**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| RICHARD COLEMAN and CARL SLEDZ and MARIETTA DENNIS and STEVEN COLEMAN and SHANE LYNAGH, | ) | |
| Plaintiffs, | ) | C.A. No. 03C-02-137 RRC |
| v. | ) | |
| PRICEWATERHOUSECOOPERS LLP, | ) | |
| Defendant. | ) | |

Submitted: November 5, 2003
Decided: November 18, 2003

**UPON DEFENDANT'S "RENEWED" MOTION FOR SUMMARY JUDGMENT. GRANTED.**

**ORDER**

1. Before the Court is a motion for summary judgment ("the Motion") filed by defendant PricewaterhouseCoopers LLP ("PwC") [1] against Plaintiffs. Plaintiffs' action sounds in tort for negligent misrepresentation,

[1] PwC originally filed a "Motion to Dismiss [the Complaint], or, in the Alternative, for Summary Judgment," but both parties attached papers outside of the pleadings to their subsequent submissions in connection with that motion; the Court, with the agreement of the parties, thereafter treated the motion as one for summary judgment. See Super. Ct. Civ. R. 12(b) (providing that a motion to dismiss shall be treated as one for summary judgment if "matters outside the pleadings are presented to and not excluded by the Court"). After hearing argument thereon, this Court denied the motion without prejudice, in order that Plaintiffs could conduct discovery in an effort to resist the ultimate dismissal of their suit.

specifically the alleged negligence of a public accountant to a third party with whom there was no privity of contract and where the only harm suffered was economic in nature.[2] In their Complaint, Plaintiffs allege that PwC negligently audited the financial statements of its client, Lason; Plaintiffs aver that they relied upon those statements in subsequently deciding to sell their business, Digital Imaging & Technologies, Inc. ("DIT") to Lason.

PwC essentially advances two grounds for summary judgment in its Motion: 1) that because Plaintiffs filed their Complaint in February 2003 but were on notice of their potential cause of action for negligent misrepresentation more than three years earlier, the applicable statute of limitations had run prior to commencement of suit;[3] and 2) that because plaintiff Richard Coleman knew of and participated in actions in part

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[2] In a similar action brought by different plaintiffs against PwC, this Court earlier decided that in Delaware the applicable standard for the tort of negligent misrepresentation lies in section 552 of the Restatement (Second) of Torts and that for PwC to be held liable to those plaintiffs, "at the time PwC was auditing [its client] Lason's financial statements, PwC would have had to have known (or have had reason to have known) that Lason would share those statements with [a] class [of similarly-situated business owners who had sold their businesses to Lason] or with [those] [p]laintiffs as part of a potential business transaction." Carello v. PricewaterhouseCoopers LLP, C.A. No. 01C-10-219 RRC, 2002 WL 1454111, at *4 (Del. Super. Ct. July 3, 2002).

[3] See DEL. CODE ANN. tit. 10, § 8106 (1999) (stating that "no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action[ ]"); both parties agree that this three-year statute of limitations applies to the present action.

constituting the misrepresentations that Plaintiffs now complain of, they cannot now sue and recover damages for their resulting injuries.

The Court finds that because the particular injury complained of was not "inherently unknowable" and because Plaintiffs were not "blamelessly ignorant" of the facts constituting the claim they now assert, the statute was not tolled in their favor; similarly, had Plaintiffs' conduct reached a sufficient level of thoroughness after they received a January 6, 1999 e-mail directing them to engage in activity apparently not in accordance with Generally Accepted Accounting Principles ("GAAP"), Plaintiffs would have "discovered" the facts underlying their present claim, further leading to the conclusion that the statute was not tolled in their favor. The Court reaches these conclusions by relying exclusively on caselaw from Delaware Courts, and despite looking at the facts in the light most favorable to Plaintiffs. PwC's motion for summary judgment is therefore **GRANTED** on statute of limitations grounds.

2. Plaintiffs were the primary shareholders of DIT, a company whose purpose was to "provid[e] data/image capture for firms in the United States and Europe[ ]" and whose primary clients were involved in "transportation, health care[,] and publishing."[4] Plaintiffs sold DIT to Lason

[4] Compl. ¶ 9.

through a transaction that closed in November 1998 and which involved a complicated deferred "earn out" formula that was apparently engineered to partly compensate Plaintiffs *in futuro*. Plaintiffs allege that in deciding to sell their business to Lason, they in part relied "on [a] review…of…statements [relating to Lason's financial health] and [PwC's] assessment of the financial condition of Lason as represented by such audited financial statements…."[5] Specifically, Plaintiffs allege that, as part of their decision, they "reviewed and relied on Lason's Annual Report, 10-K[,] and the audited financial statements accompanying such report for the period[ ] ending December 31, 1997…together with Lason's Quarterly Report on Form 10-Q, and the unaudited financial statements accompanying such report, for the period[ ] ending September 30, 1998."[6]

Principals of both companies were in contact after the November 1998 close of the acquisition of DIT by Lason. The parties have produced as part of the record in this case an e-mail dated January 9, 1999 from Robert Bassman (apparently the then C.F.O. of Lason) to Al Lydon (apparently the then C.F.O. of the former-DIT). Importantly, in that e-mail, Bassman directs Lydon as follows:

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[5] Compl. ¶ 57.

[6] Compl. ¶ 41.

> note the $800,000 posted to “accrued expenses.” this is the extraordinary gain relating to…forgiveness of a portion of…[a] note payable. proper GAAP would be to record the entire amount as reduction of goodwill. however, i have elected an aggressive accounting approach in order to create more tail wind and cushion for 1999.
>
> take $400,000 of the $800,000 and record into income in december. i don’t really care where you put it so long as it is not obvious to the auditors should they look at your numbers. the remainder we will save for a rainy day in 1999.[7]

Relatedly, and as highlighted by PwC in this action, in their Rule 26 Expert disclosures, the plaintiffs in the Carello action, *supra*, stated that:

> …Lason instructed Coleman to defer recognition of $800,000 from forgiveness of debt, which should have been recorded prior to the acquisition [of DIT by Lason] so that Lason could record the income. The [attendant] effect…which some have described as “tail winding” had the net effect of increasing Lason’s net income in excess of $1,500,000.[8]

Nevertheless, Coleman has explained by e-mail to his counsel that:

> …after Al Lydon…received Bassman’s…e-mail, Lydon came to me…to discuss the e-mail. Subsequent to this discussion with Mr. Lydon, I had concerns as to the propriety of the entries Bassman was directing. In that regard, I called Lason’s CEO, Gary Monroe, and asked him why Bassman was directing us to make the adjustments referenced in Bassman’s e-mail. Monroe responded by saying that he would enquire and call me back. He called back shortly and said to go ahead with the entries. He further states he had met with Bassman, and that Bassman would work out these adjustments with representatives of PriceWaterhouse. The clear influence I took from Mr. Monroe’s statements in this regard[ ] is that PriceWaterhouse and Bassman would do whatever was necessary to insure that these adjustments would be correctly reflected, in accordance with GAAP, in Lason’s consolidated financial statements.[9]

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[7] E-mail from Bassman to Lydon of 1/6/99 (Ex. “A” to Def.’s Mot. to Dismiss; Ex. “C” to Def.’s Reply Br. on Renewed Mot. for Summ. J.).

[8] Carello Am. R. 26 Disclosures at III.j. (Ex. “B” to Def.’s Mot. to Dismiss).

[9] E-mail from Coleman to Kevin W. Gibson of 4/9/03 (Ex. “A” to Pls.’ Answer to Def.’s Mot. to Dismiss).

As part of the discovery this Court permitted Plaintiffs to conduct after earlier denying PwC's motion to dismiss or for summary judgment, Plaintiffs deposed both Coleman and Lydon. Both of them testified in their depositions that the Bassman e-mail caused them some concern,[10] and Lydon testified that "the deferral of…gain to a rainy day [*i.e.*, 'tail winding'] is not a typical accounting procedure, especially if it's a material amount…."[11] Both Coleman and Lydon testified that they had had prior public accounting experience themselves,[12] and both at one time had been qualified as CPAs.[13]

As part of their deposition testimony, Coleman and Lydon related that neither had had any discussion with a representative of PwC concerning the substance of the Bassman e-mail.[14] Coleman did testify that after having spoken with Monroe about the Bassman e-mail, he thought that Lason and PwC "would work everything out."[15] Nevertheless, in June 2000, both

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[10] Coleman Dep. of 6/20/03 at 17 (Ex. "B" to Def.'s Renewed Mot. for Summ. J.); Lydon Dep. of 6/20/03 at 17 (Ex. "C" to Def.'s Renewed Mot. for Summ. J.).

[11] Lydon Dep. at 69.

[12] Coleman Dep. at 40-45; Lydon Dep. at 48-49.

[13] Coleman Dep. at 52-53; Lydon Dep. at 49.

[14] Coleman Dep. at 105; Lydon Dep. at 85.

[15] Coleman Dep. at 19.

Coleman and Lydon visited the offices of an "outside" board member associated with Lason;[16] apparently nothing ever came about as a result of this unannounced meeting.

3. A further chronology drawn from the Complaint follows: "On December 9, 1999, in reaction to Lason's falling stock price, [Lason's C.E.O. Monroe]…announce[d] '[w]e are not aware of any reason for Lason's share price decline[ ]'";[17] "Approximately one week later…Lason announced that fourth-quarter earnings w[ould] be between 31% and 38% lower than expected[ ]";[18] "On…the next trading day, Lason's common stock fell to $11 7/8ths, from a high for the year of $64.94…";[19] "On or about May 1, 2000, Plaintiffs…became aware…of the possibility that Lason earnings as reported…for fiscal years 1997, 1998, and 1999, and the 10Ks and 10Qs for such periods, may have been misstated by reason of accounting system deficiencies and accounting irregularities";[20] "On March 26, 2001, Lason announced that it had informed the U.S. Securities and Exchange Commission and the US Attorney for the Eastern District of Michigan of

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[16] Coleman Dep. at 11-12; Lydon Dep. at 14-15.

[17] Compl. ¶ 63.

[18] Compl. ¶ 64.

[19] Compl. ¶ 66.

[20] Compl. ¶ 67.

certain accounting irregularities…";[21] "The Plaintiffs subsequently learned [after DIT was acquired by Lason] that Lason's reported revenues on its audited financial statements, and its 10Ks, and 10Qs, for the reporting fiscal years 1997, 1998, and 1999, which were prepared by…[PwC], were not based upon an accounting method which was in conformity with…GAAP…."[22]

On December 5, 2001, Lason filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code.[23] As a result of the accounting irregularities that Plaintiffs allege existed in Lason's audited financial statements and (presumably) because of Lason's subsequent filing for bankruptcy protection, Plaintiffs aver that Lason "cannot and will not be able to" pay the "earn out" Plaintiffs argue is now due them as part of the DIT acquisition.[24] Plaintiffs assert that PwC is liable to them "in that had [PwC] not misstated the income of Lason contrary to [Generally Accepted

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[21] Compl. ¶ 75.

[22] Compl. ¶ 77.

[23] Compl. ¶ 89.

[24] Compl. ¶ 92.

Accounting Principles], Plaintiffs never would have agreed to sell DIT to Lason."[25]

4. PwC's primary argument is that Delaware's three-year statute of limitations had run prior to the filing of Plaintiffs' Complaint because that statute started to run at the time when Plaintiffs should have known of their claim. In its initial written submissions, PwC pegged this time to the date of Lason's December 1999 decline in share value, because this triggered a duty to investigate or inquire into the nature of their claim on Plaintiffs behalf; in support of this "inquiry" notice argument,[26] PwC cites numerous securities fraud cases from various courts around the country.[27] However, over the course of briefing and at oral argument on its Motion, PwC's position

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[25] Compl. ¶ 103.

[26] "Inquiry" notice is defined as "Notice attributed to a person when the information would lead an ordinarily prudent person to investigate the matter further; esp., the time at which the victim of an alleged securities fraud became aware of facts that would have prompted a reasonable person to investigate." BLACK'S LAW DICTIONARY 1088 (7th ed. 1999).

[27] For example, PwC cites: In re NAHC, Inc. Securities Lit., 306 F.3d 1314 (3d Cir. 2002) (holding that an "inquiry" notice—rather than an "actual" notice—standard would apply to determine when the limitations period begins to run in a securities fraud action); Matthews v. Kidder, Peabody & Co., Inc., 260 F.3d 239 (3d Cir. 2001) (holding that in determining the point in time when a plaintiff was on inquiry notice of his RICO claim based on securities fraud, the burden is on the defendant to show the existence of adequate "storm warnings"); Lenz v. Associated Inn and Rests. Co. of America, 833 F.Supp. 362 (S.D.N.Y. 1993) (holding that if it can be determined from the face of the documents and facts in evidence on a summary judgment motion that a plaintiff was placed on notice of possibility of securities fraud and the plaintiff then failed to exercise reasonable diligence in discharging a duty to inquire, summary judgment may be granted).

evolved in that it now asserts that, because Plaintiffs claim is for negligent misrepresentation and not fraudulent concealment, Plaintiffs were on "actual" notice of the existence of a possible claim against PwC in January 6, 1999 because of the directives contained within the Bassman e-mail from that time. PwC contends that, at this summary judgment stage, there can be no reasonable inferences in Plaintiffs favor to be drawn from the tone of that communication.

With regard to relevant Delaware authority in support of its position, PwC cites Becker v. Hamada, Inc.[28] and Hill v. Equitable Bank, N.A.[29] in support of its argument that under an "inquiry" notice analysis, Plaintiffs did not timely and effectively discharge their duty to inquire into the existence of their claim. PwC contends that the fact that the Bassman e-mail encouraged questionable activity on the part of Plaintiffs, coupled with the fact that Monroe did not take further action following the Bassman e-mail being brought to his attention, bolsters its argument of the lack of diligence on Plaintiffs' part, in that Plaintiffs should have then contacted

[28] 455 A.2d 353 (Del. 1982) (defining "time of discovery" for statute of limitations purposes and holding that a "time of discovery" rule tolling the statute of limitations did not apply where the existence of the complained-of roof defect was reasonably discoverable prior to the running of the statute).

[29] 655 F.Supp. 631 (D.Del. 1987) (holding that once a plaintiff becomes aware of sufficient "storm warnings" of securities fraud to be placed on "inquiry" notice, that plaintiff must exercise reasonable diligence in investigating the cause of action for fraud).

representatives of PwC; PwC has contended that had Plaintiffs inquired of a PwC representative, it is "self-evident" that PwC would have investigated. Instead, PwC highlights, Plaintiffs did not even inquire how they could contact its auditing representatives.

(Additionally, PwC argues that: 1) because Plaintiffs have no contractual relationship with it, and because Ruger v. Funk[30] supports the proposition, there can be no tolling of the statute of limitations because of misrepresentations by a third party not in privity with the complainant; and 2) because Plaintiffs participated in the activity now complained of, under Burns v. Ferro[31] they are not entitled to any relief they may seek from that transaction.)

Plaintiffs argue a variety of facts and inferences to defeat PwC's Motion, chief among which is the action they took when confronted with the Bassman e-mail. Plaintiffs argue that under Technicorp International II, Inc.

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[30] C.A. No. 93C-04-210 WSL, 1996 WL 110072 (Del. Super. Ct. Jan. 22, 1996) (holding that injury resulting from an attorney's failure to discover a title defect is "inherently unknowable" to a layperson so that the statute of limitations does not begin to run until actual discovery of the injury).

[31] C.A. No. 88C-SE-178 CG, 1991 WL 53834 (Del. Super. Ct. Mar. 28, 1991) (holding that illegal contracts are unenforceable and therefore a plaintiff who participates in a fraudulent scheme cannot sue out of that fraud).

v. Johnston,[32] they were met with “stonewalling” on behalf of Monroe such that there was no manner in which the “time of discovery” rule as formulated in Becker v. Hamada, Inc., *supra*, would have applied to them; Plaintiffs further contend that this Court should adopt a three-part test as formulated by the Eight Circuit in Great Rivers Coop. of Southeastern Iowa v. Farmland Industries, Inc.[33] as having “defined” and “evolved” the standard Plaintiffs claim was established in Becker.

With regard to the post-Bassman e-mail diligence on their parts, Plaintiffs further contend that Coleman’s efforts as detailed in his e-mail to counsel evidences a satisfactorily diligent investigation on Plaintiffs’ behalf, and that Coleman himself could not reasonably have contacted PwC representatives to inquire as to their knowledge. Furthermore, Plaintiffs have contended that neither Coleman nor Lydon had any way of knowing that the manner in which the forgiveness of debt was recorded (the “tail winding”) would not be “reversed” at the “corporate” level, *i.e.*, Lason

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[32] C.A. No. 15084 JBJ, 2000 WL 713750 (Del. Ch. May 31, 2000) (holding that the statute of limitations was tolled because the party with information necessary to support plaintiffs’ claim, *i.e.*, corporate books and records, fraudulently concealed that information in an attempt to “stonewall” plaintiffs).

[33] 120 F.3d 893 (8th Cir. 1997) (formulating a three-part test in context of securities fraud claim and examining: 1) the facts of which the putative plaintiff was aware; 2) whether reasonable persons would have investigated further on those facts; and 3) following such investigation, a determination of whether a reasonable person would have thereafter acquired “actual” notice of the basis of the claim).

would "work it out" with PwC. In support of this position, Plaintiffs have attached an affidavit executed by William N. Easton III, CPA, which states in pertinent part:

> From an accounting perspective and had I been DIT's CFO at the time [of receipt of the Bassman e-mail], I can not disagree…that…[the Bassman e-mail] would not have aroused me to be suspicious of the accoungting practices of Lason. Although I might have viewed the request as odd at the time, DIT was not being asked to make an accounting misrepresentation in that DIT was not communicating this transaction to unsuspecting third parties. The transaction was being communicated to Lason's accounting department which…could have…reversed or deemed [the transaction] immaterial to Lason's overall financial statement.[34]

Plaintiffs contend that had PwC done what it was charged with doing, it would have discovered the allegedly misrepresentative entries Lason had made on its books.

Nevertheless, Plaintiffs have conceded that, given their past CPA experience, a heightened standard of reasonableness should be applied to Coleman and Lydon vis-à-vis any event that would have "triggered" their duty to inquire as to any potential legal claim they may have had. In its responding papers, however, Plaintiffs contend that the nature of their injury was "inherently unknowable," and cite Council of Unit Owners of Sea

[34] William N. Easton Aff. of 9/4/03 ¶ 4 (Ex. "C" to Pls.' Answer to Def.'s Renewed Mot. for Summ. J.).

Colony East v. Carl M. Freeman Associates, Inc.[35] in support of that argument. Plaintiffs' position is that the first time they became aware of a potential claim, *i.e.*, the statute accrued, was when Lason publicly announced that it had informed the S.E.C. of certain accounting irregularities in March 2001.[36]

5. Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[37] The court must view the facts in a light most favorable to the non-moving party.[38]

6. At this point, a general discussion of the tort of negligent misrepresentation is warranted. As previously stated, this Court in its earlier decision in Carello, *supra*, held that in Delaware the applicable standard of the tort lies in section 552 of the Restatement (Second) of Torts. That section, in pertinent part, provides that:

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[35] 1988 WL 90569 (Del. Super. Ct. Aug. 16, 1988) (denying motion for summary judgment because of material facts in dispute about when the plaintiff "discovered or should have discovered" certain construction and design defects).

[36] Pls.' Answer to Def.'s Mot. to Dismiss at 3; Pls.' Answer to Def.'s Renewed Mot. for Summ. J. at 4.

[37] Super. Ct. Civ. R. 56(c); Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991).

[38] Merrill v. Crothall-American, Inc., 606 A.2d 96, 99-100 (Del. 1992).

> (1) One who, in the course of business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others…is subject to liability for pecuniary loss caused to [those others] by their justifiable reliance…
> (2)…the liability is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance [the information supplier]…knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that [the information supplier] knows that the recipient…intends [the information to influence]….[39]

An illustration of the liability-limiting concepts inherent in section 552 can be found in an illustration to comment h to the section:

> A, an independent public accountant, is retained by B Company to conduct an annual audit of the customary scope for the corporation and to furnish his opinion on the corporation's financial statements. A is not informed of any intended use of the financial statements; but A knows that the financial statements, accompanied by an auditor's opinion, are customarily used un a wide variety of financial transactions by the corporation and that they may be relied upon by lenders, investors, shareholders, creditors, purchasers and the like, in numerous possible kinds of transactions. In fact B Company uses the financial statements…to obtain a loan from X Bank…[and] through reliance upon [the negligently prepared financial statements]…X Bank suffers pecuniary loss. A is not liable to X Bank.[40]

Thus this Court, in denying the defendant's motion for summary judgment in the Carello action, held that "[i]n order for [defendant] to be potentially held liable to [p]laintiffs [therein], [p]laintiffs must show that [defendant] owed [them] a duty, either through [p]laintiffs' inclusion in a class of similarly-situated business owners who relied to their detriment on what [p]laintiffs allege[d] [we]re the negligently-audited financial statements of

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[39] Restatement (Second) of Torts § 552 (1977).

[40] Restatement (Second) of Torts § 552 cmt. h, illus. 10 (1977).

[defendant's client] and which were prepared by [defendant], or through a showing that [p]laintiffs [therein] alone relied to their detriment on those allegedly negligently-audited statements[ ]"; in either case, this Court held, "at the time [defendant] was auditing [it]'s clients financial statements, [defendant] would have had to have known (or have had reason to have known) that [the client] would share those statements with the class or with [p]laintiffs as part of a potential business transaction."[41]

7. Turning now to this case, this Court and the Delaware Supreme Court have previously held that ignorance of the facts constituting a cause of action generally does not act as an obstacle to the operation of a statute of limitations, except in the case of infancy, incapacity, and certain types of fraud.[42] The statute therefore begins to accrue, *i.e.*, run, at the time of the wrongful act.[43] The statute should not, however, run against an ignorant plaintiff, "particularly where the 'triggering' of the cause of action depends on the action of a third party."[44] "This is…merely a refinement of the so-

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[41] Carello, 2002 WL 1454111, at *4.

[42] Began v. Dixon, 547 A.2d 620, 623 (Del. Super. Ct. 1988); Isaacson, Stolper & Co. v. Artisan's Savings Bank, 330 A.2d 130, 132 (Del. 1974).

[43] Isaacson, Stolper & Co., 330 A.2d at 132.

[44] Id. at 133.

called rule of discovery….”[45] Nevertheless, “the running of the statute is tolled [only] so long as the injury is ‘inherently unknowable’ and the party-plaintiff [is] ‘blamelessly ignorant.’”[46] “Application of the ‘time of discovery’ rule is [consequently] limited[ ][,] and each case must stand or fall on its own facts[.]”[47]

Under the rule of discovery, discovery “means discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.”[48] Under the rule, a cause of action for fraud or misrepresentation “accrues for statute of limitations purposes when the party seeking to bring the action knows facts which would put a reasonable person on notice of the possible existence of the fraud [or] misrepresentation….”[49] The party asserting that tolling applies

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[45] Id.

[46] Ruger v. Funk, 93C-04-210 WSL, 1996 WL 110072, at *2 (Del. Super. Ct. Jan. 22, 1996) (citation omitted).

[47] Isaacson, Stolper & Co., 330 A.2d at 133.

[48] Becker v. Hamada, Inc., 455 A.2d 353, 356 (Del. 1982) (citation omitted) (emphasis removed)

[49] Hostetter v. Hartford Ins. Co., C.A. No. 85C-06-028 RSG, 1992 WL 179423, at *4 (Del. Super. Ct. July 13, 1992).

"bear[s] the burden of pleading specific facts to demonstrate that the statute of limitations was, in fact, tolled."[50]

8. Initially, the Court notes that Plaintiffs' reliance on Technicorp International, *supra*, is misplaced. Although the Court of Chancery (in holding that the applicable statute of limitations had been tolled) found that "at each stage [plaintiff] diligently and doggedly pursued all facts of which he was aware," the reason why suit was not filed in a more timely manner in that case was because "at every bend and turn…the defendants resisted and obstructed [plaintiff's] efforts to obtain the necessary information[ ]"; in other words, and as related in the court's opinion, "findings [previously] made [in ancillary litigation]…[ ]point to intentional concealment by the defendants of material facts…[necessary to plaintiff's action]."[51] Here, Plaintiffs have not alleged intentional or fraudulent concealment, but only negligence; in that sense, then, Technicorp is inapposite.

Secondly, this Court does not need to adopt the "three-part" test enunciated in Great Rivers Coop., *supra*, as Plaintiffs urge, because that decision is from the Eighth Circuit, as opposed to Becker, a decision of the Delaware Supreme Court. Furthermore, the Great Rivers Coop. case was

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[50] In re Dean Witter P'ship Lit., C.A. No. 14816 WBC, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998).

[51] Technicorp Int'l, 2000 WL 713750 at *7.

concerned with securities fraud, and not negligent misrepresentation. Those foreign cases cited by PwC having to do with "inquiry" notice and securities fraud are similarly unpersuasive, for the same reasons.

Turning to Delaware caselaw concerning "accrual" of the three-year statute of limitations contained in title 10, section 8106, the Court finds that the statute did in fact commence running in this case as early as January 6, 1999. Plaintiffs action, filed in February 2003, is therefore untimely.

As stated, for purposes of this case (which is not premised on any type of fraud), ignorance of the facts constituting Plaintiffs' cause of action does not bar the operation of section 8106.[52] Importantly, Plaintiffs' theory of the case involves negligent misrepresentation, specifically the negligent auditing by PwC of Lason's financial statements for the periods ending December 31, 1997 and September 30, 1998. When Plaintiffs received an e-mail from a representative of Lason in January 6, 1999 asking them to pursue "an aggressive accounting approach" that was apparently in contravention of "proper GAAP,"[53] together with Plaintiffs' knowledge that PwC (the defendant in this action) was the party auditing Lason's financial statements, Plaintiffs can reasonably be said to have been on notice of potential

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[52] Began, 547 A.2d at 623; Isaacson, Stolper & Co. 330 A.2d at 132.

[53] E-mail from Bassman to Lydon of 1/6/99.

problems between Lason and its auditor, PwC, such that Plaintiffs should have investigated this further with PwC representatives.

That Plaintiffs can reasonably be said to have been on notice of potential problems between Lason and PwC as early as January 6, 1999 is further supported by the fact that both Coleman and Lydon had previously been qualified as CPAs. Both of them testified in their depositions that the Bassman e-mail caused them some concern,[54] and Lydon testified that "the deferral of…gain to a rainy day [*i.e.*, 'tail winding'] is not a typical accounting procedure, especially if it's a material amount…."[55] Yet the Complaint that Plaintiffs filed is largely predicated on their allegation that "Lason's reported revenues on its audited financial statements, and its 10Ks, and 10Qs, for the reporting fiscal years 1997, 1998, and 1999, which were prepared by…[PwC], were not based upon an accounting method which was in conformity with Generally Accepted Accounting Principles ('GAAP')."[56] Even though those statements relied upon had apparently been audited by PwC before the date Plaintiffs received the Bassman e-mail, the fact that that

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[54] Coleman Dep. of 6/20/03 at 17 (Ex. "B" to Def.'s Renewed Mot. for Summ. J.); Lydon Dep. of 6/20/03 at 17 (Ex. "C" to Def.'s Renewed Mot. for Summ. J.).

[55] Lydon Dep. at 69.

[56] Compl. ¶ 77.

e-mail directed Plaintiffs to engage in an activity of the type now complained of reasonably should have aroused Plaintiffs' suspicions that such activity had occurred between Lason and its auditor before.

The affidavit submitted by Plaintiffs and executed by William N. Easton III, CPA, does not persuade the Court to hold otherwise; in his affidavit, Easton himself states that "I can not disagree…that…[the Bassman e-mail] would not have aroused me to be suspicious…."[57] In other words, that e-mail would have caused Easton to become suspicious of Lason's accounting practices, practices that involved preparation of financial statements to be audited by PwC, the defendant here.

Given this finding, then, the Court cannot agree with Plaintiff's position that the nature of their injury was "inherently unknowable" such as was the injury in Council of Unit Owners, *supra*. As stated previously, in that case this Court denied a motion for summary judgment because there were material facts in dispute concerning when the plaintiffs therein discovered or should have discovered certain construction and design defects. In so ruling, this Court noted that the plaintiffs were "not made privy to confidential memoranda and other information held by defendants which concerned the serious nature of the [building] deterioration" and in

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[57] William N. Easton Aff. of 9/4/03 ¶ 4.

fact were "misled…into believing all work being done [beforehand] was routine maintenance."[58] That case is therefore distinguishable from this case, based on the Court's analysis above.

Given that the Court has found that Plaintiffs' injury was not "inherently unknowable" based on the facts of this case, and given that Plaintiffs cannot be said to be "blamelessly ignorant" of the possibility of a claim against PwC based on Lason's apparently fraudulent financial statements, the Court must now determine whether there is any other factor that would have tolled the statute of limitations in a manner that the February 2003 filing of this suit was not untimely.[59]

As stated, under the "rule of discovery," discovery "means discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery."[60] Based on the above, the Court finds that for "discovery" purposes, both Coleman and Lydon have sufficient past experience to qualify as more than a "person of ordinary

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[58] Council of Unit Owners, 1988 WL 90569 at *6.

[59] Ruger, 1996 WL 110072 at *2 (noting that "the running of the statute is tolled [only] so long as the injury is 'inherently unknowable' and the party-plaintiff [is] 'blamelessly ignorant[ ]'").

[60] Becker, 455 A.2d at 356.

intelligence and prudence," insofar as standard accounting procedures are considered. The question then becomes whether they would have "discovered" the facts underlying their eventual claim against PwC, had Coleman and Lydon taken greater action.

Looking at the facts in the light most favorable to Plaintiffs, the Court concludes that they would have discovered the facts necessary to initiate their claim. Despite Plaintiffs' argument that neither Coleman nor Lydon knew if Lason and/or PwC would ultimately "reverse" any improper "tail winding" on Lason's books vis-à-vis its acquisition of DIT, the Court concludes that something more than the subsequent actions taken by the two principals was needed. Coleman's e-mail to counsel does not deter this finding; despite testimony that he was "concerned" about the Bassman e-mail, Coleman himself related in his e-mail that, after contacting Gary Monroe, he "took from Mr. Monroe's statements…that [PwC] and [Lason] would do whatever was necessary to insure that…adjustments…[were made] in accordance with GAAP…."[61] The Court finds that something more than Coleman's assumption at that time was necessary to protect Plaintiffs' then-developing cause against PwC.

[61] E-mail of Coleman to Kevin W. Gibson of 4/9/03.

Despite an argument to the contrary, the Court cannot agree with the assertion that Coleman had no way of contacting a PwC representative to inquire as to its knowledge of any improprieties on Lason's behalf. As one secondary authority has stated, "accountants, due to their professional status and the respect they command, invite reliance on their work by the business community, and…investors and creditors do, in fact, rely upon their accuracy and integrity[ ][.]"[62] The Court therefore agrees with PwC's assertion (although perhaps not with as much vigor) that had Plaintiffs inquired of a PwC representative, it is "self-evident" that PwC would have investigated.

In sum then, even looking at the facts in the light most favorable to Plaintiffs, the Court finds that the three-year statute of limitations found at title 10, section 8106 did in fact commence running in this case as early as January 6, 1999. Plaintiffs' action, filed in February 2003, is therefore untimely. Having found that the particular injury complained of was not "inherently unknowable" and that the Plaintiffs were not "blamelessly ignorant," the statute was not tolled in Plaintiffs favor; similarly, had Plaintiffs' conduct after January 6, 1999 reached a sufficient level of

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[62] Jack W. Shaw, Jr., Annotation, Liability of Public Accountant to Third Parties, 46 A.L.R.3d 979, 984 (1972).

thoroughness, Plaintiffs' investigation would have consequently "lead to the discovery" of the facts constituting their present claim.[63] It did not, however, and Plaintiffs' claim is therefore time-barred.

9. For the reasons stated above, PwC's "Renewed" Motion for Summary Judgment is **GRANTED**.[64]

**IT IS SO ORDERED**.

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Richard R. Cooch

oc: Prothonotary
xc: Kevin W. Gibson, Esquire, Attorney for Plaintiffs
Gregory V. Varallo, Esquire, Kelly A. Green, Esquire, and Lisa M. Zwally, Esquire, Martin L. Perschetz, Esquire (*pro hac vice*) and Joanna Goldenstein, Esquire (*pro hac vice*), Attorneys for Defendant.

[63] Becker, 455 A.2d at 356.

[64] Given the Court's ruling, it need not reach PwC's arguments that: 1) there can be no tolling based on misrepresentations by a party not in privity with the complainant; and 2) because Plaintiffs were participants in the complained-of activity, they are not entitled to any relief based on that transaction.