

STATE OF MICHIGAN  
IN THE SUPREME COURT OF APPEALS  
ON APPEAL FROM THE COURT OF APPEALS  
AND OAKLAND COUNTY CIRCUIT COURT

RANDY H. BERNSTEIN, DPM,

Plaintiff-Appellee,

v

SEYBURN, KAHN, GINN, BESS AND  
SERLIN, PROFESSIONAL CORPORATION,  
~~a Michigan professional corporation, and~~  
BARRY R. BESS, individually,

Defendants-Appellants.

SCt No.  
LC No. 08-096538-NM  
COA No. 313894

*Oakland  
D. Longford-Mom)*

*Opn 2-2014*

*dk*

**APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANTS  
SEYBURN, KAHN, GINN, BESS & SERLIN, P.C. AND BARRY R. BESS**

COURT OF APPEALS OPINION DATED 2/20/14  
AND CIRCUIT COURT OPINION AND ORDER DATED 11/29/12  
ATTACHED TO STATEMENT IDENTIFYING OPINION  
BEING APPEALED AND RELIEF SOUGHT

EXHIBITS

NOTICE OF HEARING FOR 4/29/14

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Dated: April 2, 2014

**FILED**

APR - 8 2014

LARRY S. ROYSTER  
CLERK  
MICHIGAN SUPREME COURT

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TABLE OF CONTENTS

Index of Authorities iii

Statement Identifying Opinion Being Appealed and Relief Sought viii

Statement of Issues Presented for Review xvi

Statement of Material Proceedings and Facts 1

Statement of Standards of Appellate Review 14

Argument I 16

PLAINTIFF'S LEGAL MALPRACTICE CLAIMS ARE BARRED BY THE PERIODS OF LIMITATIONS SET FORTH IN MCL 600.5805(6) AND MCL 600.5838 BECAUSE PLAINTIFF FILED HIS COMPLAINT MORE THAN SIX MONTHS AFTER DISCOVERING THE ALLEGED MALPRACTICE AND MORE THAN TWO YEARS AFTER THE DATES OF THE SPECIFIC AND DISCRETE LEGAL SERVICES BETWEEN 1991 AND 2002 OUT OF WHICH THE CLAIMS ARISE AND THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY DETERMINING THAT PLAINTIFF'S 2008 COMPLAINT WAS TIMELY FILED ON THE BASIS THAT THE TWO YEAR STATUTORY LIMITATION PERIOD WAS EXTENDED THROUGH 2006 BY AN ALLEGED CONTINUOUS PROFESSIONAL RELATIONSHIP.

Argument II 34

THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY REVERSING THE GRANT OF SUMMARY DISPOSITION ON PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIMS PURSUANT TO MCR 2.116(C)(7) BECAUSE THESE CLAIMS ARE IDENTICAL TO AND SUBSUMED BY PLAINTIFF'S LEGAL MALPRACTICE CLAIMS AND, THEREFORE, ARE BARRED BY THE MALPRACTICE LIMITATION PERIODS, AND, EVEN IF PLAINTIFF PERFECTED AN INDEPENDENT BREACH OF FIDUCIARY DUTY CLAIM AND A FRAUDULENT CONCEALMENT THEORY, THE FIDUCIARY CLAIMS ARE STILL UNTIMELY BECAUSE PLAINTIFF FILED HIS COMPLAINT MORE THAN THREE YEARS AFTER THE ALLEGED WRONGFUL ACTS AND OMISSIONS AND MORE THAN TWO YEARS AFTER HE DISCOVERED THE CLAIMS.

Conclusion and Relief Requested 43



**Exhibit List**

- 1: Plaintiff's Answers to Interrogatories 4/9/09
- 2: Memorandum from Barry Bess dated 12/11/91
- 3: Articles of Incorporation for Foot Health Centers, P.C. dated 8/13/91
- 4: Management Services Agreement
- 5: Consent in Lieu of a Joint Special Meeting of Shareholders dated 6/1/92
- 6: Memorandum from Barry Bass dated 6/24/92
- 7: Articles of Incorporation for Foot & Ankle Health Centers dated 12/18/98
- 8: Foot & Ankle Health Centers Corporation Information Update dated 5/17/05
- 9: Deposition transcript of Plaintiff – dated 5/26/10 and concluded on 7/28/10
- 10: Articles of Incorporation for Diversified Medical Consultants dated 8/1/91
- 11: Certificate of Amendment for Sharon Foot Centers dated 1/22/99
- 12: Certificate of Amendment for Sharon Foot Centers dated 2/10/99
- 13: Articles of Organization for Sunset Boulevard dated 5/15/02
- 14: Bess letter dated 4/28/06
- 15: Complaint
- 16: *Melody Farms v Carson Fischer, PLC*, 2001 Mich App LEXIS 1755 (No. 215883, 2/16/01)
- 17: *Anderson v David & Wierenga, P.C.*, 2012 Mich App LEXIS 635 (No. 301946, 4/10/02)
- 18: *Taylor v Kochanowski*, 2010 Mich App LEXIS 1320 (No. 289660, 7/8/10)
- 19: *Alken-Ziegler, Inc. v Bearup*, 2006 Mich App LEXIS 615 (No. 264513, 3/9/06)
- 20: *Sharma v Giarmarco*, 2004 Mich App LEXIS 2547 (No. 248840, 9/28/04)
- 21: *Masterguard Home Sec v Nemes & Anderson, PC*, 2010 Mich App LEXIS 1481 (No 291085, 7/29/10)
- 22: *Boss v Loomis*, 2010 Mich App LEXIS 504 (Nos 287578, 289438, 5/16/10)
- 23: *Old CF, Inc*, 2012 Mich App LEXIS 1836 (No 307484, 9/20/12)
- 24: *Azzar v Tolley*, 2004 Mich App LEXIS 2979 (No 249879, 11/2/04)



## INDEX OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<i>Adell v Sommers, Schwartz, Silvers &amp; Schwartz, PC</i> , 170 Mich App 196; 428 NW2d 26 (1988), <i>lv den</i> , 432 Mich 902 (1989)	36
<i>Admire v Auto Owners Inc</i> , 494 Mich 10; 831 NW2d 849 (2013), <i>reh den</i> , 494 Mich 880 (2013)	xiii,39,40
<i>Aldred v O'Hara-Bruce</i> , 184 Mich App 488; 458 NW2d 671 (1990)	xiii,35,36,37
<i>Alken-Ziegler, Inc. v Bearup</i> , 2006 Mich App LEXIS 615, *9-11 (No. 264513, <i>dec'd</i> 3/9/06)	xiii,35,36,37
<i>Al-Shimnari v Det Med Ctr</i> , 477 Mich 280; 731 NW2d 29 (2007)	xii,xiv,14,33,42
<i>Ameriwood Indus Int'l Corp v Arthur Anderson &amp; Co</i> , 961 F Supp 1078 (WD Mich, 3/11/97)	xi,25
<i>Anderson v David &amp; Wierenga, P.C.</i> , 2012 Mich App LEXIS 635, *2-4 (No. 301946, <i>dec'd</i> 4/10/02), <i>lv den</i> , 492 Mich 869; 819 NW2d 868 (2012)	18
<i>Azzar v Tolley</i> , 474 Mich 922-923; 705 NW2d 349 (2005)	x,23,28
<i>Azzar v Tolley</i> , 2004 Mich App LEXIS 2979, *8-12 (No 249879, 11/2/04), <i>lv den</i> , 474 Mich 922; 705 NW2d 349 (2005)	xi,24
<i>Balcom v Zambon</i> , 254 Mich App 470; 658 NW2d 156 (2002)	18,26
<i>Barnard v Dilley</i> , 134 Mich App 375; 350 NW2d 887 (1984)	xiii,35,36,37
<i>Bauer v Ferriby &amp; Houston</i> , 235 Mich App 536; 599 NW2d 493 (1999)	18
<i>Beaty v Hertzberg &amp; Golden, P.C.</i> , 456 Mich 247; 571 NW2d 716 (1997)	30,36
<i>Bonifas-Gorman Lumber Co v Unemployment Comp Comm</i> , 313 Mich 363; 21 NW2d 163 (1946)	17,28



<i>Boss v Loomis</i> , 2010 Mich App LEXIS 504 (Nos 287578, 289438, 3/16/10), <i>lv den</i> , 487 Mich 857; 784 NW2d 813 (2010)	xi,24,30
<i>Boyle v GMC</i> , 468 Mich 226; 661 NW2d 557 (2003)	xii,xiii,14,27,33,37,38
<i>Brackins v Olympia, Inc</i> , 316 Mich 275; 25 NW2d 197 (1946)	19,22
<i>Buchanan v Kull</i> , 323 Mich 381; 35 NW2d 351 (1948)	xiv,38,39,40
<i>Chapman v Sullivan</i> , 161 Mich App 558; 411 NW2d 574 (1987)	18
<i>Chase v Sabin</i> , 445 Mich 190; 516 NW2d 60 (1994)	23
<i>DeHaan v Winter</i> , 258 Mich 293; 241 NW 923 (1932)	x,xiv,18,39,40
<i>Det Gray Iron &amp; Steel Founders, Inc v Martin</i> , 362 Mich 205, 212; 106 NW2d 793 (1961)	xiv,39,40
<i>Doe v Roman Catholic Archbishop of the Archdiocese of Det</i> , 264 Mich App 632; 692 NW2d 398 (2005)	xiv,39,41
<i>Draws v Levin</i> , 332 Mich 447; 52 NW2d 180 (1952)	xiv,38,39,40
<i>Dunmore v Babaoff</i> , 149 Mich App 140; 386 NW2d 154 (1985)	xiv,38,40
<i>Eschenbacher v Hier</i> , 363 Mich 676; 110 NW2d 731 (1961)	xiv,38,40
<i>Estate of Mitchell v Dougherty</i> , 249 Mich App 668; 644 NW2d 391 (2002)	17,32
<i>Fassihi v Sommers, Schwartz, Silvers, Schwartz &amp; Tyler, P.C.</i> , 107 Mich App 509; 309 NW2d 645 (1981)	30,36
<i>Garg v Macomb Co Cmty Health Servs</i> , 472 Mich 263; 696 NW2d 646 (2005)	xiii,37,38



<i>Gebhardt v O'Rourke</i> , 444 Mich 535; 510 NW2d 900 (1994)	x, ii, 15, 17, 18, 19, 27, 28, 32
<i>Gilbert v Grand Trunk RR</i> , 95 Mich App 308; 290 NW2d 1980), <i>lv den</i> , 410 Mich 854 (1980)	xiv, 39, 41
<i>Gold v Deloitte &amp; Touche</i> , 405 BR 830 (Bank Crt, ED Mich, 10/16/08)	xi, 25
<i>Huron Twp v City Disposal System</i> , 448 Mich 362; 531 NW2d 153 (1995)	17, 28
<i>Kincaid v Cardwell</i> , 300 Mich App 513; 834 NW2d 122 (2013)	x, 22, 28
<i>Kloain v Schwartz</i> , 272 Mich App 232; 725 NW2d 671 (2006)	17, 32
<i>Kutlenios v Unum Provident Corp</i> , 475 Fed Appx 550; 2012 US App LEXIS 7009, *7-9 (6 <sup>th</sup> Cir, 4/6/12)	xi, 24
<i>Kuznar v Raksha</i> , 481 Mich 169; 750 NW2d 121 (2008)	xii, 14, 27, 33
<i>Lesner v Liquid Disposal, Inc</i> , 466 Mich 95; 643 NW2d 553 (2002)	15, 17, 28
<i>Levy v Martin</i> , 463 Mich 478; 620 NW2d 292 (2001)	x, 18, 19, 20, 21, 22, 23, 25, 28, 30, 32, 33
<i>Lignons v Crittenton Hosp</i> , 490 Mich 61; 803 NW2d 271 (2011)	14, 15, 17, 28
<i>Local 1064, RWDSU AFL-CIO v Ernst &amp; Young</i> , 449 Mich 322; 535 NW2d 187 (1995)	xiii, 35, 36, 37
<i>Lothian v City of Det</i> , 414 Mich 160; 324 NW2d 9 (1982)	17, 28, 32
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999)	xii, 14, 27, 29, 33
<i>Masterguard Home Sec v Nemes &amp; Anderson, PC</i> , 2010 Mich App LEXIS 1481, *8-9 (7/29/10)	18
<i>McKiney v Clayman</i> , 237 Mich App 198; 602 NW2d 612 (1999)	x, 22, 28, 32



<i>Melody Farms v Carson Fischer, PLC,</i> 2001 Mich App LEXIS 1755, *5-11 (No. 215883, dec'd 2/16/01)	18, 35, 36, 37
<i>Miller v Magline, Inc,</i> 76 Mich App 284; 256 NW2d 761 (1977)	37
<i>Morgan v Taylor,</i> 434 Mich 180; 451 NW2d 852 (1990)	x, 18, 19, 21, 22, 25, 28, 30, 32, 33
<i>Napier v Jacobs,</i> 429 Mich 222; 414NW2d 862 (1987)	xiii, 39, 40
<i>Nugent v Weed,</i> 183 Mich App 791; 455 NW2d 409 (1990)	xi, 24
<i>Odom v Wayne Co,</i> 482 Mich 459; 760 NW2d 217 (2008)	14
<i>Old CF, Inc v Rehmann Group, LLC,</i> 2012 Mich App LEXIS 1836 (No. 307484, 9/20/12), <i>lv den,</i> 439 Mich 930; 825 NW2d 77 (1/25/13)	xi, 24, 30
<i>Omne Fin, Inc v Shacks, Inc,</i> 460 Mich 305; 596 NW2d 591 (1999)	15, 17, 28
<i>Patterson v Kleiman,</i> 447 Mich 429; 526 NW2d 879 (1994)	21
<i>Petipren v Jaskowski,</i> 494 Mich 190; 833 NW2d 247 (2013)	14
<i>Prentis Fam Found, Inc v Karmanos Cancer Inst,</i> 266 Mich App 39; 698 NW2d 900 (2005), <i>lv den,</i> 474 Mich 871; 703 NW2d 816 (2005)	30, 34, 36, 37
<i>Sam v Balardo,</i> 411 Mich 405; 308 NW2d 142 (1981)	17, 28
<i>Scott v Green,</i> 140 Mich App 384; 364 NW2d 709 (1985)	30
<i>Sharma v Giarmarco,</i> 2004 Mich App LEXIS 2547, *4-7 (No. 248840, dec'd 9/28/04)	xii, 35, 36, 37
<i>Solowy v Oakwood Hosp Corp,</i> 454 Mich 214; 561 NW2d 843 (1997)	xii, 18, 26, 39



<i>Stanfill v Hoffa</i> , 368 Mich 671; 118 NW2d 991 (1962)	xiv, 38, 39, 40, 41
<i>Taylor v Kochanowski</i> , 2010 Mich App LEXIS 1320, *17-18 (No. 289660, dec'd 7/8/10)	xiii, 35, 36, 37
<i>Thatcher v Det Trust Co</i> , 288 Mich 410; 285 NW 2 (1939)	xiii, 37, 38
<i>Trentadue v Gorton</i> , 479 Mich 378; 738 NW2d 664 (2007), <i>reh den</i> , 480 Mich 1202; 739 NW2d 79 (2007)	xiii, 37, 38
<i>Walters v Nadell</i> , 481 Mich 377; 751 NW2d 431 (2008)	xiii, 39, 40
<i>Weast v Duffie</i> , 272 Mich 534, 539; 262 NW 401 (1935)	xiv, 39, 40
<i>Wright v Rinaldo</i> , 279 Mich App 526; 761 NW2d 114 (2008)	17, 32
 <b><u>Court Rules</u></b>	
MCR 2.116(C)(7)	viii, xii, xiv, 8, 9, 14, 21, 26, 29, 33, 34, 42, 43
MCR 2.116(G)(5)	xii, 14, 29, 33
MCR 2.116(I)(3)	xii, xiv, xv, 14, 33, 42, 43
MCR 7.301(A)(2)	ix
MCR 7.302(B)(3)	viii, ix
 <b><u>Statutes</u></b>	
MCL 600.5805	7, 16, 17, 35, 37
MCL 600.5805(6)	x, 8, 10, 16, 17, 22, 25, 26, 27, 30, 32, 37, 42
MCL 600.5805(10)	xii, xiii, 7, 8, 10, 13, 34, 37, 38, 42
MCL 600.5813	8
MCL 600.5827	7, 8, 37, 38, 42
MCL 600.5838	x, 7, 16, 17, 18, 29, 23, 37
MCL 600.5838(1)	ix, x, 8, 10, 17, 21, 22, 23, 24, 25, 26, 27, 28, 32, 42
MCL 600.5838(2)	25
MCL 600.5855	xii, xiv, 10, 11, 38, 39, 40, 41, 42
 <b><u>Miscellaneous</u></b>	
1961 PA 236	18
1986 PA 178	19
Michigan Court Rules of 1985	ix, xi, xii, xiv



**STATEMENT IDENTIFYING OPINION BEING APPEALED  
AND RELIEF BEING SOUGHT**

The Defendants-Appellants invoke the Supreme Court's jurisdiction pursuant to *MCR 7.301(A)(2)* and seek review of an Opinion issued by the Court of Appeals in this matter on February 20, 2014 (copy attached), reversing the Opinion and Order of the Oakland County Circuit Court dated November 29, 2013 (copy attached), granting summary disposition to the Defendants pursuant to *MCR 2.116(C)(7)* on the basis that Plaintiff's legal malpractice and breach of fiduciary duty claims are barred by the applicable statutes of limitation.

Plaintiff Bernstein instituted the instant action in 2008, asserting legal malpractice and breach of fiduciary theories seeking the same damages and resting upon the same underlying facts. According to Bernstein:

- he retained the Defendants between 1991 and 2006 to serve as corporate counsel for FHC, FAHC, and Sunset Boulevard, LLC ("Sunset Blvd") as well as Bernstein's personal attorneys for estate planning and other services unrelated to the Defendants' role as corporate counsel;
- due to this attorney-client relationship, Bernstein reposed faith, confidence and trust in the Defendants to use reasonable care and diligence to act on Bernstein's behalf and to protect Bernstein's interests; and,
- the Defendants breached the standard of care and their fiduciary obligations by failing to protect Bernstein from acts of fraud and conversion committed by Kenneth Poss, Bernstein's business partner.

It is undisputed that Poss was the only individual duly authorized to retain and instruct legal counsel for the three corporate entities. Yet, Bernstein maintains that the Defendants wrongfully followed Poss' instructions to: form and allocate the shares for FAHC in 1998; dissolve FHC in 1999; and, form and allocate the shares for Sunset Blvd in 2002. Bernstein also accuses the Defendant corporate attorneys of a



wrongful failure to intervene when, in 2000, Poss persuaded Bernstein to execute an allegedly incomplete copy of a Consent in Lieu of Joint Annual Shareholders and Directors meeting which ratified an allocation of 98% of the shares in FAHC to Poss.

Bernstein demands "significant" economic damages for lost corporate equity interests and lost corporate profits.

In this Application for Leave, the Defendants challenge the Court of Appeals' refusal to affirm the Circuit Court's entry of summary disposition in favor of the Defendants on the grounds that Bernstein's legal malpractice and breach of fiduciary duty claims had not been timely filed. The Defendants maintain that review and reversal of the Court of Appeals' opinion is warranted pursuant to *MCR 7.301(A)(2)* and *MCR 7.302(B)(3)* because:

- the opinion is clearly erroneous from both factual and legal standpoints;
- the opinion conflicts with the *Michigan Court Rules of 1985* as well as prior decisions of the Supreme Court and Court of Appeals involving legal principles of statutory construction of major significance to the jurisprudence of the State of Michigan; and,
- if left intact, the Court of Appeals' decision would cause material injustice by forcing the Defendants to attempt to defend against incredibly stale claims which, but for Plaintiff Bernstein's lack of diligence, could have and should have been timely filed and could have been vigorously defended on the merits.

With respect to the legal malpractice claims, the Defendants challenge the Court of Appeals' determination that application of the "last treatment" or "continuous representation" exception to the two year limitation period set forth in *MCL 600.5838(1)* compels the conclusion that Bernstein's claims did not accrue until **April of 2006**, when Bernstein terminated his business and professional relationship with FAHC, notwithstanding the undisputed fact that the claims arise out of the formation of FHC in **1991**, the



dissolution of FHC in 1999, the formation and allocation of shares in FAHC in 1998, and the formation and allocation of shares in Sunset Blvd in 2002.

**Current Michigan jurisprudence lacks clear rule or consensus with respect to whether there is, or should be, a "continuous representation" exception to the statutory definition focusing solely upon the date of the specific professional services at issue.**

Prior to 1961, Michigan common law followed a "last treatment" rule which set the accrual date for medical malpractice actions as the date the physician/patient relationship terminated.<sup>1</sup> In 1986, the Michigan Legislature amended *MCL 600.5838* to repudiate the "last treatment" rule and replaced it with an accrual definition focusing solely on the date of the specific acts or omissions that caused the claimed harm.<sup>2</sup> Yet, in the *Levy* and *Morgan* cases, this Court appeared to reinstate a "last service" rule in malpractice actions where: the claims arise out of routine, periodic, and interrelated professional services; and, there is no evidence of an event, occurrence, or knowledge that demonstrated abandonment, disruption, or termination of the professional relationship.

Both before and after the *Morgan* and *Levy* decisions, the Michigan Court of Appeals has struggled with the construction and application of *MCL 600.5805(6)* and *MCL 600.5838(1)* in malpractice cases featuring a long-term or on-going professional relationship. Some panels have refused to recognize a "continuous relationship" exception to §5838(1), reasoning that the unambiguous language selected by Michigan Legislature when amending this statute clearly indicates that the Legislature was abrogating that principle that the existence of a continuing professional relationship could extend the accrual date beyond the specific, allegedly negligent acts or omissions.<sup>3</sup> Other Court of Appeals' panels have refused to apply

<sup>1</sup> *Levy v Martin*, 463 Mich 478, 483, 488; 620 NW2d 292 (2001); *Morgan v Taylor*, 434 Mich 180, 187-188; 451 NW2d 852 (1990); *DeHaan v Winter*, 258 Mich 293; 241 NW 923 (1932).

<sup>2</sup> *Levy*, 463 Mich at 484, 488-489; *Morgan*, 434 Mich at 192-193; *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994).

<sup>3</sup> *McKiney v Clayman*, 237 Mich App 198, 203-204; 602 NW2d 612 (1999). See also: *Kincaid v Cardwell*, 300 Mich App 513, 525-526; 834 NW2d 122 (2013), and Judge Markman's dissenting opinions in *Levy*, 463 Mich at 491-503 and *Azzar v Tolley*, 474 Mich 922-923; 705 NW2d 349 (2005).



the "continuous relationship" rule where it is undisputed that malpractice arose out of discrete professional services as opposed to continuous, interrelated, routine, and periodic services.<sup>4</sup> Still other Court of Appeals' panels, including the panel deciding the instant matter, held that, whenever a defendant even allegedly provides "generalized" professional services over a period of time, the two-year limitation period does not accrue until the last date of professional service as to any allegedly related matter.<sup>5</sup> Several federal courts have concluded that the Michigan appellate courts have adopted a "broad view" of the accrual of malpractice claims with the focus upon the "whole relationship" rather than the specific acts and omissions out of which the claims arise.<sup>6</sup>

The Defendants respectfully submit that the Court of Appeals' decision in this case graphically demonstrates that it is necessary for the Supreme Court to categorically renounce the continued existence and application of a "continuous relationship" doctrine.

Specifically, Bernstein's legal malpractice claims, filed in 2008, allegedly arise out of the "continuous" services of corporate counsel since 1991. Obviously in the **twenty-three years** that have elapsed since the Defendants were first retained to act on behalf of FHC, witnesses have died or become otherwise unavailable, the memories of available witnesses have faded and/or are rapidly fading, and necessary documents can no longer be located.

Alternatively, the Defendants submit that the Court of Appeals' opinion is in conflict with the *Michigan Court Rules of 1985* and with Supreme Court precedent which stands for the propositions that:

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<sup>4</sup> *Old CF, Inc v Rehmann Group, LLC*, 2012 Mich App LEXIS 1836 (No. 307484, 9/20/12, Ex 23), *iv den*, 439 Mich 930; 825 NW2d 77 (1/25/13); *Boss v Loomis*, 2010 Mich App LEXIS 504 (Nos 287578, 289438, 3/16/10, Ex 22), *iv den*, 487 Mich 857; 784 NW2d 813 (2010).

<sup>5</sup> *Bernstein*, 2014 Mich App LEXIS at \*8-12; *Azzar v Tolley*, 2004 Mich App LEXIS 2979, \*8-12 (No 249879, 11/2/04, Ex 24), *iv den*, 474 Mich 922; 705 NW2d 349 (2005); *Nugent v Weed*, 183 Mich App 791, 796; 455 NW2d 409 (1990).

<sup>6</sup> *Kutlenios v Unum Provident Corp*, 475 Fed Appx 550, 554; 2012 US App LEXIS 7009, \*7-9 (6<sup>th</sup> Cir, 4/6/12); *Gold v Deloitte & Touche*, 405 BR 830, 839-845 (Bank Cr, ED Mich, 10/16/08); *Ameriwood Indus Int'l Corp v Arthur Anderson & Co*, 961 F Supp 1078, 1092-1094 (WD Mich, 3/11/97).



- a court reviewing a *subule (C)(7)* motion must considered documentary evidence submitted by the movant and must grant summary relief if the pleadings and evidence relied upon by the opposing party fail to demonstrate a material question of fact;<sup>7</sup>
- in situations where an attorney has not been dismissed by a court or client or replaced by substitute counsel, the attorney's service discontinues upon completion of the specific legal service that the lawyer performed;<sup>8</sup> and,
- the fact that an attorney later represents the same client in an unrelated matter does not extend the statutory limitation period.<sup>9</sup>

Again in the alternative, the Court of Appeals' decision to remand for a trial on the merits of Plaintiff's malpractice claims is in conflict with provisions of the *Michigan Court Rules of 1985* and Supreme Court precedent which require an immediate trial on such potentially outcome-determinative issues.<sup>10</sup>

With respect to Plaintiff's **breach of fiduciary duty** claims, the Court of Appeals held that, as a matter of law, Plaintiff Bernstein's breach of fiduciary claims are distinct from his legal malpractice claims and, as such, reversed the Circuit Court's determination that, for the purposes of application of the statutory limitation periods, the breach of fiduciary duty claims were identical to and subsumed by the malpractice. While recognizing that independent breach of fiduciary duty claims are subject to the three year limitation period set forth in *MCL 600.5805(10)*, the Court of Appeals failed/refused to determine whether the 2008 Complaint had been timely filed. Instead, the Court held that Bernstein had perfected a fraudulent concealment theory for the purposes of *MCL 600.5855* and remanded the case to the Circuit Court with

<sup>7</sup> *MCR 2.116(G)(5)*; *Kuznar v Raksha*, 481 Mich 169, 175; 750 NW2d 121 (2008); *Boyle v GMC*, 468 Mich 226, 661 NW2d 557 (2003); *Maiden v Rozwood*, 461 Mich 109, 119, 597 NW2d 817 (1999).

<sup>8</sup> *Gebhardt v O'Rourke*, 444 Mich 535,543; 510 NW2d 900 (1994)

<sup>9</sup> *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843 (1997).

<sup>10</sup> *MCR 2.116(I)(3)*; *Al-Shimnari v Det Med Ctr*, 477 Mich 280, 288-289; 731 NW2d 29 (2007).



instructions that Bernstein be provided with an opportunity to prove the Defendants engaged in fraudulent concealment and, thereby, preserve his breach of fiduciary duty claims.

**Supreme Court review and correction of the Court of Appeals opinion regarding the timeliness of Bernstein's breach of fiduciary duty claims is absolutely justified.**

First, the Court of Appeals' opinion directly conflicts with prior Supreme Court and Court of Appeals decisions standing for the proposition that where, as here, breach of fiduciary claims are premised expressly upon an attorney-client relationship, these claims are subsumed within legal malpractice claims for the purposes of application of statutory limitation periods.<sup>11</sup>

Second, the opinion is in direct conflict with unambiguous statutory language and Supreme Court precedent mandating that breach of fiduciary duty claims be dismissed as untimely where, as here, the claims are filed more than three years after the alleged wrongful acts and omissions constituting the breach of duties owed by a fiduciary.<sup>12</sup>

Third, the opinion is in direct conflict with Supreme Court precedent standing for the proposition that appellate review is precluded where, as here, a litigant has failed to first present the issue for resolution before the trial court.<sup>13</sup>

Additionally, the opinion is in direct conflict with Supreme Court precedent and prior Court of Appeals decisions which hold that a party espousing a fraudulent concealment theory in an effort to avoid summary disposition on statute of limitations grounds cannot rest on allegations of general fraud but,

<sup>11</sup> *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995); *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990); *Barnard v Dilley*, 134 Mich App 375, 378-379; 350 NW2d 887 (1984); *Taylor v Kochanowski*, 2010 Mich App LEXIS 1320, \*17-18 (No. 289660, dec'd 7/8/10, Ex 18); *Alken-Ziegler, Inc. v Bearup*, 2006 Mich App LEXIS 615, \*9-11 (No. 264513, dec'd 3/9/06, Ex 19); *Sharma v Giarmarco*, 2004 Mich App LEXIS 2547, \*4-7 (No. 248840, dec'd 9/28/04, Ex 20).

<sup>12</sup> *MCL 600.5805(10)*; *Trentadue v Gorton*, 479 Mich 378, 386-392; 738 NW2d 664 (2007), *reh den*, 480 Mich 1202; 739 NW2d 79 (2007); *Boyle, supra*; *Garg v Macomb Co Cmty Health Servs*, 472 Mich 263, 282; 696 NW2d 646 (2005); *Thatcher v Det Trust Co*, 288 Mich 410, 413-416; 285 NW 2 (1939).

<sup>13</sup> *Admire v Auto Owners Inc*, 494 Mich 10, 35; 831 NW2d 849 (2013), *reh den*, 494 Mich 880 (2013); *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008); *Napier v Jacobs*, 429 Mich 222, 227-228; 414NW2d 862 (1987).



instead, must provide the trial court with the particular affirmative acts or violation of duties to disclose which prevent inquiry or investigation by a plaintiff or misleads a plaintiff with respect to a right of action.<sup>14</sup>

Moreover, the Court of Appeals' opinion is in direct conflict with the plain language of MCL 600.5855, Supreme Court precedent, and prior Court of Appeals decisions all standing for the proposition that the controlling statutes of limitation will not be tolled where, as here, it is undisputed, that the claimant failed to file tort claims within the two year after the claimant discovered, or should have discovered, the existence of a potential claim.<sup>15</sup>

Finally, the Court of Appeals' remand instructions regarding the breach of fiduciary claims are in conflict with the *Michigan Court Rules of 1985* and Supreme Court precedent because the instructions fail to order an immediate trial on such potentially outcome-determinative issues.<sup>16</sup>

In conclusion, and for the reasons stated here and in the accompanying brief, the Defendants Barry R. Bess and Seyburn, Kahn, Ginn, Bess & Serlin, P.C., respectfully request this Honorable Court to grant their Application for Leave to Appeal and either peremptorily, or via a written opinion following a review on the merits, reverse the Court of Appeals Opinion of February 26, 2014 and reinstate the November 29, 2012 Opinion and Order of the Circuit Court granting summary disposition of Plaintiff's Complaint pursuant to MCR 2.116(C)(7).

Alternatively, the Defendants respectfully request this Honorable Court to either peremptorily, or via a written opinion following a review on the merits, remand this matter with instructions to the Circuit Court to

<sup>14</sup> *Stanfill v Hoffa*, 368 Mich 671, 676; 118 NW2d 991 (1962); *Eschenbacher v Hier*, 363 Mich at 676, 681-682; 110 NW2d 731 (1961); *Det Gray Iron & Steel Founders, Inc v Martin*, 362 Mich 205, 212; 106 NW2d 793 (1961); *Draws v Levin*, 332 Mich 447, 452-453; 52 NW2d 180 (1952); *Buchanan v Kull*, 323 Mich 381, 386-387; 35 NW2d 351 (1948); *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935); *DeHaan v Winter*, 258 Mich 293, 296-297; 241 NW 923 (1932); *Dunmore v Babaoff*, 149 Mich App 140, 146-147; 386 NW2d 154 (1985).

<sup>15</sup> *Stanfill*, *supra*; *Doe v Roman Catholic Archbishop of the Archdiocese of Det*, 264 Mich App 632, 642; 692 NW2d 398 (2005); *Gilbert v Grand Trunk RR*, 95 Mich App 308, 317-318; 290 NW2d 1980, *lv den*, 410 Mich 854 (1980).

<sup>16</sup> MCR 2.116(l)(3); *Al-Shimmari*, *supra*.





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conduct an immediate trial pursuant to *MCR 2.116(l)(3)* on any existing and potentially outcome-determinative factual issues surrounding application of the controlling statutes of limitation.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW:**

**ISSUE I:**

**ARE PLAINTIFF'S LEGAL MALPRACTICE CLAIMS BARRED BY THE PERIODS OF LIMITATIONS SET FORTH IN *MCL 600.5805(6)* AND *MCL 600.5838* BECAUSE PLAINTIFF FILED HIS COMPLAINT MORE THAN SIX MONTHS AFTER DISCOVERING THE ALLEGED MALPRACTICE AND MORE THAN TWO YEARS AFTER THE DATES OF THE SPECIFIC AND DISCRETE LEGAL SERVICES BETWEEN 1991 AND 2002 OUT OF WHICH THE CLAIMS ARISE AND DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR BY DETERMINING THAT PLAINTIFF'S 2008 COMPLAINT WAS TIMELY FILED ON THE BASIS THAT THE TWO YEAR STATUTORY LIMITATION PERIOD WAS EXTENDED THROUGH 2006 BY AN ALLEGED CONTINUOUS PROFESSIONAL RELATIONSHIP?**

Plaintiff-Appellant says "No."

Defendants-Appellees say "Yes."

The Circuit Court said "Yes."

The Court of Appeals said "No."

**ISSUE II:**

**DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR BY REVERSING THE GRANT OF SUMMARY DISPOSITION ON PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIMS PURSUANT TO *MCR 2.116(C)(7)* BECAUSE THESE CLAIMS ARE IDENTICAL TO AND SUBSUMED BY PLAINTIFF'S LEGAL MALPRACTICE CLAIMS AND, THEREFORE, ARE BARRED BY THE MALPRACTICE LIMITATION PERIODS, AND, EVEN IF PLAINTIFF PERFECTED AN INDEPENDENT BREACH OF FIDUCIARY DUTY CLAIM AND A FRAUDULENT CONCEALMENT THEORY, ARE THE FIDUCIARY CLAIMS STILL UNTIMELY BECAUSE PLAINTIFF FILED HIS COMPLAINT MORE THAN THREE YEARS AFTER THE ALLEGED WRONGFUL ACTS AND OMISSIONS AND MORE THAN TWO YEARS AFTER HE DISCOVERED THE CLAIMS?**

Plaintiff-Appellant says "No."

Defendants-Appellees say "Yes."

The Circuit Court said "Yes."

The Court of Appeals said "No."

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## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In 1991, Kenneth Poss, D.P.M., was operating a podiatry practice where Plaintiff, Randy Bernstein, D.P.M., had previously been employed as an associate podiatrist (Complaint, **Ex 15**, ¶5; Bernstein Dep. **Ex 9**, pp 6-14, 18-20, 168). Due to some legal problems, Dr. Poss expected to temporarily lose his license to practice in the near future and, therefore, his ability to remain a shareholder of his podiatry P.C. (Complaint, ¶7; **Ex 9**, pp 14, 165-166).

After extensive negotiations, Kenneth Poss and Randy Bernstein entered into an oral contract, effective August 1, 1991, whereby Bernstein agreed to:

- rejoin Poss' podiatry practice;
- operate the practice and protect Poss' financial interests in the practice until Poss' podiatry license was reinstated; and,
- split all corporate profits equally with Poss.

(Complaint, ¶¶8, 9, 11; Plaintiff's Ans. to Interrogatories. 20, 23, copy of Answers attached as **Ex 1**; Bess Memorandum dated 12/11/91, **Ex 2**; **Ex 9**, pp 9-16, 27).

Pursuant to the agreement, Bernstein would be responsible for the medical aspects of the podiatry practice while Poss would remain responsible for all corporate administration and management (Complaint, ¶¶8, 13; **Ex 1**, Answers 20, 23; **Ex 9**, pp 16, 28). Additionally, Poss and Bernstein agreed that Bernstein would temporarily serve as the sole corporate shareholder and sole corporate officer of Foot Health Center, Inc. ("FHC"), a corporation to be founded in order to continue operation of Poss' established practice (Complaint, ¶¶8, 9, 13; **Ex 1**, Answers 20, 23; **Ex 2**; **Ex 9**, pp 25-26).

At all times during the negotiation of the oral contract between Poss and Bernstein, Poss was represented by his long-time business attorney, the Defendant Barry Bess, and Bernstein was represented by his own attorneys (**Ex 1**, Answers 23, 24; **Ex 9**, pp 10-17, 21-27, 46, 177).





On August 8, 1991, Poss formed a separate corporation, Diversified Medical Consultants, Inc. ("DMC") as a vehicle to manage FHC and to receive compensation for these management services (Ex 9, pp 16-17; DMC Articles of Incorporation, Ex 10). Poss served as the sole corporate director, officer and shareholder of DMC (Ex 9, pp 16-17; DMC Articles of Incorporation, Ex 10).

FHC was incorporated on August 16, 1991 (Complaint, ¶14; Articles of Incorporation, Ex 3). FHC's assets were comprised solely of those assets previously belonging to Poss and his "thriving" practice; Bernstein paid no consideration for his shares in FHC (Ex 9, pp 26-27). The Defendants Barry Bess and his firm, Seyburn, Kahn, Ginn, Bess & Serlin, P.C. (hereinafter "Seyburn/Kahn"), served as corporate counsel for FHC (Ex 9, pp 28, 178).

On August 16, 1991, Randy Bernstein, individually, and as president of FHC, and Kenneth Poss, as president of DMC, executed a Management Services Agreement (Agreement, Ex 4; Ex 9, pp 23-23). This contract conferred the authority to retain and instruct legal counsel for FHC exclusively upon DMC/Kenneth Poss:

1. Engagement of Management Services. FHC hereby appoints and engages DMC to provide management, consulting, and other administrative support services for and on its behalf, and DMC agrees to act in such a capacity, subject to and in accordance with the terms and conditions of this Agreement.
2. Services to be Performed. For and on behalf of FHC, *DMC shall provide and have sole authority and responsibility for all management, marketing, financial, billing and other administrative support services necessary or appropriate for the operation of FHC's podiatric practice at all of FHC's locations, which services shall include, without limitation, all of the following:*

\*\*\*

- (m) *Select FHC's professional advisors for legal and accounting services."*

(Ex 4, pp 1-2, ¶¶1, 2, 2m, emphasis supplied in italics).

The Management Services Agreement also expressly and irrevocably designates Poss as the attorney-in-fact for Bernstein and FHC for the purposes of dissolution and liquidation of FHC:

7. Terms and Termination.

\*\*\*

- (c) Upon termination of this Agreement for any reason, ...FHC and Bernstein each hereby *irrevocably designate the president of DMC [Kenneth Poss] as their respective*

*attorney-in-fact*, coupled with an interest, to effectuate such dissolution and liquidation....

(Ex 4, pp 8-9, ¶7(c), emphasis supplied in italics)

Bernstein has repeatedly acknowledged that he voluntarily executed the Management Services Agreement after receiving the advice of his own legal counsel (Ex 4, p 10, ¶14; Ex 9, pp 22-39).

It is undisputed that DMC, through its authorized employee, Kenneth Poss, controlled all of FHC's corporate management duties – including the selection of and interaction with the Defendants as corporate counsel for FHC (Complaint, ¶¶8, 13, 16, 23; Ex 1, Answers 30, 23; Ex 9, pp 70-71).

In 1992, Poss regained his podiatry license and resumed active practice with FHC (Complaint, ¶21; Ex 9, p 45).

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 (Consent in Lieu of a Joint Special Meeting of the Shareholders and the Board of Directors of FHC dated 6/1/92, Ex 5; Bess memorandum dated 6/24/92, Ex 6). Bernstein served as vice president and treasurer (Ex 5, p. 3; Ex 6). Additionally, as of June 1, 1992, Poss became a 50 percent shareholder, with Bernstein holding the other 50 percent (Ex 5; Ex 6).

On December 18, 1998, Poss formed Foot & Ankle Health Centers, P.C. ("FAHC"), a corporation which succeeded to the interests of FHC as of January 1, 1999 (Complaint, ¶18; Articles of Incorporation, Ex 7; Ex 9 p 178). Poss designated himself as the sole director of FAHC, as well as the corporate president, secretary and treasurer, and designated Bernstein as FAHC's Vice-President (Ex 7; 2005 Michigan Domestic Corp. Info. Update form filed 7/21/05, Ex 8). At the time of incorporation, Poss designated himself as a 98% shareholder and designated Bernstein as a 2% shareholder in FAHC (Ex 9, pp 101-102).

The incorporation and management of FAHC was directed solely by Poss, including all interactions with the Defendants as corporate counsel (Complaint ¶¶7, 16, 18, 19; Ex 9, p 178).



On January 15, 1999, a Certificate of Assumed Name was filed indicating that FAHC would be doing business as FHC (Complaint, ¶19).

On January 22, 1999, FHC changed its name to Sharon Foot Centers, P.C. (1/22/99 Certificate of Amendment to Articles of Incorporation, Ex 11).

On February 9, 1999, Sharon Foot Centers P.C. filed a Certificate of Amendment to the Articles of Incorporation the terms of which terminated the corporation's existence, effective February 11, 1999 (2/10/99 Certificate of Amendment to Articles of Incorporation, Ex 12).

On December 29, 2000, Poss provided Bernstein with an incomplete copy of a Consent in Lieu of Joint Annual Shareholders and Directors meeting (Complaint, ¶¶44, 53, 54; Ex 9, pp 145-155). By signing this form, Bernstein ratified an allocation of 98% of the shares in FAHC to Poss (Id).

On May 15, 2002, Poss formed Sunset Boulevard, LLC ("Sunset Blvd") (5/15/02 Articles of Organization, Ex 13). Sunset Blvd purchased the building that served as the main location of the three offices operated by FAHC (Ex 9, pp 83-87, 117-119). Bernstein admittedly has no evidence proving that he was to have a 50% equity interest in Sunset Blvd and/or that Bess served as corporate counsel for the LLC (Ex 9, pp 82-83, 134).

Year-end meetings for all three corporate entities were held annually between 1991 and 2004 with Poss, Bernstein, and Bess in attendance and with all corporate/business documents, including stock certificates, tax records, financial statements, by-laws and minutes, present and readily available for review (Ex 9, pp 75, 107-109). Until 2005, Bernstein never attempted to review any of the corporate documents (Ex 9, pp 111-113, 180-181).

By 2004, Bernstein began actively questioning Poss' heavy-handed and secretive control of corporate/business management (Ex 9, pp 96-97). In mid-2005, Poss began actively withholding financial documents and instruments from Bernstein (Ex 9, pp 81, 94-96). By November of 2005, Bernstein believed that "everything" was "amiss" with respect to the ownership, finances, corporate records, and tax returns for



FAHC, and Sunset Blvd (Complaint, ¶31; Ex 9, pp 81-82). Therefore, Bernstein instructed his personal attorney, Kenneth Gross, to direct a letter to Bess requesting a copy of all corporate records and tax returns (Ex 9, pp 81-82).

At the annual meeting held on December 16, 2005, Bernstein confirmed his year-long suspicion that Poss had intentionally structured FAHC in 1998 with Bernstein as a 2% shareholder (Ex 9, pp 101-102, 113, 121, 158).

In April of 2006, Bernstein decided to terminate his professional and business relationships with Poss (Ex 9, p 100). Therefore, on April 28, 2006, and on behalf of FAHC, attorney Bess directed a letter to Bernstein which:

- confirmed that Bernstein's resignation would be effective June 30, 2006;
- reminded Bernstein that he was bound by a two year non-compete clause;
- reminded Bernstein that FAHC's business practices and marketing strategies must remain confidential;
- requested Bernstein not to solicit or recruit any current FAHC employees;
- requested Bernstein not to contact any of FAHC's service providers; and,
- instructed Bernstein that his FAHC shares must be tendered by may 30, 2006 and he would be advised on or before August 1, 2006 regarding the appropriate redemption price for his stock.

(Bess later dated 4/28/06, Ex 14).

In June 2006, Bernstein confirmed his two-year long suspicions that he had no equity interest in Sunset Blvd (Complaint, ¶35; Ex 1, Answer 27; Ex 9, pp 121, 158).

On April 28, 2008, Bernstein instituted the instant action against the Defendant attorneys via separate theories of legal malpractice (Count I) and breach of a fiduciary duty (Count II).

Bernstein's legal malpractice and breach of fiduciary claims seek the same damages and rest upon identical facts.



Specifically, both theories rest upon allegations that:

- Bernstein retained the Defendants between 1991 and 2006 to serve as corporate counsel for FHC, FAHC, and Sunset Blvd, as well as Bernstein's personal attorneys for estate planning and other services unrelated to the Defendants' role as corporate counsel (Complaint ¶¶14, 26, 49-51); and,
- due to the attorney client relationship, the Defendants owed Bernstein reposed faith, confidence and trust in the Defendants to use reasonable care and diligence to act on Bernstein's behalf and to protect Bernstein's interests (Complaint ¶¶43, 44, 51, 52).

With respect to the Defendants' alleged wrongful acts and omission, both the malpractice and fiduciary duty theories rest upon allegations that, by following Poss' instructions to form FAHC in 1998 and dissolve FHC in 1999, the Defendant corporate attorneys "allowed" the fraud and conversion committed by Poss. (Complaint ¶¶18, 19, 20, 25-28, 37, 44, 48, 53, 54). Additionally, both theories rest upon averments that, while acting as corporate counsel on December 29, 2000, the Defendants failed to intervene when Poss provided Bernstein with an incomplete copy of a Consent in Lieu of Joint Annual Shareholders and Directors meeting and, therefore, "allowed" Bernstein to unwittingly ratify an allocation of 98% of the shares in FAHC to Poss (Complaint, ¶¶44, 53, 54; Ex 9, pp 145-155). Moreover, both Counts assert that, in 2002, the Defendants improperly allowed Poss to take Bernstein's expected 50% equity interest in Sunset Boulevard, LLC without notice or compensation (Complaint ¶¶35, 44, 53, 54).

Finally, recovery sought by Bernstein under both the legal malpractice and fiduciary duty theories is "significant" economic damages in the form of lost corporate equity interests and lost corporate profits caused by the Defendants' alleged failure to properly and ethically protect Bernstein's interests as a corporate shareholder from the conflicting interests of Poss and/or the corporate entities (Complaint, ¶¶26, 37, 44-45, 54).

Bernstein has testified under oath that has no proof that the Defendants:



- either assisted Poss or were complicit in Poss' efforts to deprive Bernstein of any equity interest in Sunset Boulevard., LLC, and to reduce Bernstein's equity interest from 50% to 2% when FAHC succeeded FHC and thus swindle Bernstein out of over \$4 million; and,
- profited, at Bernstein's expense, by receiving over \$500,000.00 in unearned attorneys' fees.

(Complaint, ¶¶34-37, 44-45, 54; Ex 9, pp 157-162, 169-174)

Bernstein has also testified that he elected to sue attorney Bess instead of Poss in order to "get the truth out of Mr. Bess" thus providing Bernstein with "a little bit more ammunition against Dr. Poss" (Ex 9, pp 173).

Following discovery, the Defendants moved for Summary Disposition pursuant to *MCR 2.116(C)(7)* on the basis that Plaintiff's claims are barred by the applicable statutes of limitation.

Specifically, the Defendants contended that the 2008 legal malpractice claims were untimely, having not been filed, as required by *MCL 600.5805* and *MCL 600.5838*, within either: two years of the date of the last specific service in 2002 out of which the claims arose; or, within 6 months of confirmed discovery in 2006 (Mt Trans 10/24/12, pp 1-9, 19-20<sup>1</sup>). Defendants argued that the breach of fiduciary duty claims were identical to and, therefore, subsumed by the legal malpractice claims and, hence, also untimely (Id). Alternatively, the Defendants maintained that any independently perfected breach of fiduciary duty claims filed in 2008 were still barred by the three year limitation period set forth in *MCL 600.5805(10)* which, pursuant to *MCL 600.5827*, accrued when the alleged wrongs committed in 1998, 1999, 2000 and 2002 (Id).

The arguments within the Defendants' Motion for Summary Disposition were verified by the allegations within Plaintiff's Complaint as well as relevant and admissible documentary evidence in the form of: Plaintiff's Answers to Interrogatories 4/9/09; Memorandum from Barry Bess dated 12/11/91; Articles of

<sup>1</sup> The transcript as provided by the Official Court Reporter does not feature page numbers. The Defendants-Appellees have assigned page numbers beginning with page one on the page where the Court Clerk calls the case for hearing.



Incorporation for Foot Health Centers, P.C. dated 8/13/91; Management Services Agreement; Consent in Lieu of a Joint Special Meeting of Shareholders dated 6/1/92; Memorandum from Barry Bass dated 6/24/92; Articles of Incorporation for Foot & Ankle Health Centers dated 12/18/98; Foot & Ankle Health Centers Corporation Information Update dated 5/17/05; Deposition transcript of Plaintiff – dated 5/26/10 and concluded on 7/28/10; Articles of Incorporation for Diversified Medical Consultants dated 8/1/91; Certificate of Amendment for Sharon Foot Centers dated 1/22/99; Certificate of Amendment for Sharon Foot Centers dated 2/10/99; and, Articles of Organization for Sunset Boulevard dated 5/15/02.

With respect to the timeliness of his malpractice claims, Plaintiff Bernstein countered that the two-year accrual period in §5805(6) and §5838(1) did not expire until April of 2008. According to Plaintiff, he was “continually represented” by the Defendants through April of 2006 when, on behalf of FAHC, the Defendants acknowledged in writing that Bernstein had terminated his shareholder status in FAHC (Mt Trans 10/24/12, pp 9-19. See also, Plaintiff’s Response Brief and supplemental response brief). Alternatively, Bernstein argued that the accrual period did not commence until June 2006, when Bernstein realized his full financial damage (Id).

With respect to his breach of fiduciary duty claims, Bernstein insisted that, the three-year accrual period in §5827 did not commence until December of 2005 when he confirmed that the Defendants had breached fiduciary duties (Id). At the motion hearing, and without any citation to legal authority, Bernstein argued that the six-year limitation period set forth in *MCL 600.5813* applied to the breach of fiduciary duty claims instead of §5805(10) (Mt Trans 10/24/12, p 17).

The Circuit Court issued an Opinion and Order on November 29, 2012 granting the Defendants summary relief pursuant to *MCR 2.116(C)(7)* and reasoning as follows:

This lawsuit originally filed on April 28, 2008 arises from certain legal services rendered to Plaintiff as a shareholder in a closely held corporation by Defendants while acting as corporate/business counsel. Defendants argue that the statute of limitations bars Plaintiff’s claims. The specific acts of alleged malpractice occurred in 1998, 1999, 2000 and 2002 and involve the formation, share allocation and dissolution of FAHC, FHC and



Sunset Blvd. Plaintiff asserts that there was an ongoing attorney/client relationship between Plaintiff and Defendant that did not terminate until after April 28, 2006. Defendants argue that the persona legal advice provided to Plaintiff regarding separate and disparate trust and estate matters cannot be used as evidence of continuous attorney/client relationship regarding the corporate matters involved in this litigation. Alternatively, Defendants contend that any alleged corporate attorney/client relationship with Plaintiff ended in 2005 when Plaintiff hired separate counsel to investigate his suspicions regarding his corporate equity interest. Plaintiff admits that he discovered the problems with his share and equity interest in December of 2005 and June of 2006.

The period of limitations for an action charging malpractice is 2 years from the date the claim accrued or six months from the date the Plaintiff discovers or should have discovered the existence of the claim, whichever occurs later. MCL 600.5805; MCL 600.5838. The legal malpractice claims accrues t the time the lawyer discontinues serving the Plaintiff as to the matters out of which the claim for malpractice arose. The attorney's service discontinues upon completion of the specific legal service that the lawyer performed. *Chapman v Sullivan*, 161 Mich App 558 (19987). The date on which a Plaintiff incurs or realizes damages is not relevant to determining the last date of legal service for the purposes of MCL 600.5805 and 600.5838. *Id.* There is no dispute that Plaintiff did not file his claims within 6 months of discovery and therefore the discovery rule does not apply in this case. The Court finds that Defendants discontinued serving Plaintiff as to the matters our 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 claims 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.

Plaintiff alleges that in addition to the malpractice there was also a breach of fiduciary duty based on his status as a shareholder. Plaintiff argues that these claims are not subject to the 2-year statute of limitations for malpractice. Defendants assert that for the purposes of the application of the statutes of limitation, Plaintiff's claims of breach of fiduciary duty are subsumed by the identical claims of legal malpractice. Alternatively, Defendants argue that any independently perfected claims of breach of fiduciary duty are barred by the 3-year statute of limitations in MCL 600.5805. This 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 claims for breach are clearly untimely having been filed more than 3 years after each breach allegedly occurred.

(11/29/12 Opinion and Order).

Plaintiff appealed the Circuit Court's Opinion and Order granting summary disposition pursuant to MCR 2.116(C)(7). Before the Court of Appeals renewed his arguments regarding the "continuous



representation" exception to §5805(6) and §5838(1) and the independent nature of his breach of fiduciary duty claims. Additionally, and for the first time, Plaintiff argued that the Defendants fraudulently concealed their wrongful acts and omissions and, as a result, the applicable statutory limitation periods were tolled by operation of *MCL 600.5855* which allowed Plaintiff to file his claims within two years of discovery.

With respect to the timeliness of Plaintiff's legal malpractice claims, the Defendants countered that:

- controlling legal precedent stands for the proposition that any "last treatment" or "continuous representation" doctrine is strictly limited to cases, unlike this one, where the record demonstrates that the malpractice claims arise solely out of generalized, routine, and completely interrelated professional services rendered to an actual client completely dependent upon the professional; and,
- the "last treatment" or "continuous representation" exception to §5838(1) did not apply in this case because, as a matter of undisputed fact, Plaintiff's legal malpractice claims arose out of specific and discrete legal services performed by the Defendants on behalf of three separate corporate clients.

With respect to the timeliness of Plaintiff's breach of fiduciary duty claims, the Defendants argued that:

- controlling legal precedent stands for the proposition that, for the purposes of application of the statutes of limitations, breach of fiduciary duty claims are subsumed within legal malpractice claims where the claims are premised upon the same facts and seek the same relief;
- Plaintiff's fiduciary duty claims are explicitly premised upon an alleged attorney-client relationship and otherwise identical to and, therefore, subsumed by his legal malpractice claims.

Alternatively, and even assuming that Plaintiff perfected independent breach of fiduciary duty claims, Plaintiff failed to file his Complaint within three years of the acts and omissions allegedly constituting the breaches of fiduciary duty, as required by *MCL 600.5805(10)*.



With respect to Plaintiff's fraudulent concealment arguments the Defendants asserted that:

- Plaintiff had waived appellate review of his fraudulent concealment theory by failing to specifically raise it before the Circuit Court in his Complaint and in response to the Defendants' Motion for Summary Disposition;
- even had Plaintiff preserved a fraudulent concealment theory, his Complaint was still untimely pursuant to §5855 because Plaintiff commenced this action more than two years after he discovered or should have discovered the existence of potential claims against the Defendants.

On February 20, 2014, the Court of Appeals issued an opinion reversing the entry of summary disposition on the malpractice claims, reasoning that application of the "last treatment" or "continuous representation" doctrine to the allegations in the Complaint, compelled the conclusion that the claims arising out of the formation of FHC in 1991, the dissolution of FHC in 1999, the formation and allocation of shares in FAHC in 1998, and the formation and allocation of shares in Sunset Boulevard in 2002, did not accrue until April of 2006 when Bernstein terminated his shares in FAHC:

Summary disposition pursuant to *MCR 2.116(C)(7)* was thus inappropriate as to plaintiff's legal malpractice claim. Plaintiff's complaint alleges that he retained defendant Bess to incorporate FHC in 1991, and that "[a]t all times, [plaintiff] looked to [defendant] Bess as his attorney and as the attorney for the corporation . . ." Thus, plaintiff alleges that defendant Bess provided him with generalized legal services. He also alleges that defendant Bess's malpractice arose out of these generalized legal services, as he asserted that during the course of the representation, defendant Bess committed malpractice by failing to inform that he represented Poss in taking actions that were adverse to plaintiff's interests. This case is therefore analogous to *Levy, 463 Mich at 481, 489*. Although defendants' involvement began with a specific legal service for plaintiff--i.e., the formation of FHC--plaintiff alleged that defendant Bess's services continued as general legal services. And, because the same type of services continued throughout the representation, plaintiff was entitled to rely upon the effectiveness of those services until the relationship terminated. See *Id. at 485*.

1 The facts of this case are also analogous to those of *Nugent v Weed, 183 Mich App 791; 455 NW2d 409 (1990)*. In *Nugent*, the plaintiff hired the defendant to perform general legal services, and these services continued from approximately 1971 to 1984. *Id. at 793*. Because of these general and continuous legal services, our Court held that the plaintiff's malpractice claim, which was filed more than two years after the date of some of the instances of malpractice, but within two years



after the defendant last rendered professional services to the plaintiff, was timely. *Id.* at 796. Similarly, Mr. Bernstein's malpractice claim did not begin to accrue until the date Bess last rendered him a professional service, despite the fact that some of plaintiff's alleged instances of malpractice occurred more than two years before he filed his complaint. See *Id.*

April 28, 2006, when defendant Bess sent plaintiff a letter outlining plaintiff's supposed legal obligations to FAHC, is the last date on which defendants rendered professional services to plaintiff. Accordingly, plaintiff's complaint, which was filed on April 28, 2008, was timely. *MCL 600.5805(6)*. We reject defendants' argument that plaintiff's consultation with Gross in 2005 terminated his attorney-client relationship with defendants. Plaintiff contacted Gross as additional, rather than substitute counsel, *Maddox, 205 Mich App at 451*, and, after plaintiff contacted Gross, defendants continued to provide plaintiff with general legal advice. Accordingly, plaintiff's complaint, which was filed on April 28, 2008, was timely. See *Id.* See also *MCL 600.5838(1)*; *MCL 600.5805(6)*.

2014 Mich App LEXIS 331, \*9-12.

In this regard, the Court of Appeals failed/refused to consider any of the documentary evidence submitted on behalf of the Defendants in all respects, including evidence which established that, in November of 2005, Bernstein had grave and abiding doubts and suspicions regarding his ownership/equity interest in FAHC and Sunset Boulevard, LLC and, therefore, instructed his long-time personal attorney, Kenneth Gross, to investigate. *Id.* at \*2-12.

The Court of Appeals also reversed the entry of summary disposition on the fiduciary duty claims, reasoning that, as a matter of law, a breach of fiduciary duty claim is separate and distinct from claims for legal malpractice and that Plaintiff's complaint sufficiently pled the elements of a fiduciary duty claim:

The trial court thus erred as a matter of law when it found that plaintiff's legal malpractice claim subsumed his claim for breach of fiduciary duty. In alleging breach of fiduciary duty, plaintiff alleged that defendant Bess "contributed to the fraud and conversion committed by Poss by preparing the necessary corporate documents that effectuated the transfer [of stock] without providing any notice to [plaintiff]." This was not an allegation that defendants breached the appropriate standard of care. Rather, it was an allegation that defendants assisted Poss in committing fraud. As such, plaintiff's complaint alleged more than mere negligence by defendants in their professional services rendered to plaintiff, and plaintiff independently pleaded a breach of fiduciary duty claim. See *Prentis Family Foundation, 266 Mich App at 47*; *Brownell, 199 Mich App at 532*.

*Id.* at \*14.





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While recognizing that perfected claims of breach of fiduciary duty are controlled by §5805(10), the Court of Appeals never analyzed whether the Circuit correctly determined that Plaintiff had failed to file these claims. *Id.* Instead the Court chastised the Circuit Court for failing to *sua sponte* apply the fraudulent concealment statute to Plaintiff's Complaint and instructed the Circuit Court on remand to allow Plaintiff to save his breach of fiduciary duty claims via proof of fraudulent concealment:

Though the statute of limitations for breach of fiduciary duty claims is three years,<sup>2</sup> in actions such as this one--where the plaintiff alleges that the defendants fraudulently concealed the existence of a 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 or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations." *MCL 600.5855*. We therefore remand to the trial court wherein plaintiff may pursue his claim that defendants fraudulently concealed their breach of fiduciary duty from plaintiff.

*Id* at \*14-15.

The Defendants seek Supreme Court review and reversal of the clearly erroneous analysis and rulings within the Court of Appeal's Opinion of February 20, 2014.

## STATEMENT OF STANDARDS OF APPELLATE REVIEW

The Supreme Court reviews *de novo* a Circuit Court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(7). *Petipren v Jaskowski*, 494 Mich 190, 201; 833 NW2d 247 (2013); *Lignons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011); *Boyle v GMC*, 468 Mich 226, 229-230; 661 NW2d 557 (2003).

A court reviewing a motion pursuant to subrule 2.116(C)(7) is required to accept as true the factual allegations within the complaint, unless contradicted by affidavits, depositions, admissions and other documentary evidence submitted by the movant. *Petipren, supra*; *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008); *Boyle, supra*; *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If documentary evidence is submitted in support of a (C)(7) motion, it must be considered by the court. MCR 2.116(G)(5)<sup>2</sup>; *Maiden, supra*.

A party is entitled to summary disposition pursuant to MCR 2.116(C)(7) where the record demonstrates that there is no genuine issue of material fact regarding whether the claims are barred by the statutes of limitations. *Kuznar v Raksha*, 481 Mich 169, 175; 750 NW2d 121 (2008); *Boyle, supra*; *Maiden, supra* ["if the proffered evidence fails to establish a genuine issue regarding any material fact the moving party is entitled to judgment as a matter of law."].

Where genuine and material questions of fact prevent the grant of summary relief, the court should order an immediate trial on those issues. MCR 2.116(I)(3)<sup>3</sup>; *Al-Shimnari v Det Med Ctr*, 477 Mich 280, 288-289; 731 NW2d 29 (2007).

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<sup>2</sup> "(G) Affidavits; Hearing.

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(5) The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)."

<sup>3</sup> "(I) Disposition by Court; Immediate Trial.

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(3) A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial



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Whether a claim is barred by a statutory limitation period is a question of law that receives *de novo* review. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994).

The Supreme Court also conducts a *de novo* review of issues of statutory construction. *Ligons, supra*; *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002); *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

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may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury."





**ARGUMENT I:**

**PLAINTIFF'S LEGAL MALPRACTICE CLAIMS ARE BARRED BY THE PERIODS OF LIMITATIONS SET FORTH IN *MCL 600.5805(6)* AND *MCL 600.5838* BECAUSE PLAINTIFF FILED HIS COMPLAINT MORE THAN SIX MONTHS AFTER DISCOVERING THE ALLEGED MALPRACTICE AND MORE THAN TWO YEARS AFTER THE DATES OF THE SPECIFIC AND DISCRETE LEGAL SERVICES BETWEEN 1991 AND 2002 OUT OF WHICH THE CLAIMS ARISE AND THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY DETERMINING THAT PLAINTIFF'S 2008 COMPLAINT WAS TIMELY FILED ON THE BASIS THAT THE TWO YEAR STATUTORY LIMITATION PERIOD WAS EXTENDED THROUGH 2006 BY AN ALLEGED CONTINUOUS PROFESSIONAL RELATIONSHIP**

This appeal requires judicial construction of *MCL 600.5805(6)* and *MCL 600.5838*, which contain the limitation periods for legal malpractice claim and state as follows:

Sec. 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

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Sec. 5838. (1) Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

(2) Except as otherwise provided in section 5838a or 5838b, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The plaintiff has the burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim. A malpractice action that is not commenced within the time prescribed by this subsection is barred. Except as otherwise provided in section 5838(a), an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

The cardinal rule of statutory construction is to ascertain and effectuate legislative intent. *Ligons, supra; Lesner, supra; Omne Fin, supra*. In this regard, this Court has indicated, with great frequency, that clear statutory language must be enforced, as written without judicial addition, subtraction, or modification. *Ligons, supra; Lesner, supra; Omne Fin, supra*. Particular judicial deference has historically been accorded by this Court to statutory amendments which, by their very nature, reflect a clear legislative intent to effect change. *Huron Twp v City Disposal System*, 448 Mich 362; 531 NW2d 153 (1995); *Sam v Balardo*, 411 Mich 405, 430; 308 NW2d 142 (1981) [construing the 1961 amendment to MCL 600.5805 as applied to legal malpractice claims]; *Bonifas-Gorman Lumber Co v Unemployment Comp Comm*, 313 Mich 363, 369; 21 NW2e 163 (1946).

This Court has characterized statutes of limitation as "representing a legislative determination of that reasonable period of time that a plaintiff will be given in which to file an action." *Lothian v City of Det*, 414 Mich 160, 165; 324 NW2d 9 (1982). This Court has also recognized that statute of limitation are enacted to: penalize claimants who have not diligently pursued possible claims and the culpable parties; relieve defendants from the protracted fear of litigation; shield defendants from fraudulent, manufactured, and/or spurious claims; and, protect defendants and the court system stale claims that are difficult to fairly and efficiently resolve. *Gebhardt*, 444 Mich at 544; *Lothian*, 414 Mich at 166-167. Notably, the Supreme Court has specifically held that MCL 600.5805(6) and MCL 600.5838 are unambiguous and must be enforced as written. *Gebhardt*, 444 Mich at 541-542.

It is well-settled that retention of new or separate legal counsel effectively terminates an attorney-client relationship for the purposes of the limitation periods set forth in §5805(6) and §5838(1). See, i.e., *Wright v Rinaldo*, 279 Mich App 526, 534-535; 761 NW2d 114 (2008); *Kloain v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006); *Estate of Mitchell v Dougherty*, 249 Mich App 668, 684; 644 NW2d 391 (2002). Additionally, this Court has expressly determined that, in situations where an attorney has not been dismissed by a court or client or replaced by substitute counsel, the attorney's service discontinues upon



completion of the specific legal service that the lawyer performed. *Gebhardt*, 444 Mich at 543. See also: *Chapman v Sullivan*, 161 Mich App 558, 561, 563-564; 411 NW2d 574 (1987); *Anderson v David & Wierenga, P.C.*, 2012 Mich App LEXIS 635, \*2-4 (No. 301946, dec'd 4/10/02, Ex 17), *lv den*, 492 Mich 869; 819 NW2d 868 (2012). Similarly, it is generally accepted that follow-up activities attendant to otherwise completed matters of legal representation do not extend the two year malpractice accrual. *Bauer v Ferriby & Houston*, 235 Mich App 536, 537-540; 599 NW2d 493 (1999); *Melody Farms v Carson Fischer, PLC*, 2001 Mich App LEXIS 1755, \*5-11 (No. 215883, dec'd 2/16/01, Ex 16). Moreover, the fact that an attorney later represents the same client in an unrelated matter does not extend the statutory limitation period. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843 (1997); *Balcom v Zambon*, 254 Mich App 470, 484; 658 NW2d 156 (2002); *Masterguard Home Sec v Nemes & Anderson, PC*, 2010 Mich App LEXIS 1481, \*8-9 (7/29/10, Ex 21) ["the attorney's consecutive representation of the same client in a different matter does not affect the original date of accrual"].

**However, current Michigan case law reveals a lack of a clear rule or consensus with respect to whether there is, or should be, a "continuous representation" exception to the accrual of professional malpractice claims as of the date of the specific acts or omissions at issue.**

Prior to 1961, Michigan common law followed a "last treatment" rule which set the accrual date for medical malpractice actions as the date the physician/patient relationship terminated. See: *Levy v Martin*, 463 Mich 478, 483, 488; 620 NW2d 292 (2001); *Morgan v Taylor*, 434 Mich 180, 187-188; 451 NW2d 852 (1990); *DeHaan v Winter*, 258 Mich 293, 296-297; 241 NW 923 (1932). The rationale behind the "last treatment" rule was to refrain from placing a duty upon a patient to inquire as to the reasonableness of a physician's judgment while the patient was still treating with the physician and reasonably relying upon the physician's expertise. *Morgan, supra*. Via 1961 PA 236, the Michigan Legislature codified the "last treatment" rule for medical malpractice actions in the original version of MCL 600.5838. *Morgan*, 434 Mich at 187-189.



However, via 1986 PA 178, the Michigan Legislature amended §5838, electing to abrogate the "last treatment" rule and, as a result, 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 acts or omissions that caused the claimed harm. *Levy*, 463 Mich at 484, 488-489; *Morgan*, 434 Mich at 192-193. This Court subsequently decreed that, where multiple and separate acts of omissions lead to a single injury, §5838 plainly requires that individual accrual dates must be determined with respect to each of the specific acts or omissions at issue. *Gebhardt, supra*. See also: *Brackins v Olympia, Inc*, 316 Mich 275, 279-280; 25 NW2d 197 (1946) [there can be more than one proximate cause for a single injury].

Yet, in the *Levy* and *Morgan* cases, this Court appeared to reinstate a "last service" rule in malpractice actions where: the claims arise out of routine, periodic, and interrelated professional services; and, there is no evidence of an event, occurrence, or knowledge that demonstrated abandonment, disruption, or termination of the professional relationship.

In *Morgan*, the plaintiff alleged that the defendant optometrist had committed malpractice by failing to timely diagnose and refer plaintiff for specialized treatment of glaucoma. *Id* at 183. The defendant had performed annual exams, including glaucoma testing, for the plaintiff between 1981 and 1983. *Id* at 182-183. The glaucoma tests were positive beginning in 1981, but the defendant did not refer plaintiff for specialized treatment until 1983. *Id* at 183. The *Morgan* Court held that malpractice claims accrued in 1983 when the defendant performed his last routine exam and informed plaintiff of the presence of glaucoma. *Id* at 193-194.

Notably, the *Morgan* Court explicitly cautioned that, in light of the legislative repeal of the "last treatment" rule, its holding was limited to the unique facts presented, to wit:

- "glaucoma is an insidious disease which often manifests no symptoms to alert the victim";
- a patient is usually dependent upon a health professional to diagnose glaucoma;



- the doctor's assurances of good eye health in 1981 and 1983, which induced the plaintiff not to seek further treatment and which otherwise negated any duty of inquiry upon the plaintiff; and,
- a union contract had required plaintiff to treat with the defendant unless referral was made to a specialist treatment and, therefore, had prevented plaintiff from seeking treatment elsewhere.

*Id.*<sup>4</sup>

In *Levy*, the defendant accountants provided the plaintiff with routine annual tax services from 1974 until 1996, when an IRS audit imposed additional taxes and penalties for 1991 and 1992. *Id.* at 480-481.

The *Levy* majority determined that the malpractice claims accrued in 1996 reasoning:

- there had been a continuing professional relationship specifically with regards to the preparation of tax returns;
- until 1996, the plaintiff had no reason to inquire into the correctness of the 1991 and 1992 returns; and,
- plaintiff alleged that the consecutive returns were inter-related and the defendants failed to offer any evidence that the preparation of each form constituted a separate and discrete professional service.<sup>5</sup>

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<sup>4</sup> "When an optometrist performs an eye examination which includes a glaucoma test, it may not be a "treatment," but it is a "service" that is critically important to the patient. As plaintiff points out, glaucoma is an insidious disease which often manifests no symptoms to alert the victim. The patient who is told to come in for an eye examination every few years is completely dependent upon the professional to screen for glaucoma and to detect it.

In the instant case defendant argues that the rationale underlying the last treatment rule does not apply in the context of routine, periodic examinations. It is contended that there is no air of truthfulness and trust once the examination is concluded. We disagree. It is the doctor's assurance upon completion of the periodic examination that the patient is in good health which induces the patient to take no further action other than scheduling the next periodic examination.

Particularly in light of the contractual arrangement which bound defendant and entitled plaintiff to periodic eye examinations, it cannot be said that the relationship between plaintiff and defendant terminated after each visit. The obligation and responsibility of defendant to provide glaucoma testing extended beyond the 1981 examination of plaintiff's eyes. We conclude that defendant did not discontinue "treating or otherwise serving" plaintiff "as to the matters out of which the claim for malpractice arose" until August 18, 1983. Thus, we hold that the claim of plaintiff is not barred by the statute of limitations. (footnote omitted).

Since the facts here are unique, and the Legislature has now repealed the last treatment rule as it applied to medical malpractice, we limit our holding to the facts of this case. (emphasis supplied in underline)



*Id* at 486-489.

The *Levy* majority also expressly limited its holding to facts before it, taking pains to explicitly emphasize that:

- the two year limitation period for malpractice claims should never be extended merely because a professional may provided generalized services over a period of time in addition to specific and discrete services out of which the malpractice claims arise<sup>6</sup>.
- the "continuous services" or "continuous relationship" rule only applies where the malpractice claims arise out of routine and generalized professional services; and,
- the defendants failed to submit any evidence regarding the nature of the professional services at issue.

*Id* at 489.<sup>7</sup>

<sup>5</sup> "We note that the result may have been different if defendants had come forward with documentary evidence that each annual income tax preparation was a discrete transaction that was in no way interrelated with other transactions."

<sup>6</sup> "Accordingly, this opinion does not mean, for example, that if an accountant prepared income tax returns for a party annually over a period of decades, the statute of limitations for alleged negligence in preparing the first of these tax returns would not run until the overall professional relationship ended."

<sup>7</sup> "...it is clear here that plaintiffs, rather than receiving professional advice 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.'"<sup>19</sup>

<sup>19</sup> We note that we are reviewing this case in the context of a motion for summary disposition brought by defendants under *MCR 2.116(C)(7)* based on the statute of limitations. In bringing such a motion, a defendant may, but is not required to, submit documentary evidence in support of its assertion that a claim is barred by the statute of limitations. See *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

However, in the present case, defendants have not offered documentary evidence regarding the nature of the professional services that were provided by defendants to plaintiffs. As Judge WHITBECK stated below, in the absence of any documentary evidence on a point, in reviewing a summary disposition motion under *MCR 2.116(C)(7)* we must accept the well-pleaded allegations in a complaint as true. Plaintiffs alleged that defendants prepared their income tax returns from 1974 to 1996. Defendants have failed to present any evidence that this is untrue--or that each income tax preparation was a discrete transaction that should be considered to separately constitute "the matters out of which the claim for malpractice arose," *MCL 600.5838(1)*; *MSA 27A.5838(1)*, for purposes of the last treatment rule. Accordingly, we conclude that defendants have not established that plaintiffs' claims are barred by the statute of limitations."





Both before and after the *Morgan* and *Levy* decisions, the Michigan Court of Appeals has struggled with the construction and application of §5805(6) and §5838(1) in malpractice cases featuring a long-term or on-going professional relationship.

Some panels have refused to recognize a "continuous relationship" exception to §5838(1), reasoning that the unambiguous language selected by Michigan Legislature when amending this statute clearly indicates that the Legislature was repudiating any "notion that the existence of a continuing [professional] relationship by itself could extend the accrual date beyond the specific, allegedly negligent acts or omissions charged." *McKinney v Clayman*, 237 Mich App 198, 203-204; 602 NW2d 612 (1999)<sup>8</sup>. See also: *Kincaid v Cardwell*, 300 Mich App 513, 525-526<sup>9</sup>; 834 NW2d 122 (2013), and Judge Markman's

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<sup>8</sup> "To the extent that plaintiff suggests a continuing-wrong or continuing-treatment rule should apply to defendant's adherence to his original diagnosis and treatment decision and extend the accrual date of plaintiff's claim to March 3, 1994, ... we decline to adopt such an approach on our own initiative when our interpretation of subsection 38a(1) in this manner would operate in this case to reinstate the last treatment rule abrogated by the Legislature over a decade ago. (footnote omitted)

The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which the courts may not interfere . . . . It is the function of the court to fairly interpret a statute as it then exists; it is not the function of the court to legislate. [*Morgan, supra* at 192 (citations omitted).]

The Legislature has removed the last treatment rule from the statutory scheme governing the limitation period for medical malpractice claims, and we will not effectively resurrect the doctrine as an "exception" to the definition of "accrual date" in *MCL 600.5838a(1)*; *MSA 27A.5838(1)(1)*. The instant record reveals that the alleged acts or omissions supporting plaintiff's malpractice claim against defendant occurred no later than December 3, 1993. Therefore, pursuant to *MCL 600.5838a(1)*; *MSA 27A.5838(1)(1)*, plaintiff's claim had accrued by this date, and the trial court correctly granted defendant summary disposition on the basis of plaintiff's failure to file her claim within two years of defendant's alleged acts or omissions."

<sup>9</sup> "In 1986, the Legislature abrogated the last-treatment rule for medical malpractice claims. See 1986 PA 178. For all medical malpractice claims arising after October 1, 1986, the accrual date was no longer determined on the basis of the last day that the physician treated the plaintiff--it was determined on the basis of the act or omission that occasioned the harm: 'For purposes of this act, a claim based on the medical malpractice of a person or entity . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice . . . ' *MCL 600.5838a(1)*.

Although the Legislature determined that the last-treatment rule should no longer govern the accrual of medical malpractice claims, it did not replace the last-treatment rule with a first-treatment rule; rather, the accrual date depends on the date of the specific act or omission that the plaintiff claims caused his or her injury. Similarly, while the Legislature referred to 'the act or omission' that is the basis for 'the claim,' *MCL 600.5838a(1)*, the Legislature did not limit a plaintiff to asserting a single claim for medical malpractice for any given injury. Because a plaintiff's injury can be causally related to multiple acts or omissions, it is possible for the plaintiff to allege multiple claims of malpractice premised on discrete acts or omissions--even when those acts or omissions lead to a single injury--and those claims will have independent accrual dates determined by the date of the specific act or omission at issue. See, e.g., *Brackins v Olympia, Inc*, 316 Mich 275, 279-280; 25 NW2d 197 (1946) (noting that there can be more than one proximate cause for the same injury). However, as this Court explained in *McKinney v Clayman*, 237 Mich App 198; 602 NW2d 612 (1999), the fact that a plaintiff may be able to plead multiple accrual dates does not mean that the plaintiff may resurrect the last-treatment rule through ambiguous or creative pleading." (emphasis supplied in underline)

dissenting opinions in *Levy*, 463 Mich at 491-503<sup>10</sup> and *Azzar v Tolley*, 474 Mich 922-923; 705 NW2d 349 (2005)<sup>11</sup>.

<sup>10</sup> "The plain language of subsection 5838(1) does *not* state that a claim of professional malpractice accrues on the last date of service (i.e., "last date of treatment"), period. Rather, the statutory language clearly defines the point of accrual, confining the last date of service expressly to those matters "out of which the claim for malpractice arose"; from this language, certainly, a professional relationship may continue on *even though* a malpractice claim arising out of that relationship has accrued and the clock has started to run with regard to the two-year limitation period. The Court of Appeals dissent and the majority's adoption of the dissent's analysis without explanation fail to acknowledge and give effect to the plain language of the entire sentence comprising subsection 5838(1), thereby rendering the modifying phrase "matters out of which the claim for malpractice arose" superfluous.

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In the present case, the 'matters out of which [plaintiffs'] claim for malpractice arose' involved defendants' preparation of their 1991 and 1992 income tax returns. Thus, under the plain language of subsection 5838(1), plaintiffs' claim of professional malpractice accrued, and the two-year limitation period began to run, when defendants worked their last day with regard to these distinct returns. Even assuming that defendants worked on plaintiffs' 1992 tax return through December 1993, plaintiffs' cause of action for malpractice was barred by subsection 5805(4) on the last day of December 1995. Plaintiffs' complaint was not filed until August 1997. (footnote omitted)

The Court of Appeals dissent's analysis and the majority's reliance on this analysis, effectively erode the policy bases for having statutory limitation periods in the first place. Obviously, while one policy base is to afford plaintiffs a reasonable opportunity to bring suit, statutes of limitation are also intended to: (1) compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend; (2) relieve a court system from dealing with stale claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured; and (3) protect potential defendants from protracted fear of litigation. *Chase v Sabin*, 445 Mich 190, 199; 516 NW2d 60 (1994).

Asserting, as the Court of Appeals dissent does in the present case, that the termination of the professional relationship is the beginning and end of the analysis in determining when a professional malpractice claim has accrued, tolls the limitation period in a potentially large number of professional malpractice cases, pending the ultimate and final termination of the professional relationship. Under the majority's interpretation of subsection 5838(1), a professional relationship may exist for one hundred years; if, perchance, malpractice was committed in the very first year of the relationship, a claim could potentially remain viable for another 101 years. Certainly, a reasonable time would have long since passed, thereby undermining the opposing party's ability to defend such a stale claim, extending the potential defendant's apprehension of litigation to unreasonable and unacceptable lengths, and unnecessarily burdening the judicial system with claims so stale as to be virtually untriable. See *Chase, supra*.

In enacting § 5838, it is reasonable to conclude that the Legislature addressed the conflict between the accrual of a simple tort claim, which generally involves but a single act or omission, and the accrual of a professional malpractice claim, where actual malpractice may occur within an extended, but nevertheless distinct, period of continuing professional service.

The 'matters out of which [plaintiffs'] claim for malpractice arose' involved defendants' preparation of plaintiffs' 1991 and 1992 income tax returns. Pursuant to the plain language of subsection 5838(1), the last date on which defendants worked in preparing such returns was the date on which plaintiffs' claim for professional malpractice accrued for purposes of the running of the statute of limitations. Because plaintiffs failed to file their complaint until well after the applicable two-year limitation period had run, their claim for professional malpractice, in my judgment, was time-barred and the circuit court properly granted summary disposition in favor of defendants in this case." (emphasis supplied in underline)

<sup>11</sup> "Defendant served as general counsel to plaintiff's various companies for many years, assisting with business and personnel matters, and other nonlegal matters. In 1994, defendant proposed the purchase of a 225-acre parcel of land for \$ 312,000. The plan was that defendant would retain 80 acres as the site of his new home, and the other 145 acres would be developed. Plaintiff loaned defendant \$ 98,000, and the deal was commenced. The deal was not otherwise documented. In 1997, defendant conveyed the entire parcel, including defendant's house now built on the land, to his wife in a divorce settlement. Defendant only repaid \$ 11,000 of the loan to plaintiff, and in 1999, plaintiff discharged defendant.



Other Court of Appeals' panels have refused to apply the "continuous relationship" rule where it is undisputed that malpractice arose out of discrete professional services as opposed to continuous, interrelated, routine, and periodic services. *Old CF, Inc v Rehmann Group, LLC*, 2012 Mich App LEXIS 1836 (No. 307484, 9/20/12, Ex 23); *lv den*, 439 Mich 930; 825 NW2d 77 (1/25/13); *Boss v Loomis*, 2010 Mich App LEXIS 504 (Nos 287578, 289438, 3/16/10, Ex 22), *lv den*, 487 Mich 857; 784 NW2d 813 (2010).

Still other Court of Appeals' panels, including the panel deciding the instant matter, have held that, whenever a defendant even allegedly provides "generalized" professional services over a period of time, the two-year limitation period does not accrue until the last date of professional service as to any allegedly related matter. See: *Bernstein*, 2014 Mich App LEXIS at \*8-12; *Azzar v Tolley*, 2004 Mich App LEXIS 2979, \*8-12 (No 249879, 11/2/04, Ex 24), *lv den*, 474 Mich 922; 705 NW2d 349 (2005); *Nugent v Weed*, 183 Mich App 791, 796; 455 NW2d 409 (1990). It is also worth noting that the several federal courts have concluded that the Michigan appellate courts have adopted a "broad view" of the accrual of malpractice claims with the focus upon the "whole relationship" rather than the specific acts and omissions out of which the claims arise. *Kutlenios v Unum Provident Corp*, 475 Fed Appx 550, 554; 2012 US App LEXIS 7009, \*7-

In 2001, plaintiff sued defendant under theories of breach of contract, promissory estoppel, unjust enrichment, and legal malpractice. The trial court granted summary disposition to plaintiff on all the claims except the legal malpractice claim, on which the court granted summary disposition to defendant.

The Court of Appeals reversed the dismissal of the malpractice claim, concluding that the statutory period of limitations had not begun to run until the longstanding relationship between attorney and client ceased. Therefore, the malpractice claim, which was filed within two years of the termination of the relationship, was timely.

However, MCL 600.5838(1) provides:

[A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues 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 discovers or otherwise has knowledge of the claim. [Emphasis added.]

Therefore, contrary to the Court of Appeals determination, the limitations period began to run, not when defendant discontinued serving plaintiff as to any matter, but only when defendant discontinued serving plaintiff "as to" the matters out of which the claim for malpractice arose. Although defendant continued to perform various legal and nonlegal tasks for plaintiff until 1999, the loan transaction/land purchase was the 'matter out of which the claim for malpractice arose . . . .' Therefore, the two-year limitations period began to run, at the latest, in 1997, when the property was conveyed to defendant's wife. Because plaintiff did not file a complaint until 2001, his malpractice claim is time-barred. Therefore, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition to defendant." (emphasis supplied in underline)



9 (6<sup>th</sup> Cir, 4/6/12); *Gold v Deloitte & Touche*, 405 BR 830, 839-845 (Bank Crt, ED Mich, 10/16/08); *Ameriwood Indus Int'l Corp v Arthur Anderson & Co*, 961 F Supp 1078, 1092-1094 (WD Mich, 3/11/97).

The Defendants respectfully request the Supreme Court to seize upon the case as an opportunity to resolve the current split of authority among Court of Appeals panels with respect to the critical issue of whether *MCL 600.5805(6)* and *MCL 600.5838(1)* permit a "continuous relationship" exception to the accrual of professional malpractice claims. In this regard, the Court may elect to uphold, clarify, or overrule its prior decisions in *Morgan, supra*, and *Levy, supra*.

However, regardless of the rule of law announced by the Court with respect to continued application of any "continuous relationship" doctrine, the Defendants submit that the Court of Appeals opinion in this case must be reversed.

Plaintiff Bernstein instituted the instant cause of action on April 28, 2008. Count I of the Complaint sets forth legal malpractice claims arising out of certain and discrete acts and omission on the part of the Defendant attorneys concerning legal services provided to three separate corporate clients; specifically:

- the formation and dissolution of FHC in which Bernstein was a 50% shareholder;
- the formation of FAHC in which Bernstein was only a 2% shareholder;
- the failure to prevent Bernstein from unwittingly ratifying the 2% share distribution in FAHC; and,
- the formation of **Sunset Blvd**, in which Bernstein was allegedly to be a 50% partner but in which Bernstein was given no equity interest from the outset.

(Complaint, ¶¶ 18-20, 25-28, 37, 44, 48, 53, 54. See also: **Ex 9**, pp 145-155)

It is undisputed that Bernstein failed to take advantage of the six month discovery period set forth in §5838(2) since he admittedly discovered, or should have discovered, his alleged financial injury and its possible causes. Therefore, the sole issue in this case is whether Bernstein's 2008 Complaint was filed within two years from the time the Defendant attorneys discontinued serving Bernstein as to the matters out of which the claim for malpractice arose.



Each of Bernstein's multiple malpractice claims should have an independent accrual date determined by the date of the act or omission out of which the claim arose. *Gebhardt, supra; Solowy, supra; Balcom, supra*. The record confirms the accrual dates are:

- August 16, **1991** – the date when FCH was formed;
- February 9, **1999** – the date when FCH was dissolved;
- December 18, **1998** – the date when **FHAC** was incorporated and its shares allocated;
- December 29, **2000** – the date when Bernstein consented to the allocation of **FAHC** shares; and
- May 15, **2002** - the date when **Sunset Blvd** was incorporated and its shares allocated.

(Ex 3; Ex 7; Ex 9, pp 101-102, 178, Ex 12; Ex 13)

Therefore, pursuant to the unambiguous language of §5805(6) and §5838(1), Bernstein's claims regarding the formation of FHC had to be filed no later than August 16, **1993** – two years from the date of FHC's incorporation. However, Bernstein waited almost **fifteen years** to file his claims!

Similarly, Bernstein's claims regarding the dissolution of FHC had to be filed no later than February 9, **2001** – two years from the date that corporation was dissolved. However, again, Bernstein waited more than **seven years** to file these claims!

Bernstein's claims regarding the formation and shares allocation of FAHC, a corporate entity separate and distinct from FHC, had to be filed no later than December 18, **2000** – two years from the date of FAHC's incorporation. However, Bernstein waited more than **seven years** to file these claims!

Bernstein's claims regarding the formation and shares allocation of **Sunset Blvd** had to be filed no later than May 15, **2004** – two years after this third separate entity was incorporated. However, Bernstein waited almost **four years** to file these claims!

In short, as a matter of law, the Court of Appeals should have affirmed the summary dismissal of Plaintiff's legal malpractice claims *MCR 2.116(C)(7)* because none of Bernstein's





claims were filed, as required, within two years from the date of accrual. *MCL 600.5805(6); MCL 600.5838(1); Gebhardt, supra; Kuznar, supra; Boyle, supra; Maiden, supra.*

Instead, the Court of Appeals reversed, reasoning that application of the "last treatment" or "continuous representation" doctrine compels the conclusion that none of Plaintiff's malpractice claims accrued until **April 28, 2006** when, on behalf of corporate client FAHC, the Defendants acknowledged that Bernstein was terminating his business relationship with FAHC and advising Bernstein of the deadline for tendering back his shares in that corporation. The Court premised its holding upon:

- allegations that Plaintiff Bernstein had initially retained and continuously relied upon the Defendants to represent his interests as a shareholder in the various corporations; and,
- evidence that the Defendants had provided generalized legal services to the three corporations, including the preparation of annual corporate updates and reports, preparation of routine corporate documents, such as DBA forms, and, attendance at annual corporate meetings.

2014 Mich App LEXIS 331at \*2-4, 9-12.

**The Defendants contend that the Court of Appeals' decision in this case graphically illustrates the necessity for this Supreme Court to categorically repudiate the continued existence and application of a "continuous relationship" doctrine.**

Essentially, once any corporation, and certainly a close corporation, is formed any and all legal services performed by corporate counsel are continuous and interrelated. And, unlike human beings, corporations do not have finite natural lives; corporate entities can exist and have existed for hundreds of years. Surely, the Michigan Legislature did not intend to consign corporate counsel to a legal limbo where professional malpractice claims linger until a corporation dissolves? Similarly, the Legislature did not intend to toll accrual of any and all legal malpractice claims possessed by individual shareholders and arising out of acts and omissions of corporate counsel related to corporate formation and share allocation until a potentially far distant date in the future when that individual elects to sell or tender back his or her shares?

In this particular case, the legal malpractice claims filed in 2008 relate to legal services by corporate counsel which first began **seventeen years** earlier in 1991 (See: Complaint, Ex 3).

This Court has already acknowledged that, by amending §5838, the Michigan Legislature deliberately abolished a rule pegging accrual of professional malpractice claims to the date of last service.

This case provides the Court with a golden opportunity to definitively acknowledge that the "continuous relationship" doctrine operates to improperly resurrect an accrual definition repudiated by the Legislature almost 30 years ago. In other words, the "continuous representation" doctrine should be renounced as an inappropriate judicial modification of the amended version of MCL 600.5838(1). See: *Lignons, supra*; *Lesner, supra*; *Omne Fin, supra*; *Morgan, 434 Mich at 192*; *Sam, supra*; *Bonifas-Gorman Lumber Co, supra*; *Huron Twp, supra*; *McKiney, supra*; *Kincaid, supra*. See also: *Azzar, 474 Mich at 922-923* and *Levy, 463 Mich at 491-503* (dissenting opinions of Justice Markham).

Negation of the "continuous relationship" exception to the legislatively-defined accrual for professional malpractice claims is equally justified by the policy consideration underlying any statutory limitation period; namely: encouraging diligent pursuit of civil claims; reducing protracted fear of potential litigation; and protecting parties and the courts from the hardships associated with fairly adjudicating stale claims. *Gebhardt, supra*; *Lothian, supra*; *Morgan, supra*; *Kincaid, supra*. In this case, it has been and will continue to be difficult, nigh impossible, to defend against Plaintiff's malpractice claims on the merits. Obviously in the **twenty-three years** that have elapsed since the Defendants acted to incorporate FHC, witness have died or become otherwise unavailable, the memories of available witnesses are faded and/or rapidly fading, and necessary documents can no longer be located.

In short, the Defendants respectfully request the Supreme Court to reverse the Court of Appeals on the basis that Michigan law will no longer sanction application of the "continuous relationship" doctrine as an exception to accrual period for malpractice claims set forth in MCL 600.5838(1).



Alternatively, even in the event that the Court is inclined to continue recognition of the "continuous relationship" doctrine, the Defendants maintain that the undisputed facts in the case do not allow application of the doctrine to save Plaintiff's malpractice claims from dismissal pursuant to *MCR 2.116(C)(7)*.

At the outset, the Court of Appeals erroneously relied upon the allegations in the Complaint, alone, to justify characterization of the "relationship" between Bernstein and the Defendants as one of "generalized" rather than specific and discrete professional services. As matter of law, the Court of Appeals was required to also review, and accept as true, the uncontroverted documentary evidence submitted by the parties. *MCR 2.116(G)(5); Maiden, supra*.

More to the point, the documentary evidence forming the record conclusively demonstrates that:

- Bernstein's claims arise out of separate and discrete professional services related specifically to the formation, share allocation, and dissolution of three distinct corporate entities and provided at random and isolated intervals between 1991 and 2006;
- there was no continuous and exclusive relationship of trust and confidence between Bernstein and the Defendants;
- years before filing his Complaint, Bernstein had good reason to inquire as to the acts and omissions of the Defendants actually at issue; and,
- even though Bernstein admittedly possessed no evidence of wrongdoing on the part of Defendants in the performance of concededly authorized legal action on behalf of the three corporations, he elected to sue the Defendants as a means of obtaining evidence to substantiate future claims against Poss.

Specifically, and has already been discussed, it simply defies all common sense and logic to deem Bernstein's claims as arising out of generalized, routine, and on-going legal services to the same client when it is undisputed that Bernstein's claims arise out of specific legal services related to the formation or



dissolution of three separate corporate entities! For this reason alone, the "continuous representation" doctrine has no application in this case. *Levy, supra; Morgan, supra; Old CF, Inc, supra; Boss, supra.*

Additionally, and as this Court made patently clear in *Levy*, merely because the Defendant corporate counsel also provided "generalized" and "routine" legal services to FHC, FAHC, and Sunset Boulevard, starting in 1991 and continuing through, and indeed after, Bernstein's formal "departure" in 2006, these additional legal services does not permit an extension until 2008 of the two year limitation period in §5805(6) which accrued with respect to the specific legal services involved in the formation of FHC in 1991, the formation and share allocation of FAHC in 1998, the dissolution of FHC in 1999, the acceptance of Bernstein's consent to FAHC share allocation in 2000, and the formation and share allocation of Sunset Blvd in 2002.

Moreover, and in sharp contrast to the facts in *Morgan* and *Levy*, the documentary evidence submitted by the Defendants in support of summary disposition, including Bernstein's testimonial admissions, utterly negates the mere allegations that Bernstein instituted and continuously "enjoyed" an actual attorney-client relationship with the Defendants as corporate counsel. Indeed, as a matter of undisputed fact, in their capacity as general counsel for FHC, FAHC and Sunset Blvd, the Defendants had no relationship whatsoever with Bernstein.<sup>12</sup>

Specifically, Bernstein entered into business negotiations with Poss knowing that the Defendants had long represented Poss and his corporate interests (Ex 1, Ans 23, 24; Ex 9, pp 10-17, 21-27, 46, 177). The Management Services Agreement (Ex 4) subsequently signed by Poss, as president of DMCI, Bernstein, individually, and Bernstein as president of FHC, conferred exclusively upon Poss/DMC the authority to retain and instruct legal counsel for FHC (Ex 4, pp 1-2, ¶¶1,2). The agreement also irrevocably

<sup>12</sup> The Defendants do not admit and never have admitted that an attorney-client relationship existed between them and Bernstein with respect to legal matters involving FHC, FAHC, and Sunset Blvd. Indeed, as a matter of law, with respect to all corporate legal services at issue, the professional relationship was with the corporations, only. *Beaty v Hertzberg & Golden, P.C.*, 456 Mich 247, 260; 571 NW2d 716 (1997); *Prentis Fam Found, Inc v Karmanos Cancer Inst*, 266 Mich App 39, 44; 698 NW2d 900 (2005), *lv den*, 474 Mich 871; 703 NW2d 816 (2005); *Scott v Green*, 140 Mich App 384, 397, 400; 364 NW2d 709 (1985); *Fassihi v Sommers, Schwartz, Silvers, Schwartz & Tyler, P.C.*, 107 Mich App 509, 514; 309 NW2d 645 (1981).



designated Poss as the attorney-in-fact for Bernstein and FHC for the purposes of dissolution and liquidation of the corporation (Ex 4, pp 8-9, ¶7). Bernstein voluntarily executed the Management Services Agreement after acknowledging that he received the advice of his own private attorney, Kenneth Goss (Ex 1, Ans 23, 24; Ex 4, p 10, ¶14; Ex 9, pp 10-17, 21-27, 46, 177).

Bernstein has acknowledged that Poss controlled all corporate management and administrative duties – including the retention of and interaction with the Defendants as corporate counsel regarding formation, allocation of shares, and/or dissolution of the three corporations (Compl, ¶¶16, 23). It is otherwise uncontroverted that Bernstein was not authorized to and did not contact the Defendant corporate attorneys on behalf of any of the three corporate entities for legal advice and services (Compl, ¶¶7, 8, 13, 16, 18, 19, 23; Ex 1, Ans 30; Ex 9, pp 70-71, 101-102, 178).

Similarly, application of the "continuous relationship" cannot be vindicated by mere allegations that Defendants utilized routine and generalized legal services to either conceal their alleged malpractice regarding corporate share allocation. For, Bernstein has admitted, under oath, that, at every annual meeting between 1991 and 2006, he had unfettered access to all corporate documents (Ex 9, pp 74-76, 92-93, 108-112).

Moreover, it is not enough for Bernstein to merely allege that he placed his dependency, trust and confidence in the Defendants. Again, the undisputed evidence reveals that Bernstein relied upon the professional services of attorney Ken Gross before entered into business arrangements with Poss, knowing full well that the Defendants were acting on behalf of Poss and had long represented Poss' interests. Additionally, the record corroborates that Bernstein was always free to retain independent counsel to review corporate documents or otherwise act on behalf of Bernstein's shareholder interests. Most notably, it is undisputed that in 2005, Bernstein specifically directly attorney Gross to investigate Bernstein's suspicions regarding the true amount of his corporate equity interest, (Complaint, ¶31; Ex 9, pp 81-82). While acknowledging this fact, the Court of Appeals nonetheless incorrectly failed or refused to recognize



or realize that undisputed evidence of disruption of the claimed "exclusive" professional relationship between Bernstein and the Defendants operated to bar application of the "continuous relationship" doctrine. *Levy, supra; Morgan, supra*. See also: *Wright, supra; Kloian, supra; Estate of Mitchell, supra*.

The undisputed facts that Bernstein discovered or should have discovered his claims against the Defendants in **2005** yet failed to file his claims until **2008**, independently precludes application of the "continuous relationship" exception to the two year limitation period set forth in *MCL 600.5805(6)* and accrual definition set forth in *MCL 600.5838(1)*. This Court has consistently refused to undermine the very purpose of statutory limitation periods where the evidence, such as in this case, substantiates that the tardy filing of claims was due to a plaintiff's failure to fulfill a duty of inquiry and to thereafter diligently and industriously pursue potential claims and tortfeasors. *Gebhardt, supra; Lothian, supra*.

Finally, paramount policy considerations which decry judicial tolerance of spurious and vindictive claims, serve to prevent application of the "continuous relationship" doctrine in light of Bernstein's admissions that:

- the Defendants' allegedly negligent acts and omission relate to fully authorized legal services on behalf of the corporate clients; and,
- he filed suit even though he has no evidence that the Defendants engaged in any wrongdoing that caused his alleged financial losses; and,
- he filed suit to gain evidence to utilize against Poss, the actual tortfeasor and Bernstein's intended target.

(Compl, ¶¶34-37, 44-45, 54; Ex 9, pp 82-83, 134, 157-162, 169-174). See: *Gebhardt, supra; Lothian, supra; Morgan, supra; McKinney, supra*.

In short, given the evidentiary record, the Court of Appeals erred, as a matter of law, by concluding that, based solely upon the allegations within Plaintiff's Complaint, the "last treatment" or "continuous relationship" doctrine extended the two year statutory limitation period with respect to Defendants specific



acts and omissions in 1991, 1998, 1999, 2000, 2002 with respect to corporate entities FHC, FAHC, and Sunset Blvd, until 2006 when Bernstein terminated his relationship with FAHC. *MCR 2.116(G)(5); Maiden, supra*. Certainly, given Plaintiff's admissions and other uncontroverted documentary evidence, the Court of Appeals should have affirmed the Circuit Court's rejection of the "continuous relationship" exception and grant of summary disposition pursuant to *MCR 2.116(C)(7)* on Count I of Plaintiff's Complaint. *Levy, supra; Morgan, supra; Kuznar, supra; Boyle, supra; Maiden, supra*. And, even if there are factual disputes regarding whether Bernstein's claims arise out of a generalized, routine, confidential and continuous attorney-client relationship for the purposes of determining the timeliness of the legal malpractice claims, the Court of Appeals should have remanded the matter with instructions to the Circuit Court to conduct an immediate trial on these potentially outcome-determinative issues. *MCR 2.116(I)(3); Al-Shimnari, supra*.

In conclusion, the Defendants respectfully request the Supreme Court to review and reverse the Court of Appeals and reinstate the Circuit Court's Order of Summary Disposition entered pursuant to *MCR 2.116(C)(7)* with respect to the legal malpractice claims set forth in Count I of Plaintiff's Complaint. This requested appellate action is warranted on the basis that the "last treatment" or "continuous relationship" doctrine has no continued viability under Michigan law. The requested action is equally justified on the basis that the "continuous relationship" doctrine has no application in light of the undisputed evidence in the record. Alternatively, the Defendants request this Court to reverse the Court of Appeals and remand this case to the Circuit Court for an immediate trial pursuant to *MCR 2.116(I)(3)* on any questions of fact regarding application of the statutes of limitation.





**ARGUMENT II:**

**THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY REVERSING THE GRANT OF SUMMARY DISPOSITION ON PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIMS PURSUANT TO MCR 2.116(C)(7) BECAUSE THESE CLAIMS ARE IDENTICAL TO AND SUBSUMED BY PLAINTIFF'S LEGAL MALPRACTICE CLAIMS AND, THEREFORE, ARE BARRED BY THE MALPRACTICE LIMITATION PERIODS, AND, EVEN IF PLAINTIFF PERFECTED AN INDEPENDENT BREACH OF FIDUCIARY DUTY CLAIM AND A FRAUDULENT CONCEALMENT THEORY, THE FIDUCIARY CLAIMS ARE STILL UNTIMELY BECAUSE PLAINTIFF FILED HIS COMPLAINT MORE THAN THREE YEARS AFTER THE ALLEGED WRONGFUL ACTS AND OMISSIONS AND MORE THAN TWO YEARS AFTER HE DISCOVERED THE CLAIMS**

Citing to *Prentis Fam Found, supra*, the Court of Appeals held that, as a matter of law, Plaintiff Bernstein's breach of fiduciary claims are distinct from his legal malpractice claims and, as such, reversed the Circuit Court's determination that, for the purposes of application of the statutory limitation periods, the breach of fiduciary duty claims were identical to and subsumed by the malpractice. While recognizing that independent breach of fiduciary duty claims are subject to the three year limitation period set forth in *MCL 600.5805(10)*, the Court of Appeals failed/refused to determine whether the 2008 Complaint had been timely filed. Instead, the Court held that Bernstein had perfected a fraudulent concealment theory and remanded the case to the Circuit Court with instructions that Bernstein be provided with an opportunity to prove the Defendants engaged in fraudulent concealment and, thereby, preserve his breach of fiduciary duty claims.

**For several reasons, the Court of Appeals opinion regarding the timeliness of Bernstein's breach of fiduciary duty claims constitutes reversible error requiring Supreme Court review and correction.**

**First, the Court of Appeals erred, as a matter of law, by reversing the Circuit Court's determination that, for the purposes of application of the statutory limitation periods, Bernstein's breach of fiduciary duty claims were identical to and subsumed by his legal malpractice claims.**



In 1995, this Court clearly mandated that, when ruling on statutes of limitations defenses, reviewing courts must consider the gravamen of the claims, not the labels selected by the plaintiff. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995). As authority for its mandate, the Supreme Court cited with approval the Court of Appeals' decision in *Barnard v Dilley*, 134 Mich App 375, 378-379; 350 NW2d 887 (1984). Notably, the *Barnard* Court held that, for the purposes of applying the malpractice limitation period set forth in *MCL 600.5805*, where a claim arises out of an attorney/client relationship, the claim is deemed to be "one for malpractice and malpractice only." *Id* at 379. In that particular case, breach of contract claims were regarded as legal malpractice claims. *Id* at 378-379. In accord: *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990) [breach of contract subsumed by legal malpractice claims].

Since 1995, and until the decision by the Court of Appeals panel in this case, the Michigan Court of Appeals has consistently held that breach of fiduciary claims premised expressly upon an attorney/client relationship are subsumed within legal malpractice claims for the purposes of application of statutory limitation periods. *Taylor v Kochanowski*, 2010 Mich App LEXIS 1320, \*17-18 (No. 289660, dec'd 7/8/10, **Ex 18**); *Alken-Ziegler, Inc. v Bearup*, 2006 Mich App LEXIS 615, \*9-11 (No. 264513, dec'd 3/9/06, **Ex 19**); *Sharma v Giarmarco*, 2004 Mich App LEXIS 2547, \*4-7 (No. 248840, dec'd 9/28/04, **Ex 20**); *Melody Farms, Inc., supra* at \*14-15.

The Complaint in this case features two separate counts with Count I entitled "Legal Malpractice" and Count II labeled "Breach of Fiduciary Duty". However, Count II is premised upon the exact same facts and seeks the same relief as Count I (**Ex 15**, Plaintiff's Complaint, ¶¶14, 18-20, 25-28, 35, 37, 43-54). Specifically, while couched in terms of breaches of fiduciary obligations, Count II focuses exclusively upon the legal services provided by the Defendants between 1991 and 2005 to corporate clients FHC, FAHC and Sunset Blvd (**Ex 15**, Plaintiff's Complaint, ¶¶46-53). Significantly, Bernstein's breach of fiduciary duty claims are expressly premised upon allegations that, starting in 1991, "Bernstein looked to {Defendant}



Bess as his attorney and as the attorney for [FHC] and trusted Bess to act honestly, ethically, and in his best interest" (Plaintiff's Complaint, ¶¶49-51). Count II also explicitly incorporates the specific allegations of legal malpractice outlined in Count I as the very basis for his claims of breach of fiduciary duties of loyalty and confidence (Complaint, ¶54). Hence, regardless of the title or label Bernstein attached to Count II, since Bernstein's breach of fiduciary duty claims arise out of an alleged attorney/client relationship and are identical to his legal malpractice theory, the fiduciary duty claims are subject to the periods of limitation applicable to legal malpractice actions. *Local 1064, RWDSU AFL-CIO; Aldred, supra; Barnard, supra; Taylor, supra; Alken-Ziegler, supra; Sharma, supra; Melody Farms, supra.*

The Circuit Court readily reached and correctly reached this very conclusion after applying controlling and persuasive law to the Complaint and documentary evidence in the record. The Court of Appeals' decision to reverse is itself clear reversible error properly subject to review and correction by the Supreme Court.

Certainly, the Court of Appeals panel erroneously relied upon *Prentis Fam Found, supra*, to support its analysis of the independent tenability and Bernstein's breach of fiduciary duty claims. As an initial matter, *Prentis Fam Found, supra*, does not, as the Court of Appeals panel suggests, stand for the proposition that legal counsel for closely held corporations always owe independent fiduciary duties to individual shareholders. The *Prentis Fam Found* Court actually held that the shareholder of a closely held corporation does not automatically enjoy a fiduciary relationship with corporate counsel. *Id* at 43-45. In accord: *Beaty*, 456 Mich at 260-261; *Adell v Sommers, Schwartz, Silvers & Schwartz, PC*, 170 Mich App 196, 205; 428 NW2d 26 (1988), *lv den*, 432 Mich 902 (1989); *Fassih*, 107 Mich App at 514-515.

Additionally, the facts in *Prentis Fam Found* are completely distinguishable: the plaintiff in *Prentis Fam Found* alleged an independent fiduciary duty outside of an attorney-client relationship, while Bernstein's theory is expressly premised upon the existence of a corporate attorney-client relationship. Again, since the gravamen of Bernstein's breach of fiduciary duty claims is legal malpractice, these claims

are properly subject to the malpractice limitation periods set forth in *MCL 600.5805(6)* and *MCL 600.5838*. *Local 1064, RWDSU AFL-CIO; Aldred, supra; Barnard, supra; Taylor, supra; Alken-Ziegler, supra; Sharma, supra; Melody Farms, supra.*

**Second**, assuming for the purposes of argument, only, that the Court of Appeals correctly concluded that Bernstein perfected independent claims of breach of fiduciary duties, the Court still committed reversible error for failing to review and affirm the Circuit Court's determination that such claims would still be untimely.

*MCL 600.5805* sets forth the periods of limitation for various common law torts and the 3 year period set forth in *§5805(10)*<sup>13</sup> applies to breach of fiduciary duty claims. *Local 1064, supra*, at 328; *Prentis Fam Found, supra*, at 47; *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977). This Supreme Court has mandated that, pursuant to *MCL 600.5827*<sup>14</sup>, all tort actions governed by §5805, including breach of fiduciary duty claims, accrue when the alleged tort is committed. *Trentadue v Gorton*, 479 Mich 378, 386-392; 738 NW2d 664 (2007), *reh den*, 480 Mich 1202; 739 NW2d 79 (2007) [applying *§5827* to claims controlled by *§5805(10)*]; *Boyle*, 468 Mich at 226 [common law discovery rule did not apply to fraud or any other actions governed by *§5827*]; *Garg v Macomb Co Cmty Health Servs*, 472 Mich 263, 282; 696 NW2d 646 (2005); *Thatcher v Det Trust Co*, 288 Mich 410, 413-416; 285 NW 2d (1939) [breach of fiduciary duty claims].

Therefore, as a matter of law, any viable independent claims of breach of fiduciary duties in this case with respect to the **1991** incorporation of FHC, the **1998** incorporation of FAHC, the **1999** dissolution of FHC, the **2000** consent to the FAHC share reallocation, and/or the **2002** incorporation of Sunset Blvd,

<sup>13</sup>“(10) 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.”

<sup>14</sup>“ Sec. 5827. Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. 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.” (emphasis supplied in underline)



are clearly untimely, having been filed in 2008, and, therefore, more than three years after each and every wrongful act or omission on the part of the Defendants. *MCL 600.5805(10); MCL 600.5827; Trentadue, supra; Boyle, supra; Garg, supra; Thatcher, supra.*

The Court of Appeals below inexplicably sidestepped the issue of whether Plaintiff's breach of fiduciary claims would have been timely if tested against §5805(10), focusing, instead, upon whether the three year limitation period was tolled by *MCL 600.5855*, which states:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for 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 or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

In this regard, the Court of Appeals chided the Circuit Court for "failing" to address the Plaintiff's fraudulent concealment theory. 2014 Mich App LEXIS 331, \*15, n 2.

**The Defendants submit that the Court of Appeals lacked any factual or legal basis for chastising the Circuit Court and for considering whether Bernstein was entitled to invoke the two tolling provisions within *MCL 600.5855* to preserve his breach of fiduciary duty claims.**

Under well-established Michigan law, a plaintiff must specifically raise and prove a theory of fraudulent concealment to survive a motion for summary disposition premised upon applicable statutes of limitation: *Stanfill v Hoffa*, 368 Mich 671, 676; 118 NW2d 991 (1962); *Eschenbacher v Hier*, 363 Mich 676, 681-683; 110 NW2d 731 (1961); *Draws v Levin*, 332 Mich 447, 452; 52 NW2d 180 (1952); *Buchanan v Kull*, 323 Mich 381, 387-389; 35 NW2d 351 (1948); *Dunmore v Babaoff*, 149 Mich App 140, 146-147; 386 NW2d 154 (1985).

This Court has made it abundantly clear that, for the purposes of postponement of statutory limitation periods, a theory of fraudulent concealment cannot rest on just any fraudulent act or omission but must state, with particularity, the affirmative acts or violation of duties to disclose which prevent inquiry or investigation by a plaintiff or misleads a plaintiff with respect to a right of action. *Eschenbacher*, 363 Mich at



681-682; *Det Gray Iron & Steel Founders, Inc v Martin*, 362 Mich 205, 212; 106 NW2d 793 (1961); *Draws*, 332 Mich at 452-453; *Buchanan*, 323 Mich at 386-387; *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935); *DeHaan*, 258 Mich at 293. In this regard, the Court has long emphasized that it is not necessary that the plaintiff know the details of the evidence necessary to establish a cause of action; rather, it is enough if, under the circumstances, the plaintiff is aware, or should have been aware, of the need to preserve and industriously pursue a claim. *Weast, supra; Solowy*, 454 Mich at 223-224.

To take advantage of the two-year tolling period set forth in §5855, a party must demonstrate that his action was filed within two years of when he discovered or should have discovered the existence of a potential claim and the identity of persons potentially liable for the claim. *Stanfill, supra; Doe v Roman Catholic Archbishop of the Archdiocese of Det*, 264 Mich App 632, 642; 692 NW2d 398 (2005); *Gilbert v Grand Trunk RR*, 95 Mich App 308, 317-318; 290 NW2d (1980), *lv den*, 410 Mich 854 (1980).

It is equally well-established, via Supreme Court precedent, that appellate review of an issue is absolutely predicated upon a litigant preserving the issue by directly presenting it for resolution by the trial court. *Admire v Auto Owners Inc*, 494 Mich 10, 35; 831 NW2d 849 (2013), *reh den*, 494 Mich 880 (2013) ["Michigan generally follows the 'raise or waive' rule of appellate review."]; *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008); *Napier v Jacobs*, 429 Mich 222, 227-228; 414NW2d 862 (1987). As this Court recently explained in *Walters*:

The principal rationale for the ['raise or waive'] rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. (footnote omitted) This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. (footnote omitted) Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. (footnote omitted) Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute.

*Id.*, 481 Mich at 388, emphasis supplied in underline.





In this case, the record confirms that the Circuit Court did not address the fraudulent concealment issue because Plaintiff never presented fraudulent concealment arguments to the Court for resolution! (Mt Trans, 10/24/12). Specifically, when responding to the Defendants' Motion for Summary Disposition premised upon the statutes of limitation, Plaintiff never invoked *MCL 600.5855*, never discussed the elements of a fraudulent concealment theory, and never outlined, with particularity, the purported affirmative misrepresentations or actionable silence on the part of the Defendants that would have justified consideration by the Circuit Court of the tolling provision set forth in §5855.

Hence, the Court of Appeals had no valid basis in fact or law for scolding the Circuit Court for "failing" to act as Bernstein's research assistant and then *sua sponte* reach the fraudulent concealment issue. *Admire, supra; Walters, supra; Napier, supra*. Indeed, to paraphrase the *Admire* Court, the Court of Appeals erred by considering the implication of §5855 because Bernstein failed to satisfactorily preserve appellate consideration of a fraudulent concealment theory. *Id*, 494 Mich at 17, n 5. See also: *Stanfill, supra; Eschenbacher, supra; Draws, supra; Buchanan, supra; Dunmore, supra*.

Additionally, the Court of Appeals erred, as a matter of law, by determining that Bernstein had perfected a fraudulent concealment theory given general fraud allegations set forth in the Complaint. *Eschenbacher, supra; Det Gray Iron & Steel Founders, Inc, supra; Draws, supra; Buchanan, supra; Weast, supra; DeHaan, supra*.

Finally, even assuming, for the purposes of argument, only, that Bernstein has preserved appellate review of a fraudulent concealment theory, the Court of Appeals committed reversible error for failing to recognize that, as a matter of undisputed fact, Bernstein failed to file his breach of fiduciary duty claims within the two year discovery "grace" period provided by §5855.

Bernstein has admitted that he discovered that he only owned 2% of FAHC shares no later than December 16, 2005 (Ex 9, pp 101-102, 113, 121, 158). Plaintiff's complaint was not filed until April 28,

2008 – a date more than two years later. Therefore, the two-year period set forth in *MCL 600.5855* is not available to save damage claims arising out of Defendants' purported breaches of fiduciary duties regarding the number of FAHC shares allocated to Bernstein in 1998. *MCL 600.5855; Stanfill, supra; Doe, supra; Gilbert, supra*.

With respect to his equity interest in Sunset Blvd, Bernstein has admitted that:

- in 2002, 2003, 2004, 2005 rear-end corporate meetings were held for Sunset Blvd with Poss, Bernstein, and Bess in attendance and with all corporate/business documents, including stock certificates, tax records, financial statements, by-laws and minutes, present and readily available for review (**Ex 9**, pp 75, 107-109);
- By 2004, Bernstein began questioning Poss' heavy-handed and secretive control of all corporate/business management (**Ex 9**, pp 96-97);
- In mid-2005, Poss began actively withholding financial documents and instruments from Bernstein, yet Bernstein never attempted to review any of the available corporate documents (**Ex 9**, pp 81, 94-96, 111-113, 180-181); and,
- By November of 2005, Bernstein believed that "everything" was "amiss" with respect to the ownership, finances, corporate records, and tax returns for Sunset Blvd, and, therefore instructed his personal attorney, Kenneth Gross, to direct a letter to Bess requesting a copy of all corporate records and tax returns (Complaint, ¶31; **Ex 9**, pp 81-82).

In short, it is undisputed that Bernstein should have discovered that he lacked any equity interest in Sunset Blvd on or before **November of 2005**. Hence, the two-year period set forth in *MCL 600.5855* is also not available to save **2008** breach of fiduciary duty claims arising out of the formation of Sunset Blvd in **2002**. *Stanfill, supra; Doe, supra; Gilbert, supra*.

The bottom line is that, even had Bernstein preserved appellate review over a theory of fraudulent concealment of the breach of fiduciary duty claims, as a matter of undisputed fact,





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Bernstein failed to take advantage of the "grace period" set forth in *MCL 600.5855* by neglecting to file his claims, as required, within two years of discovery.

In conclusion, regardless of whether the timeliness of Bernstein's breach of fiduciary duty claims are tested against *MCL 600.5805(6)* and *MCL 600.5838(1)* OR *MCL 600.5805(10)* and *MCL 600.5827*, the Circuit Court correctly granted summary disposition of Count II of Plaintiff's Complaint pursuant to *MCR 2.116(C)(7)*. Hence, the Court of Appeals' reversal of the Circuit Court constitutes plain error. Therefore, the Defendants respectfully requested the Supreme Court to reverse the opinion of the Court of Appeals in this regard and reinstate the Circuit Court's Opinion and Order of November 29, 2012.

Alternatively, if the Court determines that the Court of Appeals correctly determined that questions of fact exist as to when Plaintiff was aware, or should have been aware of the need to preserve and industriously pursue breach of fiduciary duty claims, then the Defendants respectfully request that the Court remand this matter with instructions to the Circuit Court to conduct an immediate trial on these potentially outcome-determinative issues. *MCR 2.116(I)(3)*; *Al-Shimnari, supra*.

**CONCLUSION AND RELIEF REQUESTED**

For the reasons stated, the Defendants respectfully request this Honorable Court to grant their Application for Leave to Appeal and either peremptorily, or via a written opinion following a review on the merits, reverse the Court of Appeals Opinion of February 26, 2014 and reinstate the November 29, 2012 Opinion and Order of the Circuit Court granting summary disposition of Plaintiff's Complaint pursuant to MCR 2.116(C)(7).

Alternatively, the Defendants respectfully request this Honorable Court to either peremptorily, or via a written opinion following a review on the merits, remand this matter with instructions to the Circuit Court to conduct an immediate trial pursuant to MCR 2.116(I)(3) on any existing and potentially outcome-determinative factual issues surrounding application of the controlling statutes of limitation.

Respectfully submitted,

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Dated: April 2, 2014

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