whether a cause of action is

barred by the statute of limitations is a question of law subject to de review de novo. *Kloian v Schwartz*, 272 Mich App 232, 235; 735 NW2d 671 (2006). If the determination of the legal question regarding the timeliness of the Complaint depends on the resolution of disputed facts, the court shall proceed under MCR 2.116(I)(3), which provides that a trial court may order an immediate trial if a motion for summary disposition is made under MCR 2.116(C)(1) through (7) to resolve the disputed issues of fact. *Sweet Air Investment Inc v Kenney*, 275 Mich App 492, 505; 739 NW2d 656 (2007).

B. CONTRARY TO THE DEFENDANTS' ASSERTION, THE LAST TREATMENT RULE FOR CLAIMS OF PROFESSIONAL NEGLIGENCE OTHER THAN MEDICAL MALPRACTICE HAS NOT BEEN ABROGATED.

The first claim in the complaint is for legal malpractice.⁶ The limitation period for a malpractice claim is two years. MCL 600.5838(2), MCL 600.5805(6). This case concerns a dispute as to the date on which Plaintiff's legal malpractice claim accrued, i.e., the date on which the two year period of limitations began to run. Defendants assert that the "last treatment"⁷ rule applied by the Court of Appeals and the Plaintiff in this matter has been abrogated, and that for all professional malpractice claims arising after October 1, 1986, the accrual date is to be determined solely on the basis of the date of the specific act or omissions that caused the claimed harm. (Defendants' App for Leave, p 19). This assertion is a gross misinterpretation of Michigan law intended to mislead and/or confuse the Court.

Initially, the legislature did not provide any statutory provisions for fixing the accrual date for claims of medical malpractice. See *Morgan v Taylor*, 434 Mich 180, 187; 451 NW2d 852

⁶ The Defendants' motion does not contest any of the elements necessary to support a claim of legal malpractice and therefore the Plaintiff will not address those elements in this brief.

⁷ Defendants' use the phrases "last treatment", "continuous relationship", and "continuous representation" interchangeably. (Defendants' App for Leave, p ix).

(1990). As a result the common-law “last treatment rule” developed to establish when a claim for medical malpractice accrued. *See DeHaan v Winter*, 258 Mich 293; 241 NW 923 (1932). The last treatment ruled provided that a claim for medical malpractice does not accrue until treatment of the injury ceased. *Id.* at 296.

In 1961, the Michigan Legislature enacted MCL 600.5838 which provided:

A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose. *See Levy, supra* at 488.

This statutory provision was not only a codification of the common law “last treatment” rule, but an expansion of the rule. The statute extended the “last treatment” rule to apply to all licensed professionals, not just those that are medically licensed. *Id.* Additionally, the Michigan Supreme Court has held that the legislatures use of the plural term “matters” in the phrase “the matters out of which the claim for malpractice arose” is significant, and indicates that the statute for a malpractice claim against a licensed professional such as an attorney does not begin to run when the professional has ceased providing services with regard to a single matter, *but instead*, the statute of limitations only begins to run when the professional has ceased providing services as to the broad “*matters*” out of which the claim arises. *Id.* at 487-489, fn 18.

In 1986, MCL 600.5838 was amended by 1986 PA 178 which applied to claims arising after October 1, 1986. With the amendment, MCL 600.5838 provided:

Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the

plaintiff discover or otherwise has knowledge of the claim. MCL 600.5838(1). (Exhibit L).

As amended by 1986 PA 178, MCL 600.5838 remained substantially the same except that it now recognized that MCL 600.5838a was an exception to the codified last treatment rule. *Levy, supra* at 488, fn 17. The exception recognized in MCL 600.5838 provided that “a claim based on the medical malpractice of a person or entity who is or who hold himself or herself out to be a licensed health care professional . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.” (Exhibit M). Thus, 1986 PA 178 abrogated the “last treatment” rule for medical malpractice claims only. Nothing in the 1986 PA 178 amendatory language limited or altered the application of the “last treatment” rule in non-medical malpractice claims.

As such Michigan Court’s have properly continued to recognize the application of the “last treatment” rule in the context of professional negligence claims other than medical malpractice. *Levy, supra ; Kloian, supra; Azzar v Tolley*, unpublished per curiam opinion of the Court of Appeals, decided November 2, 2004 (Docket No 248879), lv den 474 Mich 922; 705 NW2d 349 (2005) (Exhibit N). The two precedents that the Defendants rely upon to assert that the legislature repudiated the last treatment rule, *McKiney v Clayman*, 237 Mich App 198; 602 NW2d 612 (1999) and *Kincaid v Cardwell*, 300 Mich 513; 834 NW2d 122 (2013), are both medical malpractice actions that were subject to MCL 600.5838a. As such these cases are completely irrelevant to the application of last treatment rule as set forth in MCL 600.5838.

Defendants repeated pleas to this court to repudiate the “last treatment” rule for policy reasons including preventing stale claims is improper. MCL 600.5838 expressly adopted and continues to recognize the “last treatment” rule in the context of non-medical malpractice. Thus, Michigan’s legislature has made a determination that it was proper to continue to apply the “last

treatment” rule to claims of professional negligence other than medical malpractice. The Michigan Supreme Court has previously recognized, that MCL 600.5838(1) allows suits against nonmedical professionals based on alleged negligence that had occurred much further in the past than would be the case absent the statutory provision and stated, “for better or worse, we believe an extended statute of limitations is precisely the point of MCL 600.5838(1); as currently enacted.” *See Levy, supra* at 490. As such, any policy arguments that support changing the statute must be addressed to the legislature, as the Court is obligated to apply statutes in light of their plain meaning. *Id.*

C. THE LAST DATE OF SERVICE IN THE CASE AT BAR WAS APRIL 28, 2006, AND AS SUCH PLAINTIFF’S APRIL 28, 2008 COMPLAINT WAS TIMELY.

The Courts have developed special rules in an effort to determine when an attorney discontinues serving the plaintiff in a professional capacity for purposes of the accrual statute. *Kloian, supra* at 237. “Generally, when an attorney is retained to represent a client, that representation continues until the attorney is relieved of the obligation by the client or the court.” *Id.* This Court has also ruled that “retention of an alternate attorney effectively terminates the attorney-client relationship.” *Id.* However, the attorney client relationship is not severed when a client hires additional, rather than substitute, counsel. *Maddox, supra.* This court has further recognized that when the circumstances of the case do not fit neatly into a specific rule, a legal malpractice claim accrues “on the attorney’s ‘last day of professional service in the matter out of which the claim for malpractice arose.’” *Kloian, supra* at 238.

Michigan law clearly recognizes that where a professional (other than a medical professional) is not retained for a specific transaction or service, but instead provides routine, periodic, and continued generalized services, the last date of service for the purpose of accrual of a

malpractice claim is the date on which the continuing services end. *Levy, supra*. In *Levy*, the Michigan Supreme Court applied this last or continuous representation rule to a claim of accounting malpractice. In *Levy*, a business client of an accounting firm brought a professional malpractice case against the accountants arising from an IRS audit of the client's income tax returns. *Id.* at 481. From 1974 until 1996, Defendant accountants prepared the annual tax returns for the Plaintiff. As a result of an audit, Plaintiff was required to pay additional taxes for 1991 and 1992. The Plaintiff received notice of the deficiency in 1995. *Id.* at 480-481. Plaintiff filed suit against Defendants in August of 1997 alleging malpractice with respect to the preparation of the 1991 and 1992 tax returns. *Id.* at 481

The Defendants filed a motion to dismiss on the basis that the action was not timely. It was Defendants position that the accountant performed discrete accounting services each year which were separate acts, and that any claim for malpractice related to these services, accrued upon the completion of each year's tax return, i.e. a claim related to the 1991 tax return accrued and the two years began running upon completion and filing of the 1991 return, and a claim related to the 1992 tax return accrued upon completion and filing of the 1992 tax return. The circuit court agreed and dismissed the Complaint. *Id.* at 481. The court of appeals affirmed in a two to one opinion with Judge Whitbeck dissenting. *Id.* at 482.

The Michigan Supreme Court granted leave and reversed the trial court's order granting summary disposition. In doing so the Court adopted the analysis set forth in Judge Whitbeck's dissent. The Court rejected the Defendants argument that the relationship between Plaintiff and Defendants terminated after the preparation of each year's tax return, and upheld the principal outlined in *Morgan v Taylor*, 434 Mich 180; 451 NW2d 852 (1990) that discrete acts that are ongoing and regularly periodic, such as periodic eye examinations offered in fulfillment of a

contractual obligation or annual tax return preparation, as took place in *Levy*, are the “matters” out of which the claim for malpractice arises for purposes of the statute, rather than considering the completion of each tax preparation to begin running the statute of limitations with respect to negligence during that singular matter. *Levy, supra* at 488-489, fn 18. The Court noted that Plaintiffs “rather than receiving generalized tax preparation services for a specific problem, were receiving generalized tax preparation services from Defendants. These continuing services, just like the continuous eye examinations in *Morgan*, to be consistent with the *Morgan* approach, must be held to constitute ‘the matters out of which the claim for malpractice arose.’” *Id.* at 489. The Court held that Defendants did not discontinue serving plaintiffs with regard to accounting matters until well after the preparation of the 1992 income tax returns. *Id.* fn 18.

The reasoning for the Court’s opinion is sound and equally applicable here. The Court noted that a client of an accountant, (just like a client of an attorney), is entitled to rely completely on the accountant’s skills and effectiveness until the termination of the relationship. A client who entrusts preparation of annual tax returns to an accountant is provided with an assurance of professional preparation of the tax returns that induces the client to take no further action regarding those matters until it is time to prepare the next year’s tax returns. The Defendants prepared annual tax returns for Plaintiff from 1974 until 1996. As such, the Court concluded that plaintiffs claim did not accrue, meaning the statute of limitations did not begin to run under 5838(1), until *at least* 1996. *Id.* at 485-486.

The Court specifically addressed how broadly “the matters out of which the claim arose” should be read. The Court specifically pointed out the legislatures use of the plural term “matters” in the phrase, stating:

Plainly, this means that the statute of limitations for a nonmedical malpractice claim against a state licensed professional does not begin to run when the

professional has ceased providing services with regard to a single matter. On the contrary, the statute of limitations begins to run only when the professional has ceased providing services as to the broad “matters” out of which the claim arises. This indicates that a continuing course of eye examinations (or preparation of income tax returns) should be considered “matters” out of which a claim for malpractice arose for purposes of the statute, rather than considering the completion of each eye examination (or tax preparation) to begin running the statute of limitations with respect to negligence during that singular matter. In addition, the phrase ‘discontinues serving’ as used in MCL 600.5838 should not be ignored or overlooked. *Id.* at fn 18.

Just as in *Levy*, this case turns on the determination of when Defendants discontinued “serving” Plaintiff in a professional capacity as to the “matters” out of which Plaintiff’s claim arose. Plaintiff’s claim of legal malpractice arises out of legal services Defendants provided to Bernstein related to a business venture between Bernstein and Poss to operate a podiatry practice, of which Bernstein and Poss were to share in the profits. Defendants incorporated FHC, of which Bernstein was a sole shareholder in 1991, and also incorporated Poss’ management company which was necessary in order for Poss, whose medical license was to be suspended, to receive the profits. The Court of Appeals, relying on *Levy*, properly determined that the evidence demonstrates that Defendants continuously provided Bernstein and Poss with generalized legal advice and services related to their podiatry practice from 1991 until sometime after April 28, 2006. Defendants prepared legal documents to incorporate and transfer stock in a variety of corporate entities under which Bernstein continuously provided podiatry services from 1991 until July of 2006.

Defendants also represented Bernstein and Poss in forming an entity which purchased the building which housed the podiatry practice, of which Bernstein was to be a 50% shareholder. Defendants held annual year end corporate meetings where they provided legal advice and services to Bernstein and Poss related to the podiatry practice. These were meetings held at Defendants office yearly. While Bernstein attended all these meetings, Bernstein testified that

Poss and Bess had conducted the majority of the meeting before he arrived, and he would hear mainly the conclusion. (Exhibit B, Ex 9, p 108). If Bernstein had questions related to the podiatry practice he called Bess. *Id.* at 176-177. Bernstein also testified that throughout the year Bess came to the podiatry practice to discuss legal issues related to the practice and have Bernstein sign documents related to the podiatry practice. *Id.* at 178.

The preparation of yearly tax returns in *Levy* is very similar to the holding of year-end corporate meetings as took place in this case.⁸ Just like in *Levy*, Plaintiff, rather than receiving professional advice for a specific problem, was receiving continuous and generalized legal services related to the podiatry practice and the closely held professional corporations. Plaintiff did not come to Defendants with a specific discrete legal request (with the exception of his estate planning matter), but instead, was receiving continuous generalized legal services related to his business venture with Poss. Consistent with the Michigan Supreme Court's analysis in *Levy*, these continuing services, must be held to constitute "the *matters* out of which the claim for malpractice arose." *Id.* at 489.⁹

The Defendants argue that a malpractice claim accrues at the completion of each individual professional act. Defendants' argument fails on two significant grounds. First, as set forth more fully above, the legislature did not choose to incorporate this type of accrual rule in the context of non-medical malpractice actions. Instead, the legislature knowingly continued to apply the "last treatment rule."

⁸ The Difference in this case is that Bess did much more than just hold year-end corporate meetings.

⁹ See also, *Nugent v Weed*, 183 Mich App 791; 455 NW2d 409 (1990), as an example of a case in which the defendant attorney was not retained to perform any specific legal service, but instead, the attorney continuously handled Plaintiff's various legal and investment affairs from 1971 until March of 1984, at which time Plaintiff discharged him.

Second, the Michigan decisions upon which the Defendants rely to support their argument are all factually distinguishable from the case at bar. *Chapman v Sullivan*, 161 Mich App 558; 411 NW2d 574(1987), the primary case relied upon by the Defendants, involved a legal malpractice case where the client hired the attorney to represent her in the sale of a restaurant and tavern business in 1981. Plaintiff alleged that defendant improperly drafted one or more documents of the sale, failed to protect a securing interest in certain personal property, and failed to draft the reassignment agreement which would reassign the liquor license if the purchasers defaulted. It was uncontroverted that the defendant rendered no legal services to plaintiff after July 1981. The file had been closed and the matter was completed.

The Plaintiff filed suit in May of 1986. The Defendant filed a motion for summary disposition alleging that the date he last rendered legal services to Plaintiff was July 1981, and thus a claim for malpractice arising out of legal services regarding the sale of the business, must have been filed by July 1983. Plaintiff alleged that the cause of action did not accrue until April 11, 1984, the date the purchasers filed their bankruptcy petition, i.e., the date Plaintiff suffered damages.

In holding that the cause of action accrued in July 1981, the court of appeals stated that “the defendant was retained by plaintiff to perform specific legal service, i.e., to advise and represent her in the sale of her business and draft certain documents in connection with the sale.” *Id.* at 561. The court noted several times that it was uncontroverted that defendant rendered no legal services to plaintiff of any kind after July, 1981. Specifically the court stated, “There is no dispute that defendant completed all work on plaintiff’s behalf and closed the file in July, 1981. *At that point, there was no ongoing litigation or relationship between the parties and both considered the matter closed.* These facts are not controverted.” *Id.* at 564, fn2 (emphasis added).

These facts are completely distinguishable from those in the present case. In *Chapman*, the Plaintiff retained the Defendant for a specific legal service. The Defendant completed the task and closed the file. In *Chapman*, there was no evidence of an ongoing relationship after he closed the file in 1981. There was a three year period of time where the Defendant did not perform any legal services for the plaintiff prior to the development of problems with the contract that had been drafted. *Id.* at 561-562. Moreover, the Court of Appeals has referred to the rule set forth in *Chapman* “as an exception to the general rule” which only applies in instances where the attorney is retained to perform a specific legal service, and where there is no evidence of an ongoing relationship following the completion of the specific legal service. *Mitchell v Dougherty*, 249 Mich App 668, 683, fn 6; 644 NW2d 239 (2002).

Another case cited by the Defendants was an unpublished case, *Melody Farms, Inc. v Carson Fischer, PLC*, Unpublished Per Curiam Opinion of the Court of Appeals, decided, February 16, 2001 (Docket No. 215883). (Exhibit B, Ex 4). In the *Melody Farms* case, the acts of malpractice occurred in 1990 when the Defendants concluded the arbitration agreement that was at issue. Thus, similar to *Chapman*, there were *no* legal services rendered by the Defendants between 1990 and 1994. There were no facts to support the Plaintiffs’ allegations that the representation was continuous and therefore the Court concluded that the case was time barred.

The Defendants also cited the case of *Bauer v Ferriby & Houston*, 235 Mich App 536, 537-540;599 NW2d 493 (1999). Again, in *Bauer*, there was a long period of time where the Defendant did not perform any legal services on the part of the Plaintiff. The malpractice arose out of a worker’s compensation settlement. The settlement occurred on July 26, 1994. Sometime after February 1, 1996 it was discovered that the Defendant attorney had made an error and there was an attempt to correct the error. The question was whether a brief revisiting of an otherwise

closed case served to extend the statute of limitations. The court held that the statute of limitations was not extended. It held that “the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship.” *Id.* at 539. It is beyond dispute that all of the Defendants actions in the case at bar occurred pursuant to a current, ongoing, attorney-client relationship.

Unlike *Chapman, Melody Farms, and Bauer* the evidence here clearly demonstrates an ongoing and continuous relationship between Plaintiff and Bess. Defendant Bess was performing legal services for Bernstein and Poss, individually, as well services for the various corporate entities continuously from 1991 through 2006. The Defendants representation of the various corporate entities, as well as Bernstein and Poss individually, related to the ongoing podiatry practice and did not cease until sometime after April 28, 2006.¹⁰ Therefore, the *Chapman* exception does not apply, and under the general “last treatment” rule Plaintiff’s April 28, 2008 Complaint alleging legal malpractice related to these legal services was timely.

Defendants also argue that Plaintiff did not have an actual attorney client relationship with the Defendants. This argument is made based on two assertions. First, Defendants assert that the Management Agreement “conferred exclusively upon Poss/DMC the authority to retain and instruct legal counsel for FHC.” (Defendants’ App for Leave, p 30). This is factually inaccurate. The agreement gave DMC the sole authority to “select” FHC’s professional advisors for legal and

¹⁰ The April 28, 2006 letter to Bernstein from Defendants demonstrates that Defendants were providing legal services to Bernstein at least as of that date. (Exhibit C, Ex 31). The letter specifically states, “The purpose of this letter is to advise you as to many of the legal obligations under which you are obliged as a result of your employment and ownership position in the P.C.” *Id.* The letter goes on to provide Bernstein with legal advice regarding his contemplated resignation from employment with PC. The letter concludes by stating, “If you have any questions or require clarification on the above, please contact the undersigned.” Signed, Barry R. Bess. *Id.* It is plaintiff’s position that this letter establishes as a matter of law that the statute of limitations did not accrue until after April 28, 2006.

accounting services. (Exhibit C, Ex. 8, ¶2 [m]). The agreement did not give DMC the right to interact with, control, or direct the services performed by the professional advisors for FHC, a corporation in which Bernstein was the sole shareholder, officer and director.

Second, Defendants assert that the corporate legal services Defendants rendered between 1991 and 2005 were distinct from the services provided to Bernstein and could not be used to establish an ongoing relationship between Bernstein and Defendants, because the professional relationship with respect to those services was with the corporation only and not with Bernstein individually. In support of their position they cited, *Beaty v Hertzberg & Golden PC*, 456 Mich 247, 260 ; 5712 NW2d 716 (1997); *Prentis Family Foundation, Inc v Karmanos Cancer Inst*, 266 Mich App 39, 44; 698 NW2d 900 (2005); *Scott v Green*, 140 Mich App 384, 397, 400; 364 NW2d 709 (1985) and *Fassihi v Sommers Schwartz, Silver, Schwartz & Tyler, P.C*, 107 Mich App 509; 309 NW2d 645 (1981). This argument is untenable.

Generally, when an attorney represents a corporation, the attorney's client is the corporation, and not its shareholders. *Fassihi, supra*, 517-515. However, contrary to Defendants argument otherwise, *Fassihi* does not stand for the position that an attorney representing a corporation cannot also be representing the shareholder personally. *Id.* In *Yatooma v Zousmer*, Unpublished opinion of the Court of Appeals, decided, May 15, 2012 (Docket No. 302591) (Exhibit G) the Court stated, "[t]he fact that an attorney represents a corporation does not preclude the attorney from additionally representing a shareholder personally." See also, *Neuffer v. Pelavin Powers P.C.* Unpublished opinion of the Court of Appeals, decided Oct 26, 2001 (Docket No. 219639) (Exhibit H) wherein this Court stated:

We agree that the trial court erred to the extent it relied on *Fassihi* [citation omitted] for the proposition that because defendants represented the corporate entity Tri-County News, no attorney-client relationship with plaintiffs could exist. This Court in *Fassihi* did not

hold as a matter of law that an attorney who represents a corporation may not ever simultaneously represent an individual shareholder, but merely noted that in light of 'the general proposition of corporate identity apart from its shareholders,' a corporate attorney's client is the corporation and not the shareholders. *Id.*

The allegations and the evidence in this case support the finding that Defendants represented Bernstein and Poss individually with respect to the Bernstein and Poss partnership to carry on the business of a podiatry practice for their shared profit. The facts also show that he represented the various corporate entities under which Bernstein and Poss operated their business from 1991 until July of 2006. Defendants incorporated FHC for Bernstein in 1991 and continued to provide legal services to Bernstein thereafter. If Bernstein had any questions related to the podiatry practice he called Bess. Bernstein testified that he looked to Bess as his attorney throughout the time Poss and Bernstein were doing business together. (Exhibit B, Ex 9, p 178). Defendants met with Bernstein annually to discuss any legal issues related to the Poss-Bernstein business venture. The evidence demonstrates that Bess simultaneously represented Poss, Bernstein and the various corporate entities under which they operated their business, at least until Bernstein severed his association with Poss in July of 2006.

Defendants further argue that even if the facts demonstrate an ongoing relationship, Defendants effectively discontinued serving Plaintiff in 2005 when Plaintiff consulted with his longtime attorney/friend Kenneth Gross, to assist him in obtaining corporate records and documents, when he became suspicious of Dr. Poss. In support of this argument Defendant cited *Wright v Rinaldo*, 279 Mich App 526; 761 NW2d 114 (2008). Defendants' reliance on this case is misplaced.

Wright, involved a legal malpractice claim related to a patent application. Plaintiff retained defendant in August 2000 to represent plaintiff in a patent application. During the

summer and fall of 2002 Plaintiff became unsatisfied with defendant's work. By October of 2003, plaintiff began to consult with another patent attorney and ultimately directed them to undertake all work for the patent. On December 18, 2003 Plaintiff signed a document that revoked Defendants power of attorney and at the same time executed a power of attorney to the new counsel. Plaintiff filed the legal malpractice action on February 16, 2006. The Defendant moved to dismiss based on the statute of limitations. The dispositive question was when Plaintiff effectively terminated Defendants representation of him in this patent application. The trial court granted the motion on the basis that the attorney client relationship ended on December 18, 2003.

On appeal the Court noted that the plaintiff's knowledge of the Defendants alleged malpractice clearly proceeded the last day of service and that the operative date is the date of Defendant's last service as Plaintiff's attorney. The parties disagreed about the date of last service. The Court held that the attorney client relationship ended on December 18, 2003, when Plaintiff hired other attorneys to handle his patent application, executed documents revoking her power of attorney and granted one of his new lawyers power of attorney to represent him in the patent application process. Importantly, the evidence established that Plaintiff began to consult with the other attorney in October of 2003, however, the court did not find, nor is it the law, that consultation with another attorney terminates a relationship with the prior lawyer. *Maddox, supra* at 451. Instead, it was Defendants act of revoking his prior attorney's power of attorney, and appointing new counsel to perform future work on the patent which effectively terminated the relationship. The court noted that from the time Plaintiff signed that document he had Defendant perform no work on the patent prosecution.

These facts are clearly distinguishable. While it is true that in late 2005 Plaintiff consulted with an attorney, whom he has had a long standing personal and professional relationship, to

assist him in obtaining corporate documents, there is certainly no evidence that he terminated his relationship with Defendants at that time, or that he intended that result. In fact, Defendants continued to provide legal services pertaining to matters out of which Plaintiff's claim arose, i.e., advice related to the business venture with Dr. Poss, until at least April 28, 2006, as shown by the letter to Plaintiff from Bess.

Defendants did not produce any evidence, similar to the documents presented in *Wright*, which establishes, as a matter of law, that Plaintiff terminated his relationship with Defendants prior to April 28, 2006. In fact, the evidence available clearly establishes otherwise.

The facts of this case are more akin to *Maddox, supra*. In *Maddox*, the Court held that the plaintiff's consultation with another attorney did not terminate the attorney client relationship with the defendant. The court noted that the evidence established that the attorney was not consulted in place of, but in addition to, defendant. Just as in *Maddox*, there is no evidence as of April 28, 2006, that Plaintiff substituted Defendants with attorney Gross.

Thus, the Court of Appeals properly found that Plaintiff's legal malpractice claim was not time barred. The evidence demonstrates a continuous and ongoing attorney-client relationship between Defendants and Bernstein from the time that Defendants were retained to incorporate FHC, with Bernstein as the sole shareholder, until sometime after April 28, 2006. Therefore, Plaintiff's April 28, 2008 Complaint alleging legal malpractice related to these legal services was timely and summary disposition was not proper.

II **THE COURT OF APPEAL PROPERLY REVERSED THE TRIAL COURT'S ORDER GRANTING SUMMARY DISPOSITION AS TO PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM WHERE THE CLAIM WAS NOT SUBSUMED BY PLAINTIFF'S LEGAL MALPRACTICE CLAIM AND WAS OTHERWISE TIMELY FILED.**

The second claim in this case is for breach of fiduciary duty. (Exhibit K). Defendants allege that Plaintiff's breach of fiduciary duty claim was subsumed by the legal malpractice claim and even if not, that claim was time barred and the Court of Appeals erred in allowing the Plaintiff to seek to establish fraudulent concealment of this claim. Defendants' arguments lack merit

A. **PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM IS DISTINCT FROM PLAINTIFF'S LEGAL MALPRACTICE CLAIM**

As a basis for dismissing Plaintiff's Complaint, Defendants allege that the Plaintiff's breach of fiduciary duty claim was duplicative of the legal malpractice claim and thus subject to the same statute of limitations as the legal malpractice claim. Defendants cited *Aldred v O'Hara-Bruce*, 184 Mich App 488; 458 NW2d 671 (1990) and *Barnard v Dilly*, 134 Mich App 375; 350 NW2d 887 (1984). The Court of Appeals has recognized that these cases do not stand for the proposition that claims arising out of an attorney-client relationship can only sound in negligence. Rather they provide that the applicable period of limitations depends on the theory actually pled when the same set of facts support either or two different causes of action. *Pukke v Hyman Lippitt, P.C.*, Unpublished opinion of the Court of Appeals, Decided, June 6, 2006 (Exhibit E, Ex. 1), citing *Adkins v Annapolis Hosp*, 116 Mich App 558,563; 323 NW2d 482 (1982); *Barnard, supra*, at 378 and *Aldred, supra*, at 490.

This Court has repeatedly recognized that breach of fiduciary duty claims are not duplicative of legal malpractice claims. *Prentis, supra*, at 47 (2005). To prevail on a claim of legal malpractice, the Plaintiff must prove (1) the existence of an attorney-client relationship; (2) negligent legal representation of the plaintiff; (3) that the negligence proximately caused an injury;

and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

To prevail on a claim of breach of fiduciary duty, the Plaintiff must demonstrate that Defendants breached a fiduciary duty owed to Plaintiff and that the breach caused a specific injury. *Beaty v Hertzberg & Golden P.C.*, 456 Mich 247; 571 NW2d 716 (1997). A fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice. Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable, and the origin of the confidence is immaterial. *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 274; 288 NW2d 613 (1979) Relief for a breach of fiduciary duty may be sought when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed. *Vincencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). The existence of an attorney-client relationship establishes a per se rule that the attorney owes fiduciary duties to the client. *Fassihi, supra* at 519. However, the mere presence of an attorney client relationship does not equate to a breach of fiduciary duty. This Court has held that a breach of fiduciary duty claim differs from a legal malpractice claim because "the conduct required to constitute a breach of fiduciary duty *requires a more culpable state of mind* than the negligence required for malpractice."¹¹ *Prentis, supra*, at 47. (Emphasis added).

Another significant difference the courts have recognized between a legal malpractice cause of action and a breach of fiduciary cause of action is that the Plaintiff need not demonstrate the existence of an attorney-client relationship to prevail on a breach of fiduciary duty claim. *Fassihi, supra*. Rather, Plaintiff must show that the circumstances surrounding the alleged breach

¹¹ Several unpublished cases have reached the same conclusion, see, e.g. *Pukke v. Hyman Lippitt, P.C.*, *supra*, (the Court of Appeals followed the holding in *Prentis Family Foundation* and held that a breach of fiduciary duty claim is not duplicative of a legal malpractice claim and that the malpractice statute of limitations does not apply). (Exhibit E, Ex. 1).

created a situation in which Plaintiff reasonably reposed faith, confidence, and trust in the attorney's advice. *Id. See also, Beaty, supra*, at 722. Whether there exists a confidential relationship apart from a well defined fiduciary category is a question of fact.

The Defendants have raised the lack of an attorney-client relationship between Bernstein and Defendants, as a basis for challenging Plaintiff's claim that the representation was continuous, as opposed to representation for discrete legal services, for purposes of dismissing Plaintiff's legal malpractice claim on statute of limitations grounds. While Plaintiff contends that there was a continuous attorney-client relationship between Plaintiff and Bess, if the court or the jury were to find that there was not a continuous attorney-client relationship between Defendants and Bernstein, and were to dismiss Plaintiff's legal malpractice claim, the facts clearly demonstrate that Defendants still owed a fiduciary duty to Bernstein, as a former client, and as a shareholder in the closely held corporation. Therefore, Plaintiff would be permitted to pursue his breach of fiduciary duty claim. *Fassihi, supra*.

Even if the court were to find that the attorney client relationship between Dr. Bernstein and Defendants involved separate discrete representations for specific legal services, which Plaintiff disputes, an attorney's duties of loyalty and confidentially continue even after an attorney-client relationship concludes. *Alpha Capital Management, Inc. v Rentenbach*, 287 Mich App 589; 792 NW2d 344 (2010). In *Alpha*, the court recognized that "the common law has long recognized that an attorney's fiduciary duties extend to both current and former clients." *Id.* at 603. The Court further stated, "the attorney's duties of loyalty and confidentially continue even after an attorney-client relationship concludes." *Id.* at 604. The Court relied in part on, MRPC 1.9(a) which states that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that

person's interests are materially adverse to the interests of the former client unless the former client consents after consultation. The Court held that an attorney breaches his or her fiduciary duty to a former client by undertaking representation of a client who has interests both adverse and substantially related to work the attorney performed for the former client. *Id.*

Here the evidence demonstrates that even if it were found that Defendants were not continuously representing Bernstein individually, as a former client, Defendants fiduciary duty of loyalty continued even after the individual representation ended. Defendants had a fiduciary duty not to represent Dr. Poss individually in a substantially related matter in which Dr. Poss' interests were materially adverse to Dr. Bernstein's, without Dr. Bernstein's prior consent and consultation. Plaintiff's Complaint alleged Defendants breached the fiduciary duty owed to Plaintiff in representing Dr. Poss in a substantially related matter to which Defendants represented Bernstein, and that Dr. Poss' interests were materially adverse to Dr. Bernstein's. This occurred without Dr. Bernstein's knowledge, or consent.

Moreover, the existence of a fiduciary relationship between Bernstein and Defendants is also found based upon Plaintiff's status as a shareholder in the various closely held corporations that Defendants served as corporate counsel. *Fassihi, supra.* In *Fassihi*, the Plaintiff sued the attorney who represented a closely held corporation of which he was a shareholder and director for legal malpractice and breach of fiduciary duty. The other shareholder had cut out the Plaintiff from the corporation. The attorney was involved in the process and failed to communicate with the Plaintiff about what was taking place. While the Court held that no attorney client relationship existed between the Plaintiff and the Defendant law firm, it further held that a fiduciary duty existed based upon the Plaintiff's status as a shareholder in a closely held corporation that the Defendants represented. Under the factual circumstances in that case, the Court did not allow the

legal malpractice claim to go forward, but allowed the Plaintiff to pursue his claim for breach of fiduciary duty. *Fassihi* stands for the proposition that when an attorney represents a closely held corporation such as FHC and FAHC, and interacts with both the principals as Bess did in this case, the attorney owes a fiduciary duty to the shareholders which is separate and distinct from an attorney-client relationship which gives rise to a claim of legal malpractice.

The facts in *Fassihi* are similar to the facts in this case and support the conclusion that regardless of whether an attorney client relationship existed between Bernstein and Defendants, Bess owed Bernstein a fiduciary duty as a shareholder in FHC and FAHC, extremely closely held corporations.¹² For the same reasons the court found the existence of a fiduciary duty in *Fassihi*, Bess similarly owed a fiduciary duty to Bernstein.

A review of Plaintiff's breach of fiduciary duty claim reveals that it does not sound in legal malpractice, but instead, "alleges a more culpable state of mind." *Prentis, supra.* at 47. Plaintiff alleges that Bernstein initially hired Bess to incorporate FHC in 1991 in which he was the sole shareholder. Bess continued to serve as counsel for the Poss-Bernstein podiatry practice, thereafter. At all times between 1991 and 2006 Bernstein reposed faith, confidence, and trust in Defendant Bess based upon his retention of Bess in 1991 to incorporate FHC and Bess's continued role as counsel for the podiatry practice, in which Bernstein was initially the sole shareholder, and then he believed he was a 50% shareholder. Defendant Bess was aware at all times of the contractual relationship between Poss and Bernstein and the fact that the agreement called for them to be equal 50% shareholders. At all times Bernstein looked to Bess as his attorney and as

¹² While the factual scenario in *Fassihi* is similar to the present case, and supports the finding of a fiduciary relationship apart from an attorney-client relationship, the Court's holding in *Fassihi*, with respect to the lack of attorney-client relationship and dismissal of the legal malpractice claim is distinguishable. As set forth above, the evidence in the present case establishes the existence of an ongoing attorney-client relationship between Bernstein and Bess, precluding dismissal of Plaintiff's legal malpractice claim.

the attorney for the corporation and trusted Bess to act honestly, ethically, and in his best interest. Plaintiff alleges that Bess owed him a duty of loyalty and that Bess breached his fiduciary duty to Plaintiff by failing to advise Bernstein that he was representing Poss individually with respect to corporate matters, and by contributing to the fraud and conversion committed by Poss by preparing the necessary corporate documents that effectuated the transfer without providing any notice to Bernstein. (Count II Complaint).

Plaintiff's breach of fiduciary duty claim does not sound in legal malpractice, but instead, "alleges a more culpable state of mind" required for such claims. *Prentis, supra*, at 47. By way of example, the allegations do not merely allege that Defendants failed to properly prepare corporate documents for which they were retained to prepare. Such an allegation would not contain conduct of the requisite "state of mind" for a breach of fiduciary duty cause of action and instead merely alleges legal malpractice. Plaintiff's allegations that Bess conspired with Poss to convert Bernstein's 100% interest in the podiatry practice to a 2% interest, in violation of the trust and confidence Bernstein bestowed upon Defendants, and in violation of Defendants' duty of loyalty and duty to act in Bernstein's best interest, satisfies the requirement of a more culpable state of mind sufficient to support a cause of action for breach of fiduciary duty. *Id.* at 47.

It is clear that Plaintiff's breach of fiduciary duty claim is separate and distinct from the legal malpractice claim, as such, it is subject to its own accrual and statute of limitations analysis.

B. PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM WAS TIMELY FILED.

Plaintiff's breach of fiduciary duty claim is subject to a three-year statute of limitations governing personal injuries. MCL 600.5805(10). *Prentis, supra*. Additionally, MCL 600.5855 specifically provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim . . . from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim, . . . although the action would otherwise be barred by the period of limitations.

1. The Court of Appeals Properly Considered Plaintiff's Claim of Fraudulent Concealment and Found that MCL 600.5855 May Preserve Plaintiff's Claim of Breach of Fiduciary Duty

Under the doctrine of fraudulent concealment, the limitations period is tolled if defendants engage in conduct masking the existence of claims. As a general rule, for fraudulent concealment to postpone the running of the period of limitation, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. Mere silence is insufficient. *Prentis, supra*, at 48. However, an exception to this rule exists where there is an affirmative duty to disclose, such as where the parties are in a fiduciary relationship. *Brownell v Garber*, 199 Mich App 519; 503 NW2d 81 (1993), citing *Lumber Village Inc v Siegler*, 135 Mich App 685-694-695; 355 NW2d 654 (1984).

Defendants contend that Plaintiff's fraudulent concealment argument was improperly considered by the Court of Appeals, as Plaintiff failed to preserve this argument. Again Defendants' position is untenable.

First, as the Court of Appeals properly determined, the gravamen of Plaintiff's complaint was fraud by Defendant Bess and was sufficient to support the application of MCL 600.5855. The complaint alleges sufficient facts to establish a fiduciary relationship between Defendant Bess and Plaintiff that would give rise to a duty to disclose the actions of Poss relative to diminishing Plaintiff's ownership interests in the podiatry practice, and that he fraudulently concealed Poss' fraudulent conduct in that regard.

Plaintiff alleges that Defendants wrongfully concealed the existence of both the legal malpractice and claim the breach of fiduciary duty claim from Plaintiff. Bess, by reason of his fiduciary relationship with Plaintiff, had an affirmative duty to disclose the fact that he was representing Dr. Poss, individually, in the same or a substantially related matter that he represented Dr. Bernstein in, and in which Dr. Bernstein's interests were materially adverse to the interests of Dr. Poss. *Brownell, supra*. The corporate transfers that Bess prepared were adverse to Plaintiff's interests, and substantially related to the matters in which he represented Bernstein. Defendants, despite having the affirmative duty to disclose this information to Dr. Bernstein, fraudulently concealed it from him. Plaintiff has presented facts which would support application of MCL 600.5855.

While not required to, because of the fiduciary relationship exception set forth above, Plaintiff has alleged more than mere silence. Plaintiff has alleged facts to establish that Defendants engaged in behavior planned to prevent inquiry and escape investigation and hinder Plaintiff's acquirement of information disclosing a right of action. Plaintiff alleges that Defendants conspired with Poss to deprive Bernstein of any substantive information regarding the corporations, and particularly FAHC.¹³

In relation to the year-end meetings, Bernstein testified that Poss and Bess would have the meetings before he arrived and "when I got there I just heard the conclusion, mainly." (Exhibit B, Ex 9, p 108). Even after Bess and Dr. Poss fraudulently converted Dr. Bernstein's interest in the practice to 2%, Bess continued to conduct year end meetings, year after year, in which Bess

¹³ Defendants in their motion claimed that "year-end corporate meetings were held annually between 1991 and 2004 with Poss, Bernstein, and Bess in attendance and all corporate/business documents, including stock certificates, tax records, financial statements, by-laws and minutes, present and readily available for review." (Def's brief pgs. 5 and 6). This statement by the Defendants is grossly misleading.

represented that Bernstein was receiving 50% of the profits, as would a 50% shareholder. *Id.* at 90-94. Plaintiff further alleges that Bess actively prevented Plaintiff from discovering the cause of action against him, by providing incomplete documents for Dr. Bernstein's signature, and misrepresenting the business purpose of documents presented for his signature, and forging his signature to documents. (Complaint). Between 1995 and 1999 all of the consents for FHC contain what purports to be Bernstein's signature. (Exhibit C, Ex. 21). When the signatures are compared with Bernstein's genuine signature which is found on (Exhibit C, Ex 8 and Ex 9) it is obvious that they are a forgery.¹⁴ There is also a 1999 consent terminating Sharon Foot Centers, P.C. which contains Bernstein's purported signature on February 9, 1999 which is also a forgery. (Exhibit C, Ex. 22).

There are also consents for FAHC for the years 1999-2004. (Exhibit C, Ex. 23). None of the consents are signed by Bernstein except for the consent in December of 2000, which has a section entitled "Ratification of Past Acts" and states:

RESOLVED, that any and all actions taken on behalf of the Corporation by the officers, Shareholders and the sole member of the Board of Directors, since inception, shall be and hereby are, ratified and approved, including, without limitation, the following:

(a) The payment of compensation to the officers and the sole Director of the Corporation and reimbursement to the officers and the sole Director for the expenses incurred in the operation of the corporate business, ...

It is undisputed that this document contains Bernstein's actual signature. Bernstein testified that he was not provided the full document, but was only provided the first page and the last page and that it was explained to him that he was ratifying a name change. He further testified

¹⁴ Bernstein will testify that he did not sign the documents in Exhibit C, Ex 23 and he did not give anyone consent to sign his name to these documents.

that Bess was present when the incomplete document was presented to him and that he (Bernstein) gave the signature page to Bess. (Exhibit B, Ex. 9, Bernstein dep., pp 145-153).

Bernstein testified that between January 1999 and June 30, 2006 that he was never given a copy of FAHC's corporate minute book, stock certificates, bylaws, financial statements or tax returns. He testified that he requested copies from Bess and from Bess' secretary but that he never received anything. Bernstein testified that he would ask for the information at the corporate meeting and Bess and Poss would respond "they'll get it to me," but that he never got anything. (Exhibit B, Ex. 9, Bernstein dep., pp 71-75, 107-108). Plaintiff repeatedly requested copies of all corporate documents from Bess. As a shareholder, Bess had a duty to provide Plaintiff with these documents when requested. Bess repeatedly failed to provide Plaintiff with the requested documents.

As of June 2006, Bess continued to fraudulently conceal the existence of a claim for legal malpractice or breach of fiduciary duty, by failing to provide Bernstein with the corporate documents, despite repeated requests by Dr. Bernstein, and an attorney retained by Dr. Bernstein to assist in this end, and failing to advise Plaintiff that he had individually represented Dr. Poss in a matter adverse to his interests, despite being under a duty to do so. (Exhibit C, Ex 32-35). As the June 5, 2006 letter to Bess indicates, all the documentation that Dr. Bernstein had in his possession as of June 5, 2006, indicated that he was the owner of all outstanding and issued stock of Foot and Ankle Heath Center, PC and that he owned 50% of Sunset Boulevard, LLC. (Exhibit C, Ex 32) In this letter, Bernstein again requests corporate documents which would establish otherwise. *Id.*

The allegations demonstrate that Defendants failed to disclose information they were obligated to disclose, based on their fiduciary duty, and employed artifice, planned to prevent

inquiry or escape investigation, and to mislead or hinder Plaintiff from acquiring information disclosing a right of action against them for legal malpractice and breach of fiduciary duty. The allegations and evidence also establishes that Plaintiff did not discover the operative facts that are the basis of the cause of the action against Defendants, despite his due diligence, until at least June 27, 2006, when the corporate documents were finally turned over to Plaintiff's counsel. (Exhibit C, Ex, 33). It was only when Plaintiff received these documents, that he had facts indicating that Bess had represented Dr. Poss individually and without Plaintiff's knowledge, and against Plaintiff's best interest, in such a manner as to fraudulently reduce his interest in the podiatry practice to a 2% interest and to convert his 50% interest in Sunset, to a 0% interest, establishing the existence of a claim for malpractice and breach of fiduciary duty against Defendants. It was only when Plaintiff received these documents, evidencing Defendants involvement and the means by which the conversion of his interest was carried out, that Plaintiff discovered, or should have discovered, the existence of a legal malpractice and breach of fiduciary duty claim against Bess. As Plaintiff filed the Complaint within two years thereof, the Complaint is timely pursuant to MCL 600.5855.

Second, this Court has repeatedly recognized that it may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, *or* if the issue involves a question of law and the facts necessary for its resolution have been presented. *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424; 711 NW2d 421 (2006), *citing*, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Here, not only is consideration of the **issue necessary** for a **proper** determination of the case, the failure to consider the issue would result in manifest injustice. While the foregoing provides sufficient basis for this court to consider the argument, the issue also

involves a question of law and contrary to Defendants' assertion otherwise, the facts necessary for its resolution have been presented and are a part of the record. As such, Plaintiff asks that the Court overlook any lack of preservation, and consider the issue. *Id.*

2. Even without the Application of Fraudulent Concealment, the Breach of Fiduciary Duty Claim Was Timely.

Although this argument was not addressed by the Court of Appeals, Plaintiff's Breach of Fiduciary Duty Claim was timely even without the application of the Fraudulent Concealment statute. MCL 600.5805(10) specifically states:

Except as otherwise provided in this section, the period of limitations is 3 years **after the time of the death or injury** for all actions to recover damages for the death of a person, or for injury to a person or property. (Emphasis added).

The legislature also has statutes addressing when various causes of action accrue. MCL 600.5827 states:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues.¹⁵ The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

The statute does not define the word "wrong", however the Michigan Supreme Court has provided insight as to how courts are to determine whether or not the statute of limitations has expired. The Michigan Supreme Court has explained that determination of the date the wrong was done, is intended to yield the date on which the plaintiff was harmed by the defendant's negligent

¹⁵ MCL 600.5805(10) specifically provides that the period of limitations in a personal injury action subject to subsection (10) runs after the time of the injury. As such, any interpretation of MCL 600.5827 must not conflict with the express provisions of MCL 600.5805, i.e., MCL 600.5827 cannot be interpreted in such a manner that the cause of action accrues before the injury occurs, because MCL 600.5805(10) specifically provides that the period of limitations in a cause of action to recover damages for injury to persons or property can be brought within three years after the *injury*.

act, not the date on which the defendant acted negligently. *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, 479 Mich 378, 388; 738 NW2d 664(2007) (“**The wrong is done when the plaintiff is harmed rather than when the defendant acted.**”) (Emphasis added). This definition of wrong is consistent with the language of MCL 600.5805(10), which specifically provides that the period of limitations is 3 years “after” the “injury.”

Defendants, citing *Trentadue*, argued that the cause of action accrued in 1998, 1999, 2000, and/or 2002 when certain discrete acts were taken and that since the Complaint was not filed within three years of any of those dates it was untimely. The trial court granted Defendants’ motion for summary disposition, stating,

The Court agrees with Defendants. The proper test for determining when a claim for breach of fiduciary duty accrues is when the alleged wrong was committed. Plaintiff’s claim for breach are clearly untimely having been filed more than 3 years after each breach allegedly occurred.

(Exhibit A, p 3).

The trial court failed to apply the correct analysis in determining when Plaintiff’s breach of fiduciary claim accrued. The trial court erroneously focused on when the Defendant acted, instead of determining when the Plaintiff was *harmed* by the Defendant’s actions.

In a breach of fiduciary duty case, the harm occurs when a Plaintiff who has placed trust in a fiduciary learns that the trust has been violated. Case law addressing the accrual of a breach of fiduciary duty claim has held that such claims accrue when the Plaintiff knew or should have known of the breach. *See, Prentis Family Foundation, Inc. v Barbara Ann Karmanos Cancer Institute, supra* at 47 (2005), *See also, Carto v Underwood Property Management Co.*, Unpublished opinion of the Court of Appeals, Docket No. 272747 (decided June 12, 2008). (Exhibit C, Ex. 34 p. 5).

Defendants argument that the claims accrued in 1998, 1999, 2000, and/or 2002 when the Defendants acted, is directly contrary to the Michigan Supreme Court's holding in *Boyle v Gen Motors Corp.*, 468 Mich 226, 231 n.5; 661 NW2d 557 (2003). In *Boyle* the Court held that "the wrong is done when the Plaintiff is harmed rather than when the Defendant acted..." This holding was expressly followed in *Trentadue, supra* at 388. *Trentadue* involved a situation where the Plaintiff was raped, but it took many years before the identity of the rapist was discovered so that the proper Defendants could be identified. There was no question that the Plaintiff in *Trentadue* was harmed at the time of the rape, thus, the cause of action accrued when the Plaintiff was raped. However, *Trentadue* confirmed that the cause of action accrues, not when the Defendant acted, but when the Plaintiff was harmed, it just so happened that Plaintiff in *Trentadue* was harmed simultaneously upon Defendant's actions.

Contrary to Defendants assertions otherwise, Plaintiff did not suffer an immediate injury or immediate harm upon Defendants actions in 1998, 1999, 2000, and/or 2002. Despite Defendants actions during these years, the parties continued to operate the business in the same manner they had from its inception in 1991, sharing the profits of the podiatry practice 50/50. In fact, as of August 30, 2004 Dr. Poss, stated under oath that he and Dr. Bernstein were 50-50 shareholders in FAHC. (Exhibit C, Ex. 34, p 5). Plaintiff continued to place his trust, confidence and loyalty in Defendants with respect to the Poss-Bernstein podiatry practice until June of 2006 when Plaintiff was provided with corporate documents revealing that Bess had aided Poss in fraudulently converting his 50% interest in the podiatry practice to a 2% interest. The Defendants actions in 1998, 1999, 2000 and 2002, only resulted in a potential future injury. Up until June of 2006, Dr. Bernstein and Dr. Poss' podiatry practice, and his relationship with Defendants, continued to operate in the same manner that it had from its inception in 1991. Plaintiff was not injured, nor

did he suffer harm resulting from Defendants actions until June 27, 2006 when Dr. Bernstein was attempting to negotiate the end of his business relationship with Dr. Poss, and was provided with corporate documents prepared by Defendants, revealing that Defendants had breached his fiduciary duties to Plaintiff by aiding Poss in fraudulently converting his 50% interest in the podiatry practice to a 2% interest. (Exhibit C, Ex. 33). As a result of Defendants breach of fiduciary duties, Plaintiff was harmed in concluding his business relationship with Dr. Poss, in that he was denied a negotiation position from the perspective of a 50% shareholder of the podiatry practice and Sunset. The harm occurred, and Plaintiff was injured in June of 2006.

While Plaintiff testified that his lack of 50% ownership was raised at the December 16, 2005 meeting, he further testified that it was Dr. Poss who had made this claim, and despite Plaintiff asking for corporate documents which would prove Dr. Poss' claim, he was not provided with such documentation at that time. In fact, he allegedly received 50% of the profits of the podiatry practice in 2005, just as he had received in all previous years. Plaintiff was not actually harmed until June of 2006 when he attempted to negotiate the end of his business relationship with Dr. Poss. The facts demonstrate that Plaintiff did not suffer harm or injury related to Defendants prior actions, until June of 2006. Therefore, Plaintiff had until June of 2009 to file his lawsuit against the Defendants for breach of fiduciary duty. As the lawsuit was filed on April 28, 2008 Plaintiff's complaint was timely.

Even if this Court were to find that Plaintiff was harmed on December 16, 2005, when *Dr. Poss* at the year-end meeting, claimed that Bernstein was only a 2% shareholder, but failed to provide any documentation or evidence that this was true, or that Defendants had any involvement with that reduction of his interest, the Complaint was still filed within three years thereof, and was timely.

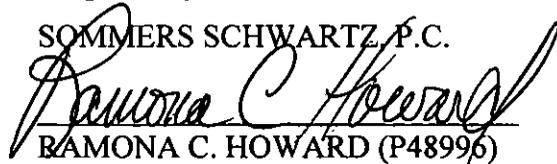
The Court must treat all well-pleaded allegations in the complaint as true, and find dismissal proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief. Pursuant to the allegations in the Complaint, Plaintiff's breach of fiduciary duty claim did not accrue until June 27, 2006. Plaintiff filed the Complaint within three years of June 27, 2006, and thus, the breach of fiduciary duty claim is timely.

RELIEF REQUESTED

For these reasons, Plaintiff-Appellee respectfully requests that this honorable Court Deny Defendants-Appellants' Application of Leave to Appeal.

Respectfully submitted,

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Dated: April 24, 2014