

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

RANDY H. BERNSTEIN, DPM,

Plaintiff-Appellee

v

SCt No. 149032

LC No. 08-096538-NM

COA No. 313894

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

Defendants-Appellants

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

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REPLY ARGUMENT I: PLAINTIFF'S LEGAL MALPRACTICE CLAIMS ARE TIME BARRED

In his response to the Defendants' Application for Leave, Plaintiff Bernstein contends that, when amending *MCL 600.5838(1)* and enacting *MCL 600.5838a(1)*, the Michigan Legislature abrogated the "last treatment" rule for medical malpractice actions, only, and, hence, the courts are free to continue to broadly apply a "last" or "continuous" service rule to all non-medical malpractice actions. Plaintiff's reasoning here: *§5838a(1)* states that medical malpractice actions accrue at the time of the alleged wrongful act or omission while *§5838(1)* states that other malpractice claims accrue when the professional discontinues serving plaintiff. Plaintiff's analysis fails to acknowledge that both *§5838a(1)* and *§5838(1)* expressly tie accrual to the date of the professional services out of which the malpractice claims arise¹. Given the identical focus upon the date of professional service out of which the malpractice allegedly arises, the slight variations in verbiage seized upon by Plaintiff amounts to a distinction without of difference.

More to the point, the Legislatures utilization of the nearly identical modifying phrases, "out of which the claim for malpractice arose" and "that is the basis of the claim of ...malpractice" clearly indicates an awareness that, while professional relationships often involve numerous services provided over an extended period of time, malpractice claims necessarily focus upon specific acts or omissions and, therefore, malpractice claims may and will accrue within the total length of a given professional relationship.

In other words, proper construction of *§5838(1)* requires the conclusion that the date of last general professional service is legally irrelevant unless that date is also the date out of which the particular

¹ "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." (emphasis supplied)

"Sec. 5838a. (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. As used in this subsection." (emphasis supplied)



malpractice claims arise. Any other result runs afoul of the maxims of statutory construction, which requires that every word within §5838(1) be given meaning and that no word or phrase be treated as surplusage or rendered nugatory. *Priority Health v Comm'r of the Office of Fin & Ins Services*, 489 Mich 67, 77; 803 NW2d 132 (2011); *In Re MCI Telecom Compl*, 460 Mich 396, 414; 596 NW2d 164 (1999); *Booth Newspapers v U of M Bd of Regents*, 444 Mich 211, 228; 507 NW2d 422 (1993); *Baker v GM Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

Certainly, the record demonstrates the Court of Appeals clearly erred by determining that the legal malpractice claims in this case did not accrue until 2006, when the Defendant corporate counsel allegedly ceased providing "generalized" and "continuous" legal services to shareholder Bernstein upon Bernstein's termination of his business relationship with FAHC. It is undisputed that the Defendants served as general corporate counsel for three distinct corporate entities FHC, FAHC, and Sunset Blvd. Various legal services were provided to FHC between its formation in 1991 and dissolution in 1999. Various legal services were provided to FAHC between its formation in 1998 and continuing after Bernstein's 2006 termination of his shares in and business relationship with FAHC. Similarly, various legal services were provided to Sunset Blvd between its formation in 2002 and continuing after Bernstein's 2006 termination of his shares in and business relationship with FAHC.

Critically, Plaintiff's malpractice claims do not arise out of every legal service, starting in 1991, which Defendants provided to the three corporations. The malpractice claims also do not arise out of legal services allegedly related to Bernstein's termination of his shareholder status in FAHC in 2006. Rather, Bernstein's malpractice claims arise specifically and exclusively out of: the 1998 formation of and share distribution in FAHC; the 1999 dissolution of FHC; and, the 2002 formation of and share distribution in Sunset Blvd.

Simply put, the Court of Appeals' decision to delay accrual until 2006 of Bernstein's malpractice claims constitute an absolute perversion of the salutary purpose behind all statutes of limitation, and, in





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particular, the two year limitation period in §5838(1) tied to the dates of the alleged wrongful acts and omissions. *Gebhardt v O'Rourke*, 444 Mich 535, 541-542, 544; 510 NW2d 900 (1994); *Lothian v City of Det*, 414 Mich 160, 165; 324 NW2d 9 (1982); *Priority Health, supra*; *In Re MCI Telecom Compl, supra*; *Booth Newspapers, supra*; *Baker, supra*. Indeed, to carry the Court of Appeals' broad application of the "continuous service" exception to its logical conclusion, if Bernstein was still a shareholder in a still operating FAHC, then Bernstein's claims arising out of general corporate legal services to FAHC, as well as to separate corporations FHC and Sunset Blvd, would still not have accrued, even though the professional services out of which the malpractice claims arise occurred between 12 and 16 years ago!

Plaintiff's arguments notwithstanding, there is no case law supporting the Court of Appeals' determination to require the Defendants to defend against malpractice claims filed between six and ten years after the alleged wrongful acts and omissions surrounding the formation and/or dissolution of FHC, FAHC, and Sunset Blvd. Plaintiff cites *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 107 Mich App 509; 309 NW2d 645 (1981); *Yatooma v Zousmer*, 2012 Mich App LEXIS 962 (No. 302591, 5/15/12), *Neuffer v Pelavin & Powers, PC*, 2001 Mich App LEXIS 2478 (No. 219630, 10/26/01), and *Nugent v Weed*, 183 Mich App 791; 455 NW2d 409 (1990), to support the propositions that: as general counsel for FHC, FAHC, and Sunset Blvd, the Defendants necessarily provided continuous legal services to Bernstein as a(n) (alleged) corporate shareholder in all three corporations; and, for the purposes of application of *MCL 600.5838(1)*, the Defendants' legal services to Bernstein continued until 2006 when Bernstein terminated his relationship with FAHC and tendered back his shares. As evidence, Bernstein relies solely upon: deposition testimony to the effect that he subjectively believed that the Defendant corporate attorneys also represented his personal interests as shareholder (**Ex 9** to Application for Leave, p. 178); and, the April 28, 2006 letter directed to him by the Defendants following Bernstein's decision to terminate his relationship with FAHC and tender back his shares (**Ex 14** to Application for Leave). However, a review

of the cases cited by Plaintiff and the entire record actually reveal that no generalized and continuous attorney-client relationship existed between the Defendants and Bernstein for the purposes of §5838(1).

The *Fassihi* Court held that an attorney for a corporation does not automatically or ordinarily have an attorney-client relationship with shareholders and determined that no attorney-client relationship existed between the defendant counsel for a closely held corporation and the plaintiff shareholder. *Id* at 514-515. In *Yatooma*, the plaintiff did not assert legal malpractice claims premised upon an alleged attorney-client relationship between himself, as shareholder in a closely held corporation and general corporate counsel. In *Neuffer, supra*, the Court of Appeals reversed summary dismissal of legal malpractice against corporate counsel arising out of allegedly mishandled corporate debts, defaults and bankruptcy proceedings, holding that the plaintiff corporate shareholders had perfected the requisite element of an actionable attorney-client relationship with allegations that: corporate counsel had provided plaintiffs with individualized legal advice regarding their purchase of corporate stock; corporate counsel had negotiated on behalf of the individual plaintiff shareholders with third party creditors; corporate counsel had represented the shareholders' interests in bankruptcy proceedings; and corporate counsel had appeared on behalf of the individual shareholders in an appeal of an order awarding the shareholders' stock to a corporate creditor. *Id* at *3. The *Neuffer* Court also highlighted the fact that the defendant attorneys did not submit any evidence establishing that they represented the corporation, only. *Id*.

The *Nugent* case is the only case cited by Plaintiff involving application of §5838(1). In *Nugent* it was undisputed that: the plaintiff musician directly retained the defendant Weed in 1971 to represent him and his corporations in various legal and investment affairs; Weed provided legal services in an individual capacity before incorporating his law practice in 1977; Weed and the PC constantly represented Nugent and his corporations until 1984, when Nugent terminated the relationship on the basis that the defendants had continuously provided improper financial advice; and, Nugent's complaint was filed in 1986. *Id* at 792-793. The Circuit Court determined that the malpractice claims against Weed were time-barred because the



attorney had ceased providing professional services in an individual capacity in 1977. *Id* at 794. The Court of Appeals reversed on the basis that: as a matter of law, the individual attorney remained personally liable for malpractice committed by the PC; the individual attorney, both as a solo practitioner and as the sole shareholder in his PC, continuously represented Nugent and his corporations as to the matters out of which the malpractice claims arose; and, the only change in the parties' relationship was the legal form of the defendant attorney's practice, a fact that was irrelevant to the application of §5838(1). *Id* at 795-796.

Unlike *Nugent* and *Neuffer, supra*, the record here, including Bernstein's admissions, confirms that the Defendant corporate attorneys for FHC, FAHC, and Sunset Blvd did not provide shareholder Bernstein with individualized and continuous legal services so as to delay the accrual of the two year malpractice limitation period until April of 2006. Specifically, Bernstein admits that, when he first entered into negotiations with Poss to temporarily serve as the corporate shareholder and officer in FHC, the Defendants represented Poss, only, with Bernstein represented by his own attorney (Ex 1 to Application for Leave, Answers 23, 24; Ex 9 to Application for Leave, pp 10-17, 21-27, 46, 177). Bernstein also admits that, via a separate management corporation in which Bernstein had no interest, Poss hired the Defendants to serve as FHC's corporate counsel (Ex 1 to Application for Leave, Answers 23, 30; Ex 9 to Application for Leave, pp 70-71). Similarly, it is undisputed that the incorporation and management of FAHC was directed solely by Poss, including all interactions with FAHC corporate counsel (Compl, ¶¶7, 16, 18, 19; Ex 9 to Application for Leave, p 178). Most significantly, the April 28, 2006 letter, which Bernstein and the Court of Appeals maintain was written on Bernstein's behalf, was actually prepared by the Defendants on behalf of FAHC to insure that Bernstein's future actions were not contrary to FAHC's best interests².

² This letter is a follow-up to our telephone conversation last week wherein you indicated to me that you were resigning your employment from the P.C. effective June 30, 2006. The purpose of this letter is to advise you as to many of the legal obligations under which you are obliged as a result of your employment and ownership position in the P.C.

First there is a restrictive provision in the By-Laws of the P.C. which precludes you from competing with the practice once your employment terminates. Under that restrictive provision you cannot compete or practice within a radius of five miles of any of the P.C.'s offices for a period of two years. Severe consequences flow from violating that provision.



In short, the undisputed evidence is that, at all times relevant, the Defendants' attorney-client relationship was with the three corporate entities formed and managed by Poss, with all legal services provided on behalf of the corporations and no individualized legal services provided to Bernstein as corporate shareholder. More to the point, neither the April 28, 2006 letter, nor any other evidence, supports the theory advanced by Plaintiffs' and embraced by the Court of Appeals, that, for the purpose of the accrual date for malpractice claims arising out of specific legal services provided to the three separate and distinct corporate clients in 1998, 1999, and 2002, Defendants provided generalized and continuous legal services to Bernstein, individually, through 2006. Therefore, Plaintiff should not be permitted to invoke any "generalized and continuous representation" exception to §5838(1) that would delay commencement of the two-year accrual period for more than four years after the specific acts of wrongdoing upon which his legal malpractice claims are premised.

Second, as you know and as I advised you in our telephone conversation, the patients are those of the practice and not of any particular doctor regardless of how or when or under what circumstances they became patients. Thus, under the restrictive provisions under the P.C.'s By-Laws, they cannot be solicited by any doctor if you were to do so, that virtually amounts to theft and severe consequences flow from that action.

Third the practices of the office including its method of conducting business, handling and billing patients, record keeping, standard of care and the like are all confidential and are not to be disclosed to anyone under any circumstances. Neither is any employee of the practice to be solicited for employment, whether full or part-time.

Fourth, the marketing strategy and practices of the P.C. are confidential as well as the business relationships with any and all of its service providers. They are not to be contacted (by you) in anyway, directly or indirectly.

Finally, as a shareholder in the P.C., your stock must be tendered for redemption on or before May 30, 2006. Also, your written resignation as an officer, director and employee shall be tendered on or before May 30, 2006. Because there exists no Buy-Sell Agreement between you and the Corporation the remaining officers and board members after consultation with their advisors will make a determination of the appropriate redemption price for your stock and you will be so advised on or before August 1, 2006." (Ex 14 to Application for Leave, emphasis supplied).



REPLY ARGUMENT II: PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIMS ARE TIME BARRED

Citing to *Pukke v Hyman Lippitt, PC*, 2006 Mich App LEXIS 1801 (No. 265477, 6/6/06), *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), and *Fassihi, supra*. Plaintiff maintains that, for the purposes of applying the controlling statute of limitations, breach of fiduciary duty claims are always separate and distinct from legal malpractice claims. Plaintiff's legal analysis here is simply incorrect.

In *Pukke*, the trial court granted summary disposition on breach of fiduciary duty claims pursuant to MCR 2.116(C)(8) for failure to state a viable claim separate and distinct from legal malpractice claims. *Id* at *38. The Court of Appeals reversed, reasoning that fiduciary duty claims are not subject to dismissal as being duplicative of legal malpractice claims where the plaintiff has alleged: conduct involving a more culpable state of mind than negligence; and, damages arising from the abuse or betrayal of a confidential relationship. *Id* at *37-38. In this regard, the *Pukke* Court distinguished the case before it from *Adkins v Annapolis Hospital*, 116 Mich App 558; 323 NW2d 482 (1982), *Barnard v Dilley*, 134 Mich App 375; 350 NW2d 887 (1984), and *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990), cases which analyzed the timeliness of fiduciary duty claims for the purposes of summary disposition sought pursuant to MCR 2.116(C)(7) and held that the applicable period of limitations depends on the theory actually pleaded where the same set of facts support either of two different causes of action. *Id* at *34.

In short, the *Pukke* Court never ruled upon the issue presented in this case; to wit: whether claims of breach of a fiduciary duty are subsumed by identical legal malpractice claims for the purpose of application of statutory limitation periods. More to the point, the limitation periods applicable to malpractice claims also apply to Plaintiff's fiduciary duty claims because, as was the case in *Aldred* and *Barnard*, the interests involved in, and the damages resulting from, the Defendants' alleged breaches of fiduciary duty do not meaningful differ from those alleged with respect to the Defendants' legal malpractice.



Plaintiff's mischaracterizations aside, the *Fassihi* and *Prentis Fam Found* Courts actually and correctly held that the shareholder of a closely held corporation does not automatically enjoy a fiduciary relationship with corporation counsel³. *Fassihi, supra*, at 514-515⁴; *Prentis Fam Found, supra*, at 43-45. Additionally, *Fassihi* does not address application of the statute of limitations to breach of fiduciary duty claims and that portion of the *Prentis Fam Found* decision discussing the application of the three year period set forth in *MCL 600.5805(10)* to breach of fiduciary duty claims is *obiter dicta* since the Court of Appeals summarily dismissed the claims for failure of the plaintiff to establish an actionable fiduciary duty. *Id* at 43-45. See: *Wold Architects and Eng's v Strat*, 474 Mich 223, 234 n 3; 713 NW2d 750 (2006).

Citing to *Prentis Fam Found, supra*, and *Cato v Underwood Property Management Co*, 2008 Mich App LEXIS 1231 (No. 272747, 6/12/08), Bernstein insists that his breach of fiduciary duty claims were timely filed pursuant to the accrual definition set forth in *MCL 600.5827*, because his 2008 complaint was filed within three years of June 2006 when he reviewed certain corporate documents and confirmed his long held suspicions regarding the Defendants' purported wrongdoings in 1998, 1999, and 2002 regarding corporate share allocation⁵. However, to the extent that *Prentis Fam. Found* and *Cato* stand for the proposition that a claim for breach of fiduciary duty accrues when the beneficiary learned, knew or discovered the breach, these decisions are contrary to the Supreme Court's rulings in *Boyle v GMC*, 468 Mich 226; 661 NW2d 557 (2003) and *Trentadue v Gorton*, 479 Mich 378, 386-392; 738 NW2d 664 (2007), where this Court mandated that, pursuant to *MCL 600.5827*, all tort actions, including those governed by §5805, accrue when the wrong is committed and not when the wrongs or claims were discovered. In this case, Plaintiff alleges he suffered immediate economic damages as a result of the Defendants' involvement

³ See also: *Beaty v Hertzbrg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997); *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 205; 428 NW2d 26 (1988), *iv den*, 432 Mich 902 (1989).

⁴ Notably, the *Fassihi* Court never reached the issue of whether the defendant corporate counsel in fact owed a fiduciary duty to the shareholder of a close corporation. *Id*.

⁵ Plaintiff's professed date of discovery is self-servingly "fluid"; before the Court of Appeals, Bernstein argued that he first discovered the improper share allocation at an annual corporation meeting in December of 2005.



in the 1998 incorporation of FAHC, the 1999 dissolution of FHC, the 2000 consent to the FAHC share allocation, and the 2002 incorporation of Sunset Blvd. Therefore, as a matter of law, the three-year limitation period set forth in §5805(10) accrued as of 1998, 1999, 2000 and 2002, regardless of when Plaintiff allegedly learned of the Defendants' breaches of fiduciary duty. *MCL 600.5827; Trentadue, supra; Boyle, supra.*⁶

Finally, in his response to the Defendants' Application for Leave, Plaintiff Bernstein argues, for the first time ever, that the gravamen of his fiduciary duty claims sounds in fraudulent concealment which entitles him to the two year discovery period set forth in *MCL 600.5855*. Obviously, this argument was not preserved for Supreme Court review. *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; 414 NW2d 862 (1987). In any event, Plaintiff has not and cannot perfect a fraudulent concealment theory.

According to Bernstein, he did not discover the breaches of fiduciary duty regarding the share allocations in FAHC and Sunset Blvd until 2006 when he actually received and reviewed long sought after corporate documents, which allegedly fully revealed the Defendants' wrongdoings. At the outset, Bernstein fails to apply the proper test under §5855, which required him to file his Complaint 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. See, i.e., *Stanfill v Hoffa*, 368 Mich 671, 676; 118 NW2d 991 (1962). Additionally, Bernstein's very theory of liability is that the Defendants breached their fiduciary obligations by refusing to honor Bernstein's repeated requests, between 1999 and 2006, for copies of corporate

⁶ Plaintiff also cites *Alpha Capital Management, Inc v Retenbach*, 287 Mich App 589; 792 NW2d 344 (2010), *lv den*, 488 Mich 948; 790 NW2d 397 (2010), to support arguments that the Defendants' fiduciary obligations continued after the specific legal services at issue forming the basis of the breach of fiduciary duty claims. Once again, Bernstein misses the salient point: the termination of fiduciary obligations is irrelevant to the application of statutory limitation periods triggered by dates of the alleged breaches of these obligations.



documents such as minutes, stock certificates, by-laws, financial statements, and tax returns (Ex 9 to Application, pp 71-75, 107-108). Hence, by Bernstein's own admissions, he should have discovered his fiduciary duty claims in 1999 when the Defendants first refused to provide Bernstein with the requested corporate documents. Certainly, it is undisputed that Bernstein discovered or should have discovered that he lacked any equity interest in Sunset Blvd on or before November of 2005 and that he only owned 2% of FAHC shares no later than December 16, 2005 (Complaint, ¶31, Ex 9 to Application, pp 75, 81-82, 96-102, 107-113, 121, 158, 180-181). Hence, the two-year period set forth in §5855 is not available to save 2008 breach of fiduciary duty claims arising out of the formation of FAHC and Sunset Blvd. *Stanfill, supra*.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth in this Reply Brief, as well as those grounds set forth in their Application for Leave, 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.

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