STATE OF MICHIGAN

COURT OF APPEALS

THOMAS E. GLEASON,

Plaintiff-Appellant,

v

ERNST & YOUNG, LLP,

Defendant-Appellee,

and

NEILL SCHMEICHEL, ESSEL BAILEY, JIM WIESE, and TOM FRANKE,

Defendants.

UNPUBLISHED
February 19, 2002

No. 224506
Kent Circuit Court
LC No. 98-010215-CB

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting summary disposition to defendant Ernst & Young ("defendant") under MCR 2.116(C)(7) and (8). We affirm in part and reverse and remand in part.

This case arises out of the sale of two businesses, Target Components, Inc., and Alofs Manufacturing Company. Defendant was hired to arrange the sale. Plaintiff was a part owner of the companies, and he decided buy out the other owners. After his purchase, the companies went bankrupt, and plaintiff brought this lawsuit, alleging that in the course of arranging the sale between plaintiff and the other owners, defendant gave fraudulent and misleading information to plaintiff regarding the value of the companies and the nature of the sale and purchase. Thereafter, defendant moved for summary disposition, arguing, among other things, that the statute of limitations barred plaintiff's lawsuit because he filed suit more than two years after the sale of the companies. The trial court agreed.

Plaintiff claims that the statute of limitations did not operate to bar his malpractice allegation because the claim did not accrue until he suffered damages, and these damages occurred within two years of the filing of his lawsuit. Upon our de novo review, see *Silver Creek Township v Corso*, 246 Mich App 94, 97; 631 NW2d 346 (2001) (setting forth the standard of review for summary disposition cases), we disagree.

MCL 600.5805 states, in part:

> (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.
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> * * *
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> (5) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

Thus, a plaintiff has two years from the date of accrual to file a claim of malpractice. See *Ohio Farmers Ins Co v Shamie (On Remand)*, 243 Mich App 232, 236; 622 NW2d 85 (2000). Accrual in this case is governed by MCL 600.5838. See *Ohio Farmers, supra* at 236-240. MCL 600.5838 states, in part:

> 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 matter out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

Here, defendant ceased serving plaintiff "in a professional . . . capacity *as to the matter out of which the claim for malpractice arose*" (emphasis added) upon the completion of the sale on or about December 20, 1995, and plaintiff did not file suit until October 2, 1998. See *id.* Therefore, his malpractice action was untimely and was correctly dismissed by the trial court.[1] See generally *Ohio Farmers, supra* at 236-243.[2]

Plaintiff contends that the malpractice statute of limitations was somehow extended here by the doctrine of fraudulent concealment because the malpractice involved fraud and misrepresentations. Plaintiff states that "[w]hen the basis of an action is fraud, the original fraud is regarded as the continuing affirmative act and [the d]efendant's silence is treated as concealment" (emphasis in original). Essentially, plaintiff contends that because his malpractice claim consisted of allegations of fraud, and because defendant was silent after perpetrating this fraud, the malpractice statute of limitations was extended by the doctrine of fraudulent concealment. This argument is disingenuous. Indeed, plaintiff made allegations of *both* malpractice and fraud in his complaint; the separate allegation of malpractice is barred as discussed above.

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[1] We note that plaintiff knew or should have known that his claim for malpractice existed at the time the companies filed for bankruptcy. Because the date of bankruptcy was more than six months before the date the lawsuit was filed, plaintiff's claims were not saved by the alternative six-months-from-discovery rule found in MCL 600.5838.

[2] The *Ohio Farmers* Court specifically indicated that "[b]ecause § 5838 governs accrual of plaintiff's accounting malpractice claim against defendants, the date when plaintiff suffered damages is irrelevant to the accrual of the claim." *Ohio Farmers, supra* at 240.

Plaintiff next argues that his claim for fraud was not controlled by the malpractice statute of limitations. He states in his appellate brief that the complaint "alleges intentional misrepresentation and contains all necessary elements therefor." We agree that the fraud claim survives.[3]

In *Kuebler v Equitable Life Assurance Soc of the United States*, 219 Mich App 1; 555 NW2d 496 (1996), the plaintiff brought claims of malpractice against the defendant insurance agent, alleging that he had concealed and misrepresented the nature of certain insurance policies he had sold the plaintiff. *Id*. at 3-4. As a defense, the defendant raised the two-year statute of limitations for malpractice. *Id*. This Court, deciding that the fraud count should not be governed by the malpractice statute of limitations, stated that "[w]hen a complaint alleges all the necessary elements of fraud as well as malpractice, the statute of limitations governing fraud actions will apply to the fraud count." *Id*. at 6. Similarly, in the context of a legal malpractice claim, this Court, in *Brownell v Garber*, 199 Mich App 519, 532-533; 503 NW2d 81 (1993), stated that

> [f]raud is no less actionable because it is committed by an attorney with whom the plaintiff has an attorney-client relationship. If a client attempts to characterize a malpractice claim as a fraud or other type of claim, a court will look through the labels placed on the claim and will make its determination on the basis of the substance and not the form. However, when a complaint alleges not only malpractice but also all the necessary elements of fraud, the statute of limitations governing fraud actions will apply to the fraud count and, if such count is not barred, the plaintiff may proceed on that count to collects damages proximately caused by the alleged fraud. [Citation omitted.]

In order to establish a claim of fraud, a plaintiff must assert (1) that the defendant made a material representation, (2) that the representation was false, (3) that the defendant knew the representation was false when he made it, (4) that the representation was made with the intent that the plaintiff rely on the representation, (5) that the plaintiff did rely on the representation, and (6) that the plaintiff suffered injury as a result of the representation. *Id.* at 533. In the instant case, plaintiff's complaint asserts in Count IV, his fraudulent misrepresentation count, that defendant intentionally "made false representations of material facts both by affirmative statements and silence where there was a duty to speak to plaintiff regarding the value of [the companies]." Defendant's alleged misrepresentations included statements concerning the payables and receivables schedules, computation of value, availability of financing, and terms of the sale. Plaintiff claimed that defendant knew its statements were false when they were made and that plaintiff relied on these representations during the sale of the companies. Plaintiff also claimed that he suffered substantial economic losses. Thus, plaintiff alleged all the elements of a fraud claim, and, contrary to defendant's assertion, we conclude that he alleged them with sufficient particularity. Therefore, following this Court's precedent in *Kuebler* and *Brownell*, the six-year statute of limitations found in MCL 600.5813 governs plaintiff's fraud claim, and the trial court erred in dismissing it.

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[3] Besides malpractice and intentional misrepresentation, plaintiff made other, variously-titled claims in his complaint. Appellant does not raise these claims as issues on appeal, so we do not address them.

Defendant contends that the fraud claim was properly dismissed here because under the accountant liability statute, MCL 600.2962,[4] fraud is defined as merely a subspecies of a malpractice action, making the fraud claim in the instant case governed by the two-year statute of limitations for malpractice actions. We do not accept this argument. Indeed, in our opinion, the fraud claim sufficiently accrued at the time of closing in December 1995,[5] *before* the March 28, 1996 effective date of MCL 600.2962. Therefore, MCL 600.2962 does not apply to abrogate the claim. See generally *Ohio Farmers, supra* at 242-243.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

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[4] This statute states, in relevant part:

> This section applies to an action for professional malpractice against a certified public accountant. A certified public accountant is liable for civil damages in connection with public accounting services performed by the certified public accountant only in 1 of the following situations:
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> * * *
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> (b) An act, omission, decision, or conduct of the certified public accountant that constitutes fraud or an intentional misrepresentation.

[5] We acknowledge that *fraud* does not necessarily fall within MCL 600.5838, which, as noted earlier, indicates that a *malpractice* claim accrues "at the time [the professional] discontinues serving the plaintiff in a professional . . . capacity as to the matter out of which the claim for malpractice arose." Nevertheless, we are convinced that at the time of closing, the elements of defendant's fraud claim were sufficiently established such that the claim accrued as of that date. Indeed, while the full extent of the damages may not have been incurred at that point, plaintiff, by purchasing the allegedly troubled companies, had incurred at least some damages as of the closing. See generally *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich 146, 151; 200 NW2d 70 (1972) ("Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but they give rise to no new cause of action. . . .").