2014 IL App (2d) 130750-U
No. 2-13-0750
Order filed April 1, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LARRY L. VOGA, LYLE L. VOGA, and LOIS ENGLERT,	)	Appeal from the Circuit Court of Kendall County.
Plaintiffs-Appellants,	)	
v.	)	No. 10-L-23
JAMES H. NASH,	)	Honorable Timothy J. McCann,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in ruling that counts I through III of plaintiffs' second amended complaint were time-barred under the repose provision of subsection 13-214.3(d) of the Code. Moreover, count IV was untimely under the limitations period provided for in subsection 13-214.3(b) of the Code. Therefore, we affirmed the trial court's grant of defendant's motion to dismiss the second amended complaint.

¶ 2 Plaintiffs, Larry L. Voga, Lyle L. Voga, and Lois Englert, brought suit against defendant, attorney James H. Nash, alleging professional negligence in drafting estate planning documents for plaintiffs' father, LeRoy Voga (Voga). The trial court granted defendant's motion to dismiss, ruling that the claims were time-barred under subsection 13-214.3(d) of the Code of Civil

Procedure (Code) (735 ILCS 5/13-214.3(d) (West 1994)).[1] We affirm the trial court's grant of defendant's motion to dismiss.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs originally brought their action in January or February 2009 but voluntarily dismissed it without prejudice. They filed a new, two-count action in February 2010, alleging as follows. Voga hired defendant in late 2002 to prepare an estate plan to benefit his children. On January 22, 2003, Voga executed a trust agreement naming himself as trustee and non-party Linda Bryant Frisbee, plaintiffs' sister, first successor trustee. On the same day, Voga executed a document giving Linda power of attorney. The trust agreement's terms demonstrated that its primary purpose was to benefit plaintiffs and Linda. The trust gave: Linda a specific distribution of farm land in DeKalb County; Larry a specific distribution of farm land in De Kalb County; Lyle a specific distribution of land in Kendall County, and all farm equipment and vehicles; and Lois a residuary distribution. Each child was also to receive 25% of the remaining trust property after the specific distributions of land. Defendant represented to Voga that using a trust to pass his property to his children would avoid or minimize any taxes on the estate. About one week before his death on September 26, 2006, Voga told defendant and his children that he wanted to replace Linda with Lyle as first successor trustee, "but this was not accomplished."

[1] Public Act 89-7 (referred to as the Tort Reform Act) (eff. March 9, 1995) removed subsection (d) from section 13-214.3 while leaving the remainder of the statute in place. *Perlstein v. Wolk*, 218 Ill. 2d 448, 450-51 (2006). However, in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 467 (1997), the supreme court declared Public Act 89-7 void in its entirety. Therefore, the 1994 version of the statute, which contains subsection (d), remains in effect. See *Perlstein*, 218 Ill. 2d at 451-52.

Linda, through her power of attorney, amended Voga's trust to include an interest for Lois, which was not in the original trust and was contrary to Voga's intentions. Further, the power of attorney was not legally sufficient to give Lois her interest as set out in the trust amendment.

¶ 5 Count I alleged professional negligence against defendant, in that defendant allegedly, among other things: negligently misrepresented tax consequences of using a trust in the estate plan; failed to use proper estate plan methods to avoid or minimize taxes; negligently drafted the trust so that Voga's intent for his children was thwarted; negligently failed to set out whether grain produced by the farm and the grains' proceeds were to be part of the trust; negligently failed to replace Linda with Lyle as trustee, contrary to Voga's express direction and intention; negligently attempted to give Lois an interest in the trust, contrary to Voga's intent; and negligently drafted the power of attorney exercised by Linda, such that Lois failed to get her interest in the trust derived from the amendment. Plaintiffs alleged that as a result, they did not "receive as much as they should have" under the trust and were subjected to a greater amount of taxes.

¶ 6 Count II alleged that plaintiffs were third party beneficiaries of the trust and that defendant breached his fiduciary duty to them by: misrepresenting to Voga the tax consequences of the trust; failing to advise Voga as to other methods that would have reduced or eliminated taxes for his estate and beneficiaries; failing to properly draft the trust so that the beneficiaries received what Voga intended; and drafting the trust in a manner that did not realize Voga's intentions. Plaintiffs alleged that as a result, their distributions from the estate were decreased, and they had to pay greater taxes.

¶ 7 On May 3, 2010, defendant filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2010)). He argued that the

claims were time-barred by the repose provision of section 13-214.3(d) of the Code, which relates to attorney malpractice actions.

¶ 8 On July 12, 2010, plaintiffs filed a motion to stay or continue the motion to dismiss. They alleged that they had received a letter from attorney James Groat stating that defendant had told him that under the trust, Lyle was to receive all crops in the fields and in storage, which were worth over $200,000. They further alleged that the trust was missing its schedule A, which was the list of property to be included in the trust. Plaintiffs argued that the letter could implicate the doctrines of fraudulent concealment and equitable estoppel, which in turn affected the pertinent limitations period. They asked that the trial court stay or continue the motion to dismiss, allow them to take various discovery depositions, and provide them leave to file an amended complaint.

¶ 9 The trial court struck the hearing on the motion to dismiss and granted plaintiffs leave to take a discovery deposition of Groat. In Groat's deposition, he testified that plaintiffs were concerned about estate tax issues and shared their concerns with him. They were doing their own computer research about estate taxation, and Groat told them that they should get lawyers. When questioned about the time frame of the conversation, Groat testified that it was the "[e]nd of 2006 or beginning of 2007. [He was] not certain." When asked if plaintiff shared their taxation concerns with him between September 27 and October 27, 2006, Groat responded in the affirmative. Groat said that he told them to not fight and get lawyers "a bunch of times." When asked if he communicated this to plaintiffs when he met with them in October 2006, Groat replied, "Probably I did."

¶ 10 Groat also testified in his deposition that he called defendant after Voga died, on Lyle's behalf.[2] Groat asked who would receive the crops, the grain in the bins, and the machinery, and defendant said that Lyle would get all of those things. Groat said that the farms needed to be appraised for federal estate tax valuation purposes, and defendant replied that he did not think there would be a federal estate tax. Groat was "incredulous about his remark" and said that in his opinion, there would be such a tax.

¶ 11 On December 3, 2010, defendant filed an amended motion to dismiss pursuant to section 2-619(a)(5). In addition to his previous arguments, defendant argued that even if subsection 13-214.3(d) did not apply, Groat's testimony established that subsection 13-214.3(b)'s two-year discovery statute of limitations had expired. Defendant alternatively argued that the complaint should be dismissed under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) for failure to timely serve him.

¶ 12 Plaintiffs filed a five-count amended complaint on October 13, 2011. The amended complaint contained new counts of breach of fiduciary duty by fraudulent concealment (count III); aiding and abetting Linda's breach of fiduciary duty (count IV); and spoliation of evidence (count V).

¶ 13 Plaintiffs subsequently filed a four-count, second amended complaint on February 9, 2012, which no longer contained the spoliation of evidence claim. Plaintiffs' second amended complaint is the complaint at issue on appeal. Count I, professional negligence, contained allegations similar to those in the original (2010) complaint. Count I additionally alleged that defendant negligently failed to consider what was to be done with the farms' grain and the

[2] Groat testified that this conversation took place on October 27, 2006, or about one week later.

grains' proceeds, and he negligently drafted the trust such that it had insufficient liquidity to pay taxes and meet expenses. Plaintiffs alleged that they discovered the negligent acts "beginning in December 2007 and extending through 2008."

¶ 14 Count II of the second amended complaint was also substantially similar to that in the original complaint. Plaintiffs additionally alleged that defendant breached his fiduciary duty to them by failing to disclose that significant estate taxes would be assessed and misrepresenting to them that there would be no estate taxes due on the trust.

¶ 15 Count III, breach of fiduciary duty by fraudulent concealment, alleged as follows. Defendant owed plaintiffs a fiduciary duty because they were third party beneficiaries of the trust. After Voga's death, defendant represented to plaintiffs that there would be no estate taxes due. Plaintiffs first learned that taxes were actually due on the trust in December 2007, after an appraisal of trust assets. Defendant concealed that Linda's amendment to the trust was designed to take part of Lyle's interest and give the same to Lois, contrary to Voga's wishes and estate plan. Defendant assisted in making this amendment after Voga was "in a coma and incapacitated or thereafter"; defendant drafted the amendment "sometime around the date of" Voga's death. Defendant attempted to conceal the fact that Lois's interest would come from trust grain by telling Groat that Lyle would receive the grain; defendant assumed that Groat would relay this information to Lyle. The fraudulent misrepresentations were attempts to conceal that defendant had breached his fiduciary duty.

¶ 16 Count IV, entitled "Aiding and Abetting Breach of Fiduciary Duty," alleged as follows. As trustee of Voga's trust, Linda had a fiduciary duty to the trust beneficiaries. She breached this duty by favoring Lois at the expense of the other beneficiaries and by threatening the other beneficiaries with disinheritance if they attempted to bring an action against her or defendant.

Defendant aided and abetted Linda's wrongful activities by creating the trust amendment, concealing her breaches of fiduciary duty as trustee, and favoring some beneficiaries at the expense of others in derogation of Voga's estate plan.

¶ 17 On April 16, 2012, defendant moved to dismiss the second amended complaint pursuant to section 2-619 and Rule 103(b). Defendant again argued that subsection 13-214.3(d)'s two-year statute of repose applied and that even under subsection 13-214.3(b), Groat's testimony showed that the two-year discovery statute of limitations had passed. Defendant alternatively argued that the case should be dismissed under Rule 103(b) for failure to exercise reasonable diligence in serving him. Defendant further argued that: counts I and II were duplicative; count IV failed to state a cause of action and was untimely; and defendant could not be held liable under count IV because Linda's amendment was permitted by the trust's terms.

¶ 18 The trial court denied the motion to dismiss on August 30, 2012. It stated that plaintiffs alleged that they first learned of defendant's negligence in December 2007, and this allegation had to be taken as true for purposes of the motion to dismiss. Therefore, reasoned the court, the filing of the complaint on January 22, 2009, was within the two-year limitations period of section 13-214.3(b).

¶ 19 Defendant subsequently filed a motion to reconsider, which the trial court granted on February 6, 2013. The trial court stated that under section 13-214.3(d), "since the injury did not occur until the death of Leroy Voga, the action must have been commenced within 2 years of his death, unless letter[s] of office were issued. Letters of office were not issued following [Voga's] death," rendering the suit untimely.

¶ 20 On March 8, 2013, plaintiffs filed a motion for clarification, vacation, rehearing, and modification of the dismissal order. The trial court denied the motion on June 17, 2013. Plaintiffs timely appealed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, plaintiffs argue that the trial court erred in granting defendant's motion to dismiss under section 2-619(a)(5) of the Code. A section 2-619 motion admits the legal sufficiency of a complaint but asserts an affirmative matter that defeats the claim. *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 396 (2009). Section 2-619(a)(5), in particular, allows for the involuntary dismissal of an action that "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2010). A section 2-619 dismissal resembles the grant of a motion for summary judgment; we must determine whether a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal was proper as a matter of law. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). In making such an analysis, we will accept as true all well-pleaded facts and reasonable inferences therefrom, but not legal conclusions or unsupported conclusions of fact. *Racquest v. Grant*, 318 Ill. App. 3d 831, 836 (2000). We may consider all facts found in the pleadings, affidavits, and depositions in the record. *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 586 (2009). We review *de novo* a dismissal under section 2-619(a)(5). *Raintree Homes, Inc.*, 209 Ill. 2d at 254.

¶ 23 At issue in this case are the limitations periods contained in section 13-214.3 of the Code. That section states, in relevant part:

> "(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services *** must be

commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) Except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

(d) When the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975." 735 ILCS 5/13-214.3 (West 1994).

¶ 24 Subsection 13-214(b) is a statute of limitations incorporating the "discovery rule," which tolls the limitations period to the time the plaintiff knew or reasonably should have known of the injury. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10. Subsection 13-214(b) provides a two-year limitations period. 735 ILCS 5/13-214.3(b) (West 1994). At the same time, subsection 13-214.3(c) is a statute of repose that serves to curtail the "long tail" of liability that could otherwise result from the discovery rule. *Snyder*, 2011 IL 111052, ¶ 10. A statute of repose begins to run when an event occurs. *Id.* It is not tied to the existence of an injury but rather extinguishes liability after a fixed period of time. Section 13-214.3(c) provides a six-year statute of repose. 735 ILCS 5/13-214.3(b) (West 1994).

¶ 25 Subsection 13-214.3(d) contains an exception to subsections (b) and (c). *DeLuna v. Burciaga*, 223 Ill. 2d 49, 74 (2006). Subsection 13-214.3(d) provides distinct repose periods that

apply when the injury caused by the malpractice occurs upon the client's death. 735 ILCS 5/13-214.3(d) (West 1994)); *Wackrow v. Niemi*, 231 Ill. 2d 418, 424 (2008). Under subsection 13-214.3(d), if letters of office are issued or the decedent's will is admitted to probate, the action must be brought within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975 (755 ILCS 5/8-3(a) (West 2006)). 735 ILCS 5/13-214.3(d) (West 1994). In contrast, if no letters of office are issued and no will is admitted to probate, the action must be filed within two years of the death of the person to whom the professional services were rendered. *Id.* Here, it is undisputed that no letters of office were issued and no will was admitted to probate. Therefore, *if* subsection (d) applies, then the statute of repose period is two years from Voga's death.

¶ 26 Plaintiffs argue that because subsection (d) states, "the action *may be* commenced within 2 years after the date of the person's death" (emphasis added) (735 ILCS 5/13-214.3(d) (West 1994)), it demonstrates that the subsection is a permissive alternative that may be used when subsection (c)'s repose period has run. Plaintiffs cite *Khan v. Deutsche Bank*, 2012 IL 112219. *Khan* involved, among other things, the statute of limitations for actions against public accountants, contained in section 13-214.2 of the Code (735 ILCS 5/13-214.2 (West 2008)). *Id.* ¶¶ 67-68. Subsection (a) of the statute stated that such action " 'shall be' " brought within two years from the time the plaintiff knew or reasonably should have known of the act or omission. *Id.* ¶ 68 (quoting (735 ILCS 5/13-214.2(a) (West 2008))). Subsection (b) provided that " '[i]n no event shall' " the action be brought more than five years from the date of the action or omission, " '[p]rovided, however, that in the event that an income tax assessment is made or criminal prosecution is brought against a person, that person *may bring* an action against the public

accountant who prepared the tax return within two years from the date of the assessment or conclusion of the prosecution.' " (Emphasis added.) *Id.* (quoting (735 ILCS 5/13-214.2(b) (West 2008))).

¶ 27 One of the *Khan* defendants argued that the term "may" in subsection (b) was synonymous with the word "shall," such that the two-year period in subsection (b) did not extend the five year repose period. The supreme court disagreed, stating that under such a construction, there would be no need for the two-year provision in the first place. *Id.* ¶ 74. It stated, "The only reading that gives the proviso meaning is that it is a true exception to the repose period and that in the circumstances envisioned by that exception, the taxpayer has an additional two years beyond the five-year repose period to bring an action against the accountant from the date of the assessment or the conclusion of the criminal prosecution." *Id.*

¶ 28 We observe that when the legislature uses the word "may," it is generally considered as expressing a permissive or directory reading while the word "shall" is generally considered to express a mandatory reading. *People v. Graham*, 406 Ill. App. 3d 1183, 1194 (2011). This principle supports plaintiffs' argument. However, the rule is not inflexible, as "may" can be construed to mean "must" or "shall" in certain situations, such as where it is necessary to carry out the legislature's intent. *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.*, 225 Ill. App. 3d 851, 855 (1992). *Khan* did not change this principle of law, but rather held that, in the context of the statute before it, the term "may" had to be given a permissive reading for the provision to have any effect. See *Khan*, 2012 IL 112219, ¶ 74.

¶ 29 In the instant case, it is clear that subsection 13-214.3(d) is a statute of repose. See *Wackrow*, 241 Ill. 2d at 426 (referring to subsection 13-214.3(d) as a "repose provision"). If it is permissive, it can only be given effect if it can apply after subsection (c)'s six-year repose period

had run, as plaintiffs argue. However, our supreme court has rejected this notion, as shown in *Petersen v. Wallach*, 198 Ill. 2d 439, 445 (2002), and *Wackrow*. In *Petersen*, the supreme court stated that if the alleged injury caused by the attorney's act or omission did not occur until the client's death, under subsection 13-214.3(d) "a plaintiff has two years to file a claim unless letters of office are issued or the will is admitted to probate." *Petersen*, 198 Ill. 2d 439, 445 (2002). If neither of the two events occur, "a plaintiff has the full two years from the date of the death of the client to file her claim." *Id.* at 446. The supreme court's analysis shows that it considered subsection (d)'s two-year repose provision independent of the six-year repose provision in subsection (c).

¶ 30 In *Wackrow*, the plaintiff argued, just as plaintiffs argue here, that section 13-214.3(d)'s repose provision was triggered only after subsection (c)'s six-year repose period had expired, thereby extending the time for the claim to be filed. *Wackrow*, 241 Ill. 2d at 426. The supreme court disagreed, stating that while subsection (d) created an exception to the six-year repose period, that exception was not in addition to the two-year statute of limitations and the six-year statute of repose, but rather instead of those periods. *Id.* The supreme court recognized that such an interpretation meant that subsection (d) could shorten the limitations period for legal malpractice claims such that a plaintiff's action could be barred before he or she learned of his or her injury. *Id.* at 427.

¶ 31 *Petersen* and *Wackrow* demonstrate that our supreme court considers the two-year repose period in subsection (d) mandatory rather than permissive. Nothing in *Khan* changes this analysis. Therefore, if subsection (d) applies, plaintiffs had two years from Voga's death to bring the action.

¶ 32 Defendant cites *Petersen* and *Wackrow* in arguing that the trial court correctly ruled that subsection 13-214.3(d) applies. He argues that under these cases, any action for damages against him arising out of his professional services to Voga had to brought on or before September 26, 2008, the two-year anniversary of Voga's death, making plaintiffs' suit (first filed in February 2009) time-barred. We therefore turn to the facts of *Petersen* and *Wackrow*.

¶ 33 In *Petersen*, the plaintiff brought suit against the defendant attorney on November 9, 1998. *Petersen*, 198 Ill. 2d at 441. She alleged that in 1989, the defendant advised her mother to make substantial taxable *inter vivos* gifts to the plaintiff, which resulted in increased tax liability when her mother died on November 10, 1996. *Id.* at 441-42. The trial court dismissed the action as untimely. *Id.* at 443. Before the supreme court, the plaintiff argued that she brought her suit within two years of her mother's death in conformance with subsection 13-214.3(d). *Id.* at 442-43. The defendant argued that subsection 13-214.3(d) was not implicated because it applied only to probate distributions and that subsection 13-214.3(c)'s six-year statute of repose barred the plaintiff's claim. *Id.* at 442, 444. The supreme court stated that subsection 13-214.3(d)'s language "unambiguously supports its application to all cases when the alleged injury caused by the attorney's act or omission does not occur until the death of the person for whom the professional services were rendered," and there was no language in the statute excluding actions involving nonprobate distributions of assets. *Id.* at 445. Therefore, subsection 13-214.3(d) applied to the plaintiff's action. *Id.* at 443-44, 448.

¶ 34 In *Wackrow*, the plaintiff alleged as follows. In April 2002, the defendant attorney prepared an amendment to the living trust of the plaintiff's brother, James Woods. The amendment provided that the plaintiff would get Woods's house or $300,000 from his estate. Woods died in August 2002. *Wackrow*, 231 Ill. 2d at 420. The estate would not turn over the

property or money, and the probate court denied the plaintiff's claim against the estate. *Id.* at 421. In December 2004, the plaintiff filed her malpractice action against the defendant, alleging that he failed to exercise reasonable care in drafting the trust amendment, because a title search would have revealed that a trust, rather than Woods individually, actually owned the property. *Id.* The trial court granted the defendant's motion to dismiss the action under subsection 13-214.3(d). *Id.*

¶ 35 The supreme court agreed. It stated that, based on *Petersen*, it needed to determine whether the injury caused by the malpractice occurred upon the death of Woods, the client. *Id.* at 424. The supreme court stated that, under the plaintiff's allegations:

> "it is clear that the injury in this case did not occur until the death of Woods. Plaintiff alleges legal malpractice in the drafting of the amendment to Woods' trust. Because Woods could have revoked that amendment or changed the beneficiary prior to his death, the injury did not occur until Woods' death. Consequently, section 13-214.3(d) applies to plaintiff's claim." *Id.* at 425.

The court rejected the plaintiff's argument that the defendant's services were also rendered to her, as a third-party beneficiary of the contract, and that the injury occurred when Woods' estate denied her claim. *Id.*

¶ 36 Defendant additionally cites *Snyder*, 2011 IL 111052. There, the plaintiff alleged that the defendant attorney negligently prepared a quitclaim deed that failed to convey certain real estate to her and her husband, Wilbert, as joint tenants with rights of survivorship. *Id.* ¶ 1. After Wilbert's death, the plaintiff learned that legal title to the property was held in a land trust, rather than by Wilbert individually. The sole beneficial interest in the land trust went to Wilbert's son, who was the plaintiff's stepson. *Id.* The trial court granted the defendant's motion to dismiss on

the basis that the injury occurred at the time the quitclaim deed was prepared, and subsection 13-214.3(c)'s six-year statute of repose therefore barred the claim. *Id.* ¶ 5. Plaintiff took the position that although an injury occurred when the deed was prepared, an additional injury occurred when Wilbert died. *Id.* ¶ 12. Relying on *Wackrow*, the plaintiff argued that Wilbert could have corrected the defendant's error at any time prior to his death. *Id.* ¶ 14.

¶ 37 The supreme court stated that there was a fundamental difference between the case before it and *Wackrow*, in that had Wilbert held legal title to the premises, a joint tenancy would have immediately conveyed to the plaintiff a one-half undivided interest entitling her to immediate possession and enjoyment of the premises, along with a present interest of survivorship. *Id.* In contrast, in *Wackrow* the trust amendment was intended to take effect only upon Woods' death, with the plaintiff there receiving nothing until that time. *Id.* In *Wackrow*, "[t]he sole injury occurred when Woods died and the trust amendment became operative." *Id.*

¶ 38 Plaintiffs here argue that their case is not one of a "failed conveyance" such as in *Wackrow* and *Snyder*, but rather "the beneficiaries received the property that [Voga] intended for them to receive through his Trust, but the mischief occurred after [his] death." Plaintiffs argue that any " 'at death' " analysis is irrelevant because defendant's wrongful actions "occurred before, around the time of, and after the death of" Voga.

¶ 39 Plaintiffs cite *In re Estate of Zuckerman*, 218 Ill. App. 3d 325 (1991), where the court stated:

> "The declaration of trust immediately creates an equitable interest in the beneficiary although the enjoyment of that interest is postponed with the death of the settlor. The fact that the beneficiary's actual enjoyment of the trust is contingent upon the settlor's

> death does not negate the existence of a present interest in the beneficiary during the settlor's lifetime."

Plaintiffs also cite *In re Estate of Michalak*, 404 Ill. App. 3d 75, 83-84 (2010) (a beneficiary in a trust has an interest the moment the trust is created, even though the beneficiary does not receive the property until the settlor's death).

¶ 40 Plaintiffs additionally cite another portion of *Khan* dealing with when the statute of limitations began to run for the plaintiffs' claims against the defendants from Deutsch Bank. The parties agreed that the five-year statute of limitations in section 13-205 of the Code (735 ILCS 5/13-205 (West 2008)), which pertained to all civil actions not otherwise provided for, applied. *Khan*, 2012 IL 112219, ¶ 19. That section required that a suit be " 'commenced within 5 years next after the cause of action accrued.' " *Id.* (quoting 735 ILCS 5/13-205 (West 2008)). The court stated that a cause of action accrues when facts exist that authorize bringing the cause of action, and that the statute of limitations begins to run when a party knows or reasonably should know that an injury occurred and that it was wrongfully caused. *Id.* ¶¶ 20-21. The supreme court held that the limitations period for the plaintiffs' action, which alleged that the defendants advised them on improper tax shelters, began to run when the Internal Revenue Service issued a notice of deficiency to the taxpayer. *Id.* ¶ 45.

¶ 41 After reviewing the cases, we agree with defendant that the trial court properly applied subsection 13-214.3(d)'s two-year repose provision to counts I and II. As stated, the relevant inquiry under subsection (d) is whether the injury caused by the malpractice did not occur until the client's death. *Wackrow*, 231 Ill. 2d at 420; *Petersen*, 198 Ill. 2d at 445. In this manner, the statute is distinguishable from that in *Khan*, where the test was when the cause of action accrued. In count I of the second amended complaint, plaintiffs alleged that defendant was professionally

negligent in: advising Voga to use a trust; drafting the trust's terms; drafting the power of attorney; failing to replace Linda with Lyle as successor trustee; and drafting the trust's amendment. Plaintiffs alleged that they were harmed by failing to receive what they should have under the trust and by an increased estate tax liability. None of these allegations relate to activities that occurred after Voga's death. Rather, as in *Petersen* and *Wackrow*, the injuries of not receiving the intended property and being subject to additional taxes on the property occurred upon Voga's death, when the trust's terms were carried out. Similar to *Wackrow*, Voga could have revoked the trust[3] or changed the beneficiaries before his death, so the injuries could not have occurred before then. See *Wackrow*, 231 Ill. 2d at 425. Tellingly, *Petersen* also involved allegations of increased tax liability under a trust, and the supreme court held that section 13-214.3(d) applied because the injury caused by the attorney's negligent act did not occur until the client's death. *Petersen*, 198 Ill. 2d at 443-44, 448.

¶ 42 Plaintiffs attempt to distinguish *Wackrow* as a "failed conveyance" case is without merit, as our supreme court stated in *Petersen* that subsection 13-214.3(d)'s language "unambiguously supports its application to *all cases* when the alleged injury caused by the attorney's act or omission does not occur until the death of the person for whom the professional services were rendered" (emphasis added), and it applied the provision to a situation where the plaintiff received property from the decedent. *Petersen*, 198 Ill. 2d at 445. That is, *Petersen* makes it clear that subsection 13-214.3(d) does not apply to only those situations where there are failed conveyances.[4] Plaintiffs' reliance on *In re Estate of Zuckerman* and *In re Estate of Michalak* is

[3] The trust's terms made it revocable.

[4] Tellingly, plaintiffs do not even cite *Petersen* in their briefs, let alone attempt to directly distinguish it.

also unconvincing, as those cases do not even involve attorney malpractice, much less section 13-214.3(d).

¶ 43 Turning to count II, entitled "Breach of Contract/Third Party Beneficiaries/Fiduciary Duty," plaintiffs alleged that defendant breached his fiduciary duty to them as third-party beneficiaries by: the failures alleged in count I; failing to properly advise Voga about tax consequences; failing to disclose to plaintiffs that significant estate taxes would be assessed against them; misrepresenting to plaintiffs that there would be no estate taxes due; and failing to disclose Voga's "estate and Trust plan" and related documents. Plaintiffs alleged that as a result, they suffered loss or diminutions of their distributions from the trust and had to pay greater taxes. As with count I, the injuries to which plaintiffs refer are grounded in the alleged negligent legal advice defendant provided Voga, with the injuries arising upon Voga's death when the transfers of property became effective. Although plaintiffs also refer to defendant's alleged conduct after Voga's death in misleading them about taxes, these actions did not cause them to receive less from the estate or have to pay more in taxes, which are their alleged injuries. Therefore, we conclude that subsection 13-214.3(d) also applies to count II.

¶ 44 Regarding counts III and IV, plaintiffs argue that the trial court erred in ruling that fraudulent concealment and aiding and abetting breaches of fiduciary duty fall under section 13-214.3.

¶ 45 In count III, breach of fiduciary duty by fraudulent concealment, plaintiffs alleged that: defendant owed them a fiduciary duty due to their third party beneficiary status; after Voga's death, defendant represented to them that there would be no estate taxes due; defendant concealed that Linda's trust amendment was designed to take part of Lyle's interest and give it to Lois; defendant attempted to conceal the fact that Lois's interest would come from trust grain by

telling Groat that Lyle would receive the grain; and defendant made the fraudulent misrepresentations with the intent of concealing that he had breached his fiduciary duty.

¶ 46 Plaintiffs argue that *DeLuna* held that the fraudulent concealment statute (735 ILCS 5/13-215 (West 2006)) trumps section 13-214.3. Section 13-215 states: "If a person liable to an action fraudulently conceals the cause of action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such a cause of action, and not afterwards." 735 ILCS 5/13-215 (West 2006)). To succeed under this provision, a plaintiff must show that the defendant engaged in affirmative acts or representations so as to prevent the discovery of the cause of action or lead the plaintiff to delay filing a claim. *J.S. Reimer, Inc. v. Village of Orland Hills*, 2013 IL App (1st) 120106, ¶ 51. Fraudulent concealment as by codified section 13-215 is not a cause of action in and of itself but rather serves as an exception to the limitations periods for the underlying cause of action. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1154 (2011). In *DeLuna*, our supreme court held that section 13-215 was an exception to the statute of repose contained in subsection 13-214.3(c), stating, "It is our belief that the legislature originally intended that section 13-215 apply to both medical malpractice and legal malpractice limitation enactments." *DeLuna*, 223 Ill. 2d at 73-74. Although *DeLuna* specifically mentioned subsection 13-214.3(c), we agree with plaintiffs that the court's broad language would also encompass section 13-215 applying as an exception to subsection 13-214.3(d).

¶ 47 Still, courts do not apply section 13-215 to toll the limitations period where the plaintiff either discovered the fraudulent concealment, or should have discovered the fraudulent concealment through ordinary diligence, and a reasonable time remains within the remaining limitations period. *J.S. Reimer, Inc.*, 2013 IL App (1st) 120106, ¶ 51. That is the situation here.

Plaintiffs alleged in count III that they received copies of the trust and amendment on about October 9, 2006. According to Groat's deposition, they were already concerned with estate taxes in October 2006.[5] Further, although plaintiffs alleged that defendant represented to them through Groat that there would be no estate taxes due, Groat's testimony clearly shows that he thought there would be such taxes, and he repeatedly told plaintiffs to retain lawyers. As such, plaintiffs should have discovered the alleged fraudulent concealment through ordinary diligence during the time they were talking to Groat, meaning that plaintiffs had well over 1½ years to file their claim before the September 26, 2008, deadline under subsection 13-214.3(d). We conclude that, as a matter of law, a reasonable time remained to file the action, so plaintiffs may not assert section 13-215's fraudulent concealment exception. *Cf. Turner v. Nama*, 294 Ill. App. 3d 19, 28 (1997) (describing the "more than eight months" left in the repose period after the decedent should have discovered the fraudulent concealment as "ample time in which to exercise due diligence to file suit"); *Real v. Kim*, 112 Ill. App. 3d 427, 436 (1983) (10 months left in limitations period after the decedent knew or should have known of his possible cause of action was sufficient time in which to bring an action); *Sabath v. Mansfield*, 60 Ill. App. 3d 1008, 1015 (1978) (eight months remaining after inducement for delay had passed was, as a matter of law, ample time to file suit); see also *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 926

[5] Although Groat testified at one point that he spoke to plaintiffs either at the "[e]nd of 2006 or beginning of 2007[, he was] not certain," he pinpointed the date of his call to defendant on Lyle's behalf regarding the grain and taxes as either October 27, 2006, or about one week later. Even using the former time frame of "[e]nd of 2006 or beginning of 2007," our analysis of this issue would not change.

(1998) ("We have held that as little as six months remaining in a statute of limitations period is 'ample time' for a plaintiff to bring suit.' ").

¶ 48 Plaintiffs argue that the "reasonable time rule in the application of the discovery rule" was struck down by the supreme court in *Hermitage v. Contractors Adjustment*, 166 Ill. 2d 72, 83-84 (1995). We note that we are applying the "reasonable time rule" to a repose provision, rather than subsection 13-214.3(b)'s statute of limitations provision (which incorporates the discovery rule). Moreover, the *Hermitage* court specifically declined to address the application of the rule to fraudulent concealment, as the issue was not before it. *Id.* at 83. Subsequently, in *Morris v. Margulis*, 197 Ill. 2d 28, 38 (2001), the supreme court applied the principle that section 13-215 does not toll the running of the limitation period if a reasonable time remains in the period when the plaintiff discovers the fraudulent concealment. Such application demonstrates that *Hermitage* did not terminate this principle. See also *Horbach v. Kaczmarek*, 288 F.3d 969, 976 (2002) (*Hermitage* did not abandon "reasonable time" rule as applied to fraudulent concealment).

¶ 49 Plaintiffs cite *Anderson v. Marquette National Bank*, 164 Ill. App. 3d 626, 636 (1987), in which the court found the plaintiff's action timely based on the allegedly fraudulent concealment of information regarding an *inter vivos* trust. *Anderson* does not assist plaintiffs here, as it did not deal with section 13-215 or the "reasonable time" rule.

¶ 50 Plaintiffs also cite *Cripe v. Leiter*, 291 Ill. App. 3d 155, 158 (1997), where the court stated that legal malpractice and common law fraud are distinct causes of action. The *Cripe* plaintiff alleged legal malpractice but included a separate claim of common law fraud for fraudulent billing. *Id.* at 156-57. The *Cripe* court held that the plaintiff could seek punitive

damages for the fraud claim but not the legal malpractice claim, for which punitive damages were prohibited under section 2-115 of the Code (735 ILCS 5/2-115 (West 1994)). *Id.* at 158.

¶ 51 Here, plaintiffs specifically alleged fraudulent concealment in count III, which is a form of common law fraud. *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1086 (1998). The fraudulent concealment allegations relate to the underlying allegations of legal malpractice, as opposed to a fraudulent act independent of legal advice, as with the billing dispute in *Cripe*. *Cf. Kennedy v. Grimsley*, 361 Ill. App. 3d 511, 514 (2005) (where the plaintiff's allegations stemmed from the attorney-client relationship and the defendant's lack of knowledge and ability, it constituted a legal malpractice claim rather than a fraud claim). Indeed, by its nature, fraudulent concealment relates to concealing another cause of action, rather than being a totally independent cause of action. See *Wisniewski*, 406 Ill. App. 3d at 1154 (fraudulent concealment is not a cause of action in and of itself but rather serves as an exception to the limitations periods for the underlying cause of action). Nothing in *Cripe* defeats the potential application of the fraudulent concealment statute (section 13-215) here or the related analysis of the "reasonable time" rule.

¶ 52 Last, looking at count IV, plaintiffs alleged that Linda breached her fiduciary duty to them by favoring Lois at the expense of the other beneficiaries and by threatening plaintiffs with disinheritance if they attempted to bring an action against her or defendant. Plaintiffs alleged that defendant aided and abetted Linda's breaches of fiduciary duty by creating the trust amendment, concealing Linda's breaches of fiduciary duty, and favoring some beneficiaries at the expense of others, contrary to Voga's estate plan. Plaintiffs alleged that they were damaged by having to expend significant attorney fees to determine and protect their interests.

¶ 53 Plaintiffs cite *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 28-29 (2003), where the court held that an attorney could be held liable for aiding and abetting a client in

committing a breach of a fiduciary duty, and *Hefferman v. Bass*, 467 F.3d 596, 601 (7th Cir. 2006), where the Seventh Circuit held, applying Illinois law, that the plaintiff adequately stated a claim that the defendant attorney aided and abetted the plaintiff's business partner's breach of fiduciary duty. However, here the trial court did not dismiss count IV (or any other counts) based on failure to state a claim, but rather on the basis that they were time-barred.

¶ 54 Plaintiffs argue that they have five years after the discovery of a breach of fiduciary duty to bring their action, citing *Fuller Family Holdings v. Northern Trust*, 371 Ill. App. 3d 605 (2007) (under section 13-205,[6] the plaintiff had five years to bring a breach of fiduciary claim against the defendant trustee bank), and *McMahan v. Deutsche Bank AG*, 938 F. Supp. 2d 795, 802 (2013) (applying section 13-205 to claim that bank assisted an accountant's breach of fiduciary duty).

¶ 55 Defendant argues that the above-cited cases do not apply because they do not involve claims of an attorney aiding and abetting a breach of fiduciary duty. Defendant maintains that the appellate court has already held that subsection 13-214.3(b)'s two-year statute of limitations applies, citing *800 South Wells Commercial, LLC v. Horwood Marcus & Berk Chartered*, 2013 IL App (1st) 123660. There, the court determined that subsection 13-214.3(b) applied to the plaintiff's claim that an attorney aided and abetted the plaintiff's lessor's breach of fiduciary duty by advising the lessor on ways to divert the plaintiff's option to acquire a parking garage and by preparing the necessary documents. *Id.* ¶ 14. The court stated that the two-year limitations period "applies to all claims against an attorney arising out of acts or omissions in the performance of professional services, and not just legal malpractice claims or claims brought

[6] As stated, section 13-205 provides a five-year statute of limitations to all civil actions not otherwise provided for. *Khan*, 2012 IL 112219, ¶ 19.

against an attorney by a client." *Id.* ¶ 13. Defendant argues that *800 South Wells Commercial, LLC*, shows that the entirety of section 13-214.3 applies to claims against an attorney for aiding and abetting. According to defendant, his alleged wrongful action in count IV of creating the trust amendment when Linda held a valid power of attorney arises in the context of providing professional services to Voga, and therefore count IV was properly dismissed under subsection 13-214.3(d) as time-barred.

¶ 56 Plaintiffs respond that the reasoning in *800 South Wells Commercial, LLC*, is contrary to that in *Ganci v. Blauvelt*, 294 Ill. App. 3d 508 (1998), and several federal cases. The *Ganci* court held that section 13-214.3(b) did not apply to the plaintiff's claim for contribution against an attorney because the complaint did not allege a breach of the attorney's duty to the plaintiff and was not an action for legal malpractice. *Id.* at 515. *800 South Wells Commercial, LLC*, rejected *Ganci's* holding on the basis that the *Ganci* court did not explain how it reached its conclusion, and the statute's plain language indicated a contrary result. *800 South Wells Commercial, LLC*, 2013 IL App (1st) 123660, ¶ 15.

¶ 57 After briefing on this case was completed, our supreme court issued its decision in *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶¶ 22-24, overruling *Ganci* and agreeing with the result in *800 South Wells Commercial, LLC*. The supreme court stated that the "arising out of language" in subsections 13-214.3(b) and (c)[7] showed that the legislature intended that the statute apply to all claims against attorneys concerning their provision of

[7] Subsections (b) and (c) refer to "[a]n action for damages based on tort, contract, or otherwise (i) against an attorney *arising out of* an act or omission in the performance of professional services." (Emphasis added.) 735 ILCS 5/13-214.3(b), (c) (West 1994).

professional services, as the statute does not contain any express limitation requiring that the services were rendered to the plaintiff or restricting the claims to legal malpractice. *Id.* ¶ 23.

¶ 58 Although defendant seeks to apply subsection 13-214.3(d) to count IV, that subsection applies only to situations where the injury caused by the attorney's act or omission does not occur until the death of the attorney's client. 735 ILCS 5/13-214.3(d) (West 1994). Here, plaintiffs have alleged that defendant may have created the trust amendment after Voga's death, and his alleged action of concealing Linda's breaches of fiduciary duty also relate to the time after Voga's death. Still, because defendant's alleged conduct relates to his professional services, subsections (b) and (c) apply under our supreme court's decision in *Riseborough*.

¶ 59 According to plaintiffs' complaint, they received a copy of Voga's trust and the amendment on October 9, 2006. Groat testified that plaintiffs met with him in October 2006, and they were concerned estate taxes and the farms' grain. Groat called defendant on Lyle's behalf either on October 27, 2006, or about one week later, to talk about the estate taxes, crops, and machinery. Groat repeatedly advised plaintiffs to get attorneys during this time. Therefore, plaintiffs knew or should have known of their alleged injuries under count IV by November 2006, and under subsection 13-214.3(b), they had two years from this date to bring this claim (*i.e.*, until November 2008). 735 ILCS 5/13-214.3(b) (West 1994). However, plaintiffs did not bring their original action until 2009. Accordingly, count IV is time-barred under subsection 214.3(b), and the trial court committed no error in dismissing it.[8]

[8] Although the trial court dismissed the entire complaint under subsection (d), we may affirm the trial court's judgment on any basis provided by the record, regardless of the trial court's reasoning. *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 62. Here, defendant's motions to dismiss consistently raised the limitations period in subsection (b)

¶ 60 Based on our resolution that the trial court did not err in granting defendant's motion to dismiss counts I, II, and III of the second amended complaint under subsection 214.3(d) and our affirmance of the dismissal of count IV under subsection 214.3(b), we do not address defendant's alternative arguments that the entire complaint was untimely pursuant to subsection 214.3(b) and that dismissal was appropriate due to plaintiffs' failure to comply with Rule 103(b).

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we affirm the judgment of the circuit court of Kendall County.

¶ 63 Affirmed.

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as an alternative basis for dismissal, so it is appropriate for us to rely on that provision.