

No. 1-08-2664

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROMILA DAMAN PAUL, as Trustee for S. DAMAN PAUL, M.D., and P. DAMAN PAUL, M.D., LTD. PENSION PLAN AND TRUST, and Individually,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 07 L 0299
)	
GERALD ADELMAN & ASSOCIATES, LTD. and FEDERAL KEMPER LIFE ASSURANCE COMPANY,)	
)	
Defendants-Appellees.)	
)	
<hr/> PROMILA DAMAN PAUL, as Trustee for S. DAMAN PAUL, M.D., and P. DAMAN PAUL, M.D., LTD. PENSION PLAN AND TRUST,)	
)	
Plaintiff-Appellant,)	
)	
v.)	
)	
GARY R. MANN and GARY R. MANN & ASSOCIATES, INC.,)	Honorable
)	Charles R. Winkler,
Defendants-Appellees.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in judgment.

ORDER

Held: Dismissal of plaintiff's amended complaints against defendants was affirmed where the circuit court correctly found that plaintiff lacked standing to raise any claims in her capacity as trustee of a joint pension plan and that her remaining claims, brought in her individual capacity, were time-barred.

This appeal involves two consolidated actions filed by plaintiff, Promila Daman Paul, against Gary R. Mann and Gary R. Mann & Associates, Inc. (collectively, Mann) and Federal Kemper Life Assurance Company (Kemper) that the circuit court dismissed pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 5/2-619 (West 2008)). In her capacity as trustee of a joint pension plan she shared with her husband, Shashi Daman Paul (Shashi), plaintiff filed amended complaints against Mann and Kemper alleging that: Mann wrongfully allowed Shashi to convert the assets of the joint pension plan to Shashi's individual pension plan; and Kemper wrongfully allowed Shashi to deplete and convert an insurance policy belonging to the joint pension plan. In her amended complaint against Kemper, plaintiff also brought claims in her individual capacity alleging that Kemper wrongfully allowed Shashi to deplete and convert certain insurance policies belonging to plaintiff's and Shashi's joint corporation. The circuit court dismissed all plaintiff's claims brought as trustee on behalf of the joint pension plan for lack of standing (735 ILCS 5/2-619(a)(9) (West 2008)) and dismissed plaintiff's remaining claims brought in her individual capacity on the basis that they were untimely filed after the passage of the applicable limitations periods and did not relate back to the filing of the original complaint. 735 ILCS 5/2-619(a)(5) (West 2008). Additionally, the circuit court also dismissed all of plaintiff's claims in both amended

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complaints against Mann and Kemper for failure to state a cause of action (735 ILCS 5/2-615 (West 2008)) and denied plaintiff the opportunity to replead. On appeal, plaintiff contends the circuit court erred in dismissing her amended complaints. We affirm.

I. Facts

A. Plaintiff's Indiana divorce case

Plaintiff and her husband Shashi were physicians who practiced medicine together. The couple operated their medical practice as an Illinois corporation known as S. Daman Paul, M.D. and P. Daman Paul, M.D., Ltd. (the joint corporation). In 1977, the joint corporation adopted a joint pension plan, pursuant to which plaintiff and Shashi were co-trustees and the only participants. In 1983, the trustees allegedly authorized the purchase of life insurance policies as assets of the joint pension plan and purchased Policy No. FK1404775 (the 775 policy) from Kemper. The 775 policy insured Shashi's life for \$1 million and named the joint pension plan as beneficiary.

Plaintiff and Shashi moved to Indiana. In January 1991, plaintiff filed for divorce in Jasper County, Indiana. On or about March 9 and March 16, 1992, the divorce court entered injunctions freezing all of the marital assets, including the assets of the joint pension plan. The court appointed a certified public accountant to identify all assets of the marital estate, going back to January 1991, when plaintiff filed for divorce.

Plaintiff thereafter repeatedly alleged that Shashi had misappropriated assets of the joint pension plan by using an improper corporate resolution purporting to change the name of the joint pension plan and remove her as co-trustee. On October 11, 1994, the divorce court ordered Shashi to disclose all assets of the joint pension plan and restated its prior injunction freezing all such assets.

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On May 26, 1995, the divorce court conducted an evidentiary hearing on plaintiff's claim that Shashi had misappropriated the assets of the joint pension plan. After the proofs closed, the divorce court entered its findings and conclusions on December 8, 1995. The court ruled: per a July 1, 1990, filing with the Internal Revenue Service (IRS), the joint pension plan's value was \$1,081,566; Shashi had forged plaintiff's signature on certain pension documents, removing her interest in the joint pension plan, and allowing him to transfer certain pension assets; and plaintiff also caused certain monies to be transferred from the joint pension plan early in the dissolution proceedings. The divorce court ordered both parties to reconstitute the pension plan assets to an amount equal to \$1,081,566, thereby returning the joint pension plan to the condition it was in before plaintiff filed for divorce and before Shashi's alleged misappropriation.

On September 6, 1996, the divorce court entered an order stating:

"[T]he husband has reported to the Court that he has reconstituted the pension funds together with any increased values acquired therein. The Court having heard argument by both parties finds that the Wife is unwilling to sign and execute a Qualified Domestic Relations Order. The Court finds that since the Husband is the Trustee of said pension, that nothing but conflict will exist if he is allowed to continue as Trustee and if the pension is reconstituted in its previous form. Therefore, the Court now directs that said pension be divided equally and that the Wife be issued a certified check for her one-half (1/2) interest in said pension fund."

On September 25, 1996, the divorce court entered an order stating:

"After [Shashi] pays to [plaintiff] her One-Half (1/2) share of the remaining balance of the

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pension plan assets, [Shashi] shall then be awarded all of the remaining assets contained in the pension plan and *[plaintiff] shall no longer have any interests in said pension plan* and [Shashi] shall no longer have any interest in the pension plan assets paid to [plaintiff]." (Emphasis added.)

Thereafter, in its order of June 26, 1997, the divorce court found that Shashi complied with its prior order to divide the assets 50/50 and, in doing so, Shashi transferred more than \$800,000 in pension plan assets to plaintiff. As Shashi had paid plaintiff her ½ share of the remaining balance of the joint pension plan assets, plaintiff's interests in the joint pension plan now were extinguished pursuant to the September 25, 1996, order. Plaintiff did not file an appeal of any of these orders entered by the divorce court.

B. Plaintiff's original cause of action against Kemper

On January 18, 1995, while the divorce action was pending, plaintiff, as a trustee of the joint pension plan, filed a complaint against Gerald Adelman & Associates (Adelman) and Kemper. Plaintiff alleged in the complaint that the joint pension plan hired Adelman, an insurance agency, to provide services with respect to the life insurance assets of the plan, including the 775 policy that insured Shashi's life for \$1 million. Plaintiff alleged that in January 1990 and March 1991, Shashi directed Adelman to obtain the maximum cash loans possible on the 775 policy. The loans totaled \$98,994 and allegedly were made for Shashi's own benefit without plaintiff's knowledge or consent. Plaintiff claimed Shashi forged her signature on the loan request forms; Adelman falsely purported to witness plaintiff's signature; and Kemper failed to verify plaintiff's signature before making the loans. Plaintiff further alleged that in June 1991, Adelman received yet another request from Shashi

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for another loan against the 775 policy. Kemper initially rejected this request because the request form contained only Shashi's signature. Adelman thereafter provided Kemper with a document purporting to be a corporate resolution of a corporation named S. Daman Paul, M.D., P.C. that changed the name of the joint pension plan to S. Daman Paul, M.D., P.C. Pension Plan and Trust and removed plaintiff as trustee. Pursuant to this corporate resolution, Kemper processed the final loan request and issued a check in the amount of \$40,778 that Shashi again used for his own purposes. Plaintiff further alleged that Kemper acquiesced to Shashi's request (relayed through Adelman) to fraudulently transfer the 775 policy from the joint pension plan to Shashi's own pension plan without plaintiff's authorization. Plaintiff sought damages for breach of contract, breach of fiduciary duty, fraud, negligence, aiding and abetting conversion, and violations of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 et seq. (West 1994)).

Kemper filed, among other pleadings, a counterclaim against Adelman and a third-party action against Shashi. Kemper alleged therein that it made certain loans on the 775 policy in reliance on documents submitted by Adelman and Shashi that contained plaintiff's forged signature. Kemper also alleged it made another loan on the 775 policy in reliance on fraudulent misrepresentations made by Adelman and Shashi regarding the purported corporate resolution changing the name of the joint pension plan and removing plaintiff as trustee. Kemper sought judgment against Adelman and Shashi in an amount equal to any amount awarded to plaintiff against Kemper, as well as attorney fees and punitive damages.

C. Plaintiff's original cause of action against Mann

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On May 22, 1995, plaintiff, in her capacity as a trustee of the joint pension plan, filed a complaint against Gary R. Mann and Gary R. Mann & Associates, Inc. (collectively, Mann) and against Engler, Zoghlin, Mann, Ltd. (EZM). Plaintiff identified EZM as an Illinois pension actuarial firm retained in 1977 to provide services in connection with the creation and administration of the joint pension plan. Gary R. Mann was the individual at EZM primarily responsible for plan administration. Gary R. Mann & Associates, Inc., was the successor firm to EZM.

Plaintiff alleged that in early 1991, Shashi began an independent medical practice in Indiana, incorporated under the name S. Daman Paul, M.D., P.C., and hired EZM to create and administer a pension plan for his practice, purportedly to be funded with assets from the joint pension plan. Plaintiff alleged that EZM and Mann prepared a corporate resolution, which Shashi executed, that purported to document decisions made at a special meeting of the board of directors of Shashi's new corporation, S. Daman Paul, M.D., P.C. The resolution allegedly falsely stated that S. Daman Paul, M.D., P.C. had established a qualified retirement plan, changed the name of the joint pension plan to the S. Daman Paul, M.D., P.C. Pension Plan and Trust, and removed plaintiff as a trustee of the joint pension plan. The corporate resolution allegedly enabled Shashi to transfer assets from the joint pension plan to his individual pension plan without plaintiff's knowledge, consent, or approval.

Plaintiff alleged that in 1993, 1994, and 1995, Mann provided Shashi with IRS submissions representing that the joint pension plan was now Shashi's individual pension plan; however, in each of those submissions, Mann used the same federal tax identification number as had been used for the joint pension plan. Plaintiff alleged that in the April 1993 IRS submission, the plan assets were valued at approximately \$1 million; in the April 1994 IRS submission, the plan assets were valued

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at less than \$900,000; and in the April 1995 IRS submission, the plan assets were shown to have "greatly diminished in value."

Plaintiff sought damages for breach of contract, breach of fiduciary duty, fraud, negligence, conversion, and violations of the Consumer Fraud Act.

D. Plaintiff's personal bankruptcy action

In January 1996, plaintiff filed a petition for personal bankruptcy in the United States Bankruptcy Court for the Northern District of Indiana. The Kemper and Mann cases became part of the bankruptcy estate under the control of the trustee in bankruptcy. On February 18, 1998, the Cook County circuit court placed the Kemper case on the court's bankruptcy calendar. On April 16, 1998, the circuit court placed the Mann case on the bankruptcy calendar.

On October 10, 2001, the circuit court removed the Kemper case from the bankruptcy calendar, renumbered the case and dismissed it for want of prosecution (DWP) because no one appeared for plaintiff. The next day, the circuit court entered a DWP order against plaintiff as to the Mann case.

On March 28, 2003, the United States Bankruptcy Court entered an order stating the Kemper case and the Mann case "are properly claimed as exempt and are no longer property of [the] Debtor's estate" and, therefore, are "abandoned back to the Debtor." On September 29, 2003, plaintiff filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)) seeking to vacate the circuit court's DWP order as to the Kemper case. Plaintiff filed a section 2-1401 petition as to the Mann case on October 8, 2003.

The circuit court granted plaintiff's section 2-1401 petitions, consolidated the Kemper and

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Mann cases, and reinstated Kemper's counterclaim against Adelman and Kemper's third-party action against Shashi. The appellate court affirmed the judgment of the circuit court vacating the dismissal orders. See *Paul v. Gerald Adelman & Associates, Ltd.*, Nos. 1-04-0189 and 1-04-0214 (March 2, 2005) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court affirmed the appellate court in relevant part and remanded the cases to the circuit court. See *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85 (2006). Following remand, plaintiff filed amended complaints against Mann and Kemper.

E. Plaintiff's amended cause of action against Mann

In her capacity as trustee for the joint pension plan, plaintiff filed her amended complaint against Mann on December 21, 2007, and re-alleged the claims of her original complaint regarding Mann's participation in the preparation of the corporate resolution enabling Shashi to transfer assets from the joint pension plan to his individual pension plan without plaintiff's knowledge, consent, or approval. Plaintiff also re-alleged Mann's participation in the IRS submissions in which Mann falsely stated the joint pension plan was now Shashi's individual pension plan. Plaintiff again sought damages for breach of contract, breach of fiduciary duty, fraud, negligence, conversion, and violations of the Consumer Fraud Act.

F. Plaintiff's amended cause of action against Kemper

In her capacity as trustee for the joint pension plan, plaintiff filed her amended complaint against Kemper on December 21, 2007, and re-alleged the claims of her original complaint regarding Kemper's participation in Shashi's depletion and conversion of the 775 policy.

The amended complaint also added claims brought by plaintiff in her individual capacity that

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she did not include in her original complaint. Specifically, plaintiff alleged she had been an equal shareholder and co-owner of the joint corporation with Shashi, and that the joint corporation bought and owned three Kemper policies, Policy Nos. FK1430538, FK1430549, and FK1430550 (the 538, 549, and 550 policies, collectively referred to as the corporate policies). The joint corporation was the beneficiary of each of these policies. Plaintiff alleged that in 1990 and 1991, without her consent, Adelman processed and Kemper approved cash loans to Shashi in the amount of \$17,192.65 on the 538 policy, \$12,100 on the 549 policy, and \$14,630 on the 550 policy. Plaintiff further alleged that, pursuant to Shashi's directive, and without the joint corporation's consent, Adelman requested that ownership of the corporate policies be transferred from the joint corporation to Shashi's individual corporation. Kemper complied with the requests to transfer the corporate policies to Shashi's individual corporation and to change the beneficiary to Shashi's individual corporation. In counts against Kemper for breach of contract, breach of fiduciary duty, fraud, negligence, aiding and abetting conversion, and violations of the Consumer Fraud Act, the amended complaint sought to recover not only for damages arising in connection with the 775 policy, but also for damages arising in connection with the corporate policies.

E. The dismissal of plaintiff's amended complaints

Mann filed a section 2-615 motion to dismiss, alleging each of plaintiff's claims against it failed to state a claim upon which relief could be granted. In two separate motions to dismiss filed pursuant to section 2-619, Mann argued: (a) plaintiff had no standing to bring suit on behalf of the joint pension plan in light of certain orders entered by the Indiana divorce court; and (b) plaintiff's claims were barred by the doctrines of *res judicata*, collateral estoppel and/or judgment and

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satisfaction.

Kemper also filed separate motions to dismiss under sections 2-615 and 2-619. Under section 2-615, Kemper argued each of the claims asserted against it in the amended complaint failed to state a claim upon which relief could be granted. Under section 2-619, Kemper argued: (a) plaintiff's claims for damages under the corporate policies were barred by the applicable statutes of limitations; (b) plaintiff lacked standing to pursue her claims for damages under the 775 policy; and (c) plaintiff's claims for damages under the 775 policy were barred by the doctrines of *res judicata* and/or collateral estoppel.

After the filing of the motions to dismiss, Adelman agreed to settle with plaintiff and moved for a good faith finding. The circuit court entered such a finding and dismissed plaintiff's claims and Kemper's counterclaims against Adelman.

The circuit court subsequently dismissed plaintiff's amended complaints against Mann and Kemper. The circuit court found that plaintiff lacked standing to assert claims on behalf of the joint pension plan and so dismissed all those claims against Mann and Kemper. The circuit court also dismissed plaintiff's remaining claims against Kemper, brought in her individual capacity and premised on Kemper's alleged wrongdoing regarding the corporate policies, finding they were barred by the applicable statutes of limitations and did not relate back to the filing of the original complaint. In addition, the circuit court also dismissed all of plaintiff's claims in both amended complaints against Mann and Kemper for failure to state a viable cause of action and denied plaintiff the opportunity to replead. Plaintiff filed this timely appeal pursuant to Supreme Court Rule 303. Ill. Sup. Ct. R. 303 (eff. May 30, 2008).

While the parties do not address this court's jurisdiction, we have an independent duty to ascertain our jurisdiction before considering the merits of plaintiff's appeal. *People v. Haldorson*, 395 Ill. App. 3d 980, 981 (2009). Generally, appeals may "only be taken from final orders which dispose of every 'claim'--*i.e.*, 'any right, liability or matter raised in an action.'" *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 339 (2001), quoting *Marsh v. Evangelical Covenant Church*, 138 Ill. 2d 458, 465 (1990). "An order is 'final' if it terminates the litigation between the parties on the merits or disposes of the rights of the parties either on the entire controversy or a definite and separate part thereof." *Lozman v. Putnam*, 328 Ill. App. 3d 761, 768 (2002).

We note that the dismissal order here does not specifically address Kemper's third-party complaint against Shashi, thereby raising a question as to whether the dismissal order is final and appealable. However, further review of the dismissal order reveals that it states "[t]his order disposes of *all* existing claims pending in these consolidated cases" (emphasis added), which would necessarily include Kemper's third-party complaint against Shashi premised on Shashi's alleged misrepresentations inducing Kemper to make the loans on the 775 policy. Kemper raised no objections below to the circuit court's order disposing of "all" existing claims pending in the consolidated cases, nor does Kemper argue on appeal that its third-party complaint against Shashi remains outstanding such that the dismissal order is not final and appealable. Accordingly, in the absence of any evidence or argument to the contrary, we hold that the dismissal order, by its express terms, disposes of all the existing claims in both consolidated cases (including Kemper's third-party complaint against Shashi) and therefore constitutes a final, appealable order. We proceed to address the merits of plaintiff's appeal.

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II. Analysis

A. The dismissal of plaintiff's amended complaint against Mann

First, plaintiff contends the circuit court erred by dismissing all her claims brought as trustee on behalf of the joint pension plan against Mann for lack of standing. Standing requires some injury in fact to a legally cognizable interest. *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). The doctrine of standing precludes persons who have no interest in a controversy from bringing a lawsuit and ensures that issues are raised only by parties with a real interest in the outcome of the controversy. *Glisson*, 188 Ill. 2d at 221. A court's disposition of a section 2-619 motion to dismiss for lack of standing presents a question of law that we review *de novo*. *International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security*, 215 Ill. 2d 37, 45 (2005).

In the present case, the circuit court did not err in finding plaintiff lacked standing to bring claims as trustee of the joint pension plan against Mann. At the time of the filing of those claims, the Indiana divorce court already had divided the joint pension plan's assets 50/50 between plaintiff and Shashi and extinguished "any interests [of plaintiff] in said plan." The effect of extinguishing "any" of plaintiff's interests in the joint pension plan was to end her trusteeship and thereby eliminate her legally cognizable interest in the joint pension plan's controversy with Mann.

Plaintiff argues "at the time the divorce court addressed the pension assets of the parties, the conversion of the [joint pension plan] had already occurred. As a result, the divorce court only considered the pension plan that was before it, *i.e.*, Shashi's individual pension plan." Plaintiff contends the Indiana divorce court only extinguished her interests in Shashi's individual pension plan

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and never extinguished her interests in the joint pension plan or removed her as trustee thereof. Plaintiff argues that the Indiana divorce court never dissolved the joint pension plan or adjudicated her rights as a co-trustee of that plan, never addressed Mann's liability for allegedly aiding and abetting conversion of the joint pension plan, and never determined the correct value of the joint pension plan assets had they not been converted by Shashi with the help of Mann. Therefore she contends she has standing, as trustee of the joint pension plan, to pursue the plan's claims against Mann.

We disagree. The record indicates that, throughout the divorce proceedings, plaintiff alleged that Shashi had wrongfully transferred the assets of the joint pension plan to his individual pension plan. In response to plaintiff's allegations, the divorce court ordered the parties to reconstitute the plan assets to \$1,081,566, which represented the value of the joint pension plan as of July 1, 1990. By ordering the reconstitution of the joint pension plan, the circuit court was attempting to counteract any misappropriation of the joint pension plan's assets by returning it to the condition it was in before plaintiff filed for divorce and before Shashi's alleged misappropriation. The divorce court then ordered that the \$1,081,566 assets of the joint pension plan be split 50/50 between the parties, after which the court extinguished "any" of plaintiff's interests in said plan. Clearly, these orders reflected a property distribution of the joint pension plan and served to extinguish any remaining interests of plaintiff in that plan. By extinguishing "any" of plaintiff's interests in the joint pension plan, the divorce court necessarily extinguished her interest as trustee. The consequence was to eliminate her legally cognizable interest in the joint pension plan's controversy with Mann. Accordingly, when plaintiff subsequently filed her amended complaint against Mann in her capacity as trustee of the

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joint pension plan, the circuit court of Cook County correctly found she lacked standing and dismissed the complaint.

Plaintiff cites several cases she admits are not "directly on all fours" but that "clearly suggest that in situations in which third-parties have aided and abetted fraud, conversion or waste of assets, defrauded parties have standing to bring actions for redress against such parties." See *Hennessy v. Connecticut General Life Insurance Co.*, 1985 WL 3943 (N.D. Ill 1985) (trustees of a terminated pension plan had standing to sue the insurance company with which they contracted to provide retirement income for participants in the plan); *Edgeworth v. First National Bank of Chicago*, 677 F. Supp 982 (S.D. Ind. 1988) (co-trustee and beneficiary of a trust had standing to bring claims against third parties premised on their knowing participation in the alleged breach of fiduciary duty by co-trustees); *Corroon & Black of Illinois, Inc. v. Magner*, 145 Ill. App. 3d 151 (1986) (holding that Illinois law recognizes actions for breach of fiduciary duty and a third party's inducement of a breach of duty.)

The cases cited by plaintiff are not analogous to the present case. In contrast to each of the cited cases, the Indiana divorce court here expressly extinguished "any" of plaintiff's interests in the joint pension plan, thereby eliminating her legally cognizable interest in the joint pension plan's controversy with Mann and depriving her of standing to sue as trustee on behalf of said plan. As none of the cited cases contain a similar court order extinguishing the respective plaintiffs' legally cognizable interest, the discussions and holdings therein regarding standing are not relevant here.

In her reply brief, plaintiff also cites *General Produce Distributors, Inc. v. Professional Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 2009 WL 2449025 (N.D. Ill. 2009),

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which held that participants of a terminated multiple employer welfare plan under the Employee Retirement Income Security Act (ERISA) had standing to sue the Trust, the Trust's contract administrator, the trustee, and the managing member of the contract administrator for fiduciary misconduct. Plaintiff concedes the joint pension plan at issue here is not an ERISA plan, but she notes that the joint pension plan provides it is "to be construed according to the provisions of [ERISA] and the laws of the State of Illinois to the extent they are not inconsistent therewith." Therefore, plaintiff argues *General Produce's* discussion of standing under ERISA provides additional support for her standing to bring claims against Mann. Mann contends plaintiff failed to allege in the circuit court that she had standing under ERISA and accordingly has waived review thereof. We need not address Mann's waiver argument, as *General Produce*, like the other cases cited by plaintiff, contained no court order extinguishing the plaintiff's legally cognizable interest in the controversy. Accordingly, *General Produce* is factually inapposite and provides no relevant support for plaintiff's standing to bring claims on behalf of the joint pension plan against Mann.

Plaintiff contends the divorce court's order of October 23, 2003, filed after the order extinguishing her interests in the joint pension plan, provides her with standing to bring her cause of action against Mann. The October 23, 2003, order states in pertinent part:

"Any actions to be brought against the Trustee or fraud allegations against the Husband must be brought through a separate action. These allegations cannot be raised through this dissolution proceeding."

The divorce court did not define "the Trustee" to which it was referring. The circuit court found that "the Trustee" apparently was a reference to Shashi. Mann contends "the Trustee" refers

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to the trustee in plaintiff's personal bankruptcy case. Regardless, plaintiff contends the import of the October 23, 2003, order is that it explicitly gives her the right to pursue a separate action outside the dissolution proceeding as to all claims arising from Shashi's alleged misappropriation of the assets of the joint pension plan, including claims against third parties like Mann.

Plaintiff reads the October 23, 2003, order too broadly. By its express terms, that order only references separate actions against the unidentified Trustee and against the Husband (Shashi). The October 23, 2003, order does not reference any actions against third parties such as Mann, nor does it contain any language modifying the earlier order extinguishing plaintiff's interests in the joint pension plan or otherwise giving her standing to bring claims as trustee on behalf of the joint pension plan.

Plaintiff argues the "decision of the trial court, if upheld, would mean that all third parties who aided and abetted a conversion would be shielded from liability if the conversion effectively eliminated the instrument from which the assets were taken. That is not and cannot be the law. We submit that Plaintiff here has standing to pursue her claims against the Mann defendants."

Plaintiff's argument is without merit. Our holding affirming the circuit court's dismissal order is not premised on the elimination of the plan from which the assets allegedly were taken. Rather, our holding is premised on the earlier divorce court orders reconstituting the joint pension plan, dividing the plan's assets 50/50 between plaintiff and Shashi, and then extinguishing "any" of plaintiff's interests in the plan. We also note that although the divorce court's order extinguishing plaintiff's interests in the joint pension plan thereby prevented her from filing suit as trustee on behalf of the plan for lack of standing, it did not impact plaintiff's rights to bring any *individual* actions she

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may have had against Mann.

B. The dismissal of plaintiff's amended complaint against Kemper

First, plaintiff contends the circuit court erred by dismissing her claims against Kemper premised on its alleged misconduct in allowing Shashi to deplete and convert the 775 policy owned by the joint pension plan. Plaintiff's claims against Kemper relating to the 775 policy were brought in her purported capacity as trustee of the joint pension plan. For all the reasons cited earlier in this order, plaintiff lacks standing to assert any claims as trustee for damages sustained by the joint pension plan. Accordingly, we affirm the dismissal of plaintiff's claims against Kemper with respect to the 775 policy for lack of standing.

Plaintiff contends the circuit court erred in *sua sponte* dismissing her claims against Kemper relating to the 775 policy for lack of standing, as Kemper never sought to dismiss those claims. Review of the record indicates that in its memorandum of law in support of its section 2-619 motion to dismiss all counts of plaintiff's amended complaint, Kemper stated that it adopts and incorporates by reference Mann's section 2-619 motion to dismiss the amended complaint for lack of standing. Kemper further stated "all counts as they relate to damages allegedly sustained by the Plan should be dismissed for lack of standing." Thus, Kemper's motion to dismiss encompassed the counts relating to the 775 policy, as those counts were for damages sustained by the joint pension plan. The circuit court committed no error in so dismissing plaintiff's claims against Kemper relating to the 775 policy for lack of standing.

Next, plaintiff contends the circuit court erred by dismissing her individual claims against Kemper premised on its alleged misconduct in assisting Shashi to deplete and convert the corporate

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policies. The circuit court dismissed those claims on the basis that they were untimely filed after the passage of the applicable limitations periods and did not relate back to the filing of the original complaint.

Kemper argues, and plaintiff does not dispute, that each of her claims against Kemper was governed by a 3, 5, or 10-year statute of limitations. Specifically, the three-year limitations period applied to the alleged violations of the Consumer Fraud Act. See 815 ILCS 505/10a(e) (West 2006). The five-year limitations period applied to the claims for breach of an oral contract, breach of fiduciary duty, fraud, negligence, and aiding and abetting conversion. See 735 ILCS 5/13-205 (West 2006). The 10-year limitations period applied to breach of a written contract. See 735 ILCS 5/13-206 (West 2006).

Plaintiff also does not dispute the circuit court's finding that the limitations periods began to run, at the latest, as of April 4, 1992. On that date, plaintiff wrote the divorce court that Shashi had forged her signature several times "to take insurance policies out of the pension plan and [had] taken nearly \$200,000 in loans against his and [their] children's policies." The circuit court found that this April 4, 1992, letter indicated plaintiff was on notice of the possibility of claims against Kemper, which allegedly had participated in Shashi's depletion and conversion of the insurance policies belonging to the joint pension plan and to the joint corporation. More than 15 years later, in December 2007, plaintiff filed her amended complaint alleging Kemper's wrongdoing with respect to Shashi's depletion and conversion of the corporate insurance policies. The circuit court correctly found that those amended claims were untimely, as plaintiff filed them outside of the 3, 5, and 10-year statutes of limitations.

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Plaintiff contends, though, that her amended claims against Kemper are not barred by the statutes of limitations because they relate back to the date of the filing of the original complaint. Section 2-616 of the Code of Civil Procedure (735 ILCS 5/2-616 (West 2006)) permits the relation back of an amended pleading to avoid the impact of the statute of limitations where: (1) the original complaint was timely filed; and (2) the original and amended complaints indicate the cause of action asserted in the amended complaint grew out of the "same transaction or occurrence" set up in the original complaint.

In the present case, plaintiff timely filed the original complaint in January 1995, well within the applicable limitations periods. The issue is whether the claims in plaintiff's amended complaint premised on Kemper's alleged wrongdoing with respect to Shashi's depletion and conversion of the corporate policies arises out of the same transaction or occurrence set up in plaintiff's original complaint. Our supreme court has held that the rationale for the "same transaction or occurrence" rule is that a defendant is not prejudiced by an amendment where "his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him." *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995), quoting *Simmons v. Hendricks*, 32 Ill. 2d 489, 495 (1965). Our supreme court also has held that the court should consider the entire record, including depositions and exhibits, when determining whether defendant had such notice. *Wolf v. Meister-Neiberg, Inc.*, 143 Ill. 2d 44, 46 (1991).

Relying on *Wolf*, plaintiff here argues that records produced in discovery show that as early as April 1992, Kemper was aware of the facts underlying the claims in plaintiff's amended complaint that Kemper wrongfully assisted Shashi in depleting and converting the corporate policies. Plaintiff

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contends that as she provided notice to Kemper before the statutes of limitations expired of the facts upon which the amended claims are based, we should hold that the amended claims relate back to the filing of the original complaint. Kemper disputes that plaintiff provided it with timely notification.

Even assuming plaintiff timely notified Kemper of the facts underlying her amended claims regarding the corporate policies, a recent supreme court opinion decided subsequent to *Wolf* indicates that plaintiff's amended claims would not relate back to the filing of her original complaint because the original and amended claims did not involve the same injuries. In *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343 (2008), our supreme court adopted the "sufficiently-close-relationship" test as set forth in *In re Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1370 (N.D. Ill. 1985), to determine whether new allegations grew out of the same transaction or occurrence set up in the earlier pleadings. The supreme court held that under the sufficiently-close-relationship test, "a new claim will be considered to have arisen out of the same transaction or occurrence and will relate back if the new allegations as compared with the timely filed allegations show that the events alleged were close in time and subject matter and led to the same injury." *Porter*, 227 Ill. 2d at 360. Where the two sets of facts lead to arguably different injuries, the amendment is considered distinct from the original pleading and does not relate back. *Porter*, 227 Ill. 2d at 359.

Plaintiff here argues "the new counts also involve the same injury: [Plaintiff's] loss of control over assets of the joint corporation and the Joint Plan due in part to the negligent or fraudulent actions of Kemper." We disagree. In her original complaint brought in her capacity as trustee of the joint pension plan, plaintiff pleaded a cause of action premised on Kemper's allegedly wrongful

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conduct in allowing Shashi to deplete and convert the 775 policy, which insured Shashi's life for \$1 million and named the joint pension plan as beneficiary. Plaintiff alleged that Kemper wrongfully allowed Shashi to obtain almost \$140,000 in loans on the 775 policy without plaintiff's knowledge or consent. In her amended complaint brought in her individual capacity, plaintiff pleaded a cause of action premised on Kemper's allegedly wrongful conduct in allowing Shashi to deplete and convert three corporate policies (the 538, 549, and 550 policies) that were distinct from the 775 policy and that named the joint corporation (not the joint pension plan) as beneficiary. Plaintiff alleged that Kemper wrongfully allowed Shashi to obtain loans in the amount of \$17,192.65 on the 538 policy, \$12,100 on the 549 policy, and \$14,630 on the 550 policy without her consent.

The injuries allegedly arising from the depletion and conversion of the 538, 549, and 550 policies belonging to the joint corporation were different in amount and were separate and distinct from the injuries allegedly arising from the depletion and conversion of the 775 policy belonging to the joint pension plan. This case is similar to *Metzger v. New Century Oil & Gas Supply Corporation Income & Development Program*, 230 Ill. App. 3d 679 (1992). In *Metzger*, an investor filed suit against defendants seeking rescission of the sale of partnership units and damages. *Metzger*, 230 Ill. App. 3d at 681. After the limitations period expired, he amended the complaint to add two other investors as plaintiffs. *Metzger*, 230 Ill. App. 3d at 685. The circuit court dismissed certain of their amended counts as time-barred. *Metzger*, 230 Ill. App. 3d at 687. The appellate court affirmed, holding that the amended counts did not relate back to the filing of the original complaint because each plaintiff was alleged to have suffered a distinct injury resulting from a distinct sale. *Metzger*, 230 Ill. App. 3d at 699. Similarly, in the present case, the original and

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amended claims were filed by plaintiff in different capacities and involved distinct policies, beneficiaries, and fraudulent transactions culminating in distinct amounts of injuries. Accordingly, plaintiff's amended claims regarding Kemper's allegedly wrongful conduct in allowing Shashi to deplete and convert the corporate policies do not relate back to the filing of the original complaint and were properly dismissed by the circuit court.

Next, plaintiff contends the statutes of limitations for her amended claims against Kemper were tolled during her bankruptcy proceedings from January 1996 to March 2003 because during that time her cause of action against Kemper was an asset of the bankruptcy estate and under the control of the trustee in bankruptcy. Plaintiff points to a statement by the supreme court in the earlier appeal of this action that "plaintiff was without authority to prosecute her claims [against Kemper] in Cook County without the trustee's approval." *Paul*, 223 Ill. 2d at 105. Plaintiff contends "it was not until the bankruptcy court agreed to abandon the lawsuits back to Plaintiff in late March 2003 that she was able to proceed with the action and reinstate the case." Plaintiff further argues that even after the trustee abandoned the lawsuits back to her in March 2003, she was unable to pursue her amended claims against Kemper until October 2006, when the supreme court resolved defendants' appeal from the circuit court's order reinstating the case. Accordingly, plaintiff contends she was "legally disabled" from pursuing her amended claims against Kemper from January 1996 through October 2006 and therefore we should deduct 10 years and 9 months from any determination of the statutes of limitations. After deducting those 10 years and 9 months, plaintiff's amended claims regarding Kemper's allegedly wrongful conduct in allowing Shashi to deplete and convert the corporate policies would be considered timely filed.

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Plaintiff's argument is unavailing. The record indicates that when plaintiff filed for personal bankruptcy, her cause of action against Kemper was limited to the allegations of wrongful conduct committed by Kemper in allowing Shashi to deplete and convert the 775 policy. Thus, it was only that particular cause of action against Kemper that became an asset of the bankruptcy estate; the cause of action regarding Kemper's allegedly wrongful conduct in allowing Shashi to deplete and convert the corporate policies never became an asset of the bankruptcy estate, never came under the control of the trustee, and was not the subject of the appeal addressed by the supreme court in October 2006. Accordingly, the bankruptcy proceedings and subsequent appeal to the supreme court in no way constituted a "legal disability" precluding plaintiff from commencing a separate action from January 1996 through October 2006 with respect to Kemper's allegedly wrongful conduct in allowing Shashi to deplete and convert the corporate policies. There was no tolling of the statutes of limitations.

We also note there was no "legal disability" as that term is used by the legislature. Section 13-211 of the Code of Civil Procedure provides for tolling of the limitations period when plaintiff is under a legal disability. 735 ILCS 5/13-211 (West 2006). The legislature defines "[p]erson under legal disability" as:

“[A] person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his or her person or estate, or (b) is a person with mental illness or is a person with developmental disabilities and who because of his or her mental illness or developmental disability is not fully able to manage his or her person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends

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or wastes his or her estate as to expose himself or herself or his or her family to want or suffering." 5 ILCS 70/1.06 (West 2006).

Plaintiff here does not fall within the legislature's definition of a person under legal disability.

For the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not address the other arguments on appeal.

Affirmed.