NOTICE
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2014 IL App (5th) 110555-U

NO. 5-11-0555

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

MICHAEL B. CONSTANCE,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellee and	) St. Clair County.
Cross-Appellant,	)
	)
v.	) No. 10-L-213
	)
EDWARD F. BRENNAN,	)
	) Honorable
Defendant-Appellant and	) Andrew J. Gleeson,
Cross-Appellee.	) Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Chapman and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: The statute of limitations expired in the plaintiff's claim where he filed it more than five years after acquiring actual notice of the defendant's breach of his fiduciary duties.

¶ 2 The plaintiff, Michael B. Constance, and the defendant, Edward F. Brennan, are lawyers who practiced law together along with another attorney, Judy Cates, beginning in June 1987 and ending in early 1997. The attorneys practiced law together in a law firm organized as a professional corporation and conducting business as Brennan, Cates & Constance, P.C. Cates is not a party to this lawsuit. In September 1992, Brennan entered into a legal representation agreement with professional tennis player Jimmy Connors, in which Brennan agreed to provide legal services to Connors on a variety of matters. The legal representation agreement provided that Brennan would receive 20% of Connors' gross earnings from his interest in "the J. Connors Group, Inc." and 20% of the gross proceeds in the event of a sale of that interest. This lawsuit concerns Constance's claim, as a shareholder of the law firm, to a portion of the fees generated as a result of the legal services contract. After a bench trial, the circuit court imposed a constructive trust upon Brennan's share of the Connors' fees and awarded Constance the sum of $1,640,796 from those fees. Brennan appeals the circuit court's judgment in favor of Constance and raises several legal and factual challenges to the circuit court's award. Constance filed a cross-appeal challenging the amount of the circuit court's award. For the following reasons, we reverse, holding that Constance's claim was not timely filed under the applicable statute of limitations.

¶ 3 BACKGROUND

¶ 4 Constance and Brennan are both experienced lawyers and have practiced law since the 1960s. When they organized their law firm with Cates, each of the three lawyers received equal shares of the corporation. Brennan served as the president of the corporation, Cates served as the vice-president, and Constance served as the treasurer and secretary.

¶ 5 At the time the attorneys formed the corporation, they each signed an employment contract which provided that fees, compensation, and other things of value received or realized as a result of the rendition of legal services would be paid to the corporation. The contract also provided that, upon withdrawal from the firm, each attorney was entitled to take all case records, files, and work papers, without lien or claim of the corporation, upon payment of all costs and case advances outstanding in said files.

¶ 6 The attorneys also signed a stock redemption agreement that provided that upon the voluntary withdrawal of a shareholder, the shareholder was required to sell his or her shares back to the corporation at their book value. The stock redemption agreement also provided that the shareholder was entitled to take files, without lien or claim of the remaining shareholders, upon the payment of all costs and case advances outstanding in said files.

¶ 7 Beginning in February 1991, Brennan began providing legal services to Connors on a variety of matters. On September 18, 1992, Brennan and Connors entered into the legal representation agreement in which Brennan agreed to continue to perform legal services for Connors. Pursuant to the agreement, Connors agreed to pay Brennan, as attorney fees for past and future legal services, "20% of the gross earnings of his present interest of 12-1/2% in the J. Connors Group, Inc. and in the case of a sale of that interest to pay the equivalent of 20% of the gross of all proceeds generated by said sale."

¶ 8 On February 18, 1993, during an initial public offering (IPO) of stock in a new company, Argosy Gaming Co. (Argosy), Connors transferred his 12.5% interest in J. Connors Group in exchange for 2,500,000 shares of Argosy stock. At the time of the IPO, Connors immediately sold some shares of Argosy stock which generated $3,681,261.34. Pursuant to the legal representation agreement, Brennan received $736,252.34 from Connors, which represented 20% of the proceeds from the sale of the shares of Argosy stock. Brennan deposited the funds into the law firm's bank account.

¶ 9 After the sale, Connors still had 2,291,666 shares of Argosy stock, and Brennan maintained that, under the legal representation agreement, he was entitled to 20% of Connors' remaining shares of Argosy stock (458,333 shares) or the cash equivalent. Connors initially did not dispute Brennan's interpretation of the legal representation agreement. Immediately following the IPO, Connors indicated that he would transfer the 458,333 shares of Argosy stock to Brennan, but Argosy's compliance officer, Dan Marshall, informed Brennan that Connors could not transfer the stock for two years following the IPO under SEC rules. According to Brennan, he asked Connors to put the stock in a trust for him, but the record indicates that a stock transfer into a trust never took place.

¶ 10 Between 1993 and 1995, Connors paid Brennan approximately $1.1 or $1.2 million in fees pursuant to the legal representation agreement, and Brennan always deposited the fees into the law firm's bank account. However, attorney fees based on the balance of Argosy stock remained outstanding. In March 1995, after the two-year SEC restriction expired, Brennan again requested that Connors transfer the stock to fulfill his requirements under the legal representation agreement. Connors' accountant, Richard Harnacker, told Connors that the transfer would cost him in excess of $1.2 million in taxes. Connors, therefore, was not willing to make the transfer at that time.

¶ 11 Brennan considered Connors a friend and agreed to work with him in helping Connors minimize the tax consequences as a result of the stock transfer. Therefore, he initially agreed to wait for the transfer until the Argosy stock price went down. The issues surrounding the Connors stock transfer, however, continued to be the subject of many meetings between Brennan, Cates, and Constance in 1995 and 1996. The other two attorneys wanted to know when the fee would be paid to the law firm. Brennan was adamant in these meetings that he would not sue Connors to recover the fees.

¶ 12 After a meeting between Brennan, Cates, and Constance in 1996, Brennan agreed to draft a letter on Connors' letterhead, addressed from Connors to Argosy's compliance officer, Marshall, requesting Argosy to transfer the 458,333 shares into Brennan's name. Brennan drafted the letter and presented it to Connors. At that time, the stock price had gone down, but Harnacker concluded that the transfer would still cost Connors $600,000 in taxes. Harnacker then told Brennan that under their interpretation of the legal representation agreement, Connors was not obligated to transfer the Argosy stock, but that Connors must pay Brennan 20% only after he sold any Argosy stock. According to Brennan, after further discussions, Connors backed down from this position. However, in order to lessen Connors' tax liability, Harnacker requested that Brennan prepare an inventory of the work he had performed for Connors. Brennan sent the inventory of his work in a letter addressed to Harnacker dated April 4, 1996. Brennan concluded the letter by requesting that Harnacker "do the necessary accounting in this matter so that I can have the stock transferred to my name as soon after April 15th as practical." The stock transfer, however, never took place.

¶ 13 In mid-February 1997, Cates informed Brennan and Constance that she was leaving their law firm and joining another firm. Cates's resignation announcement was not well received by Brennan and Constance, and the attorneys immediately began discussions concerning the dissolution of the corporation and winding up the corporation, including payment of corporate debts, distribution of corporate assets, and the handling of fees that were owed to the corporation for legal services that had already been rendered.

¶ 14 The parties met in late February and in early March 1997 to discuss, among other issues, fees earned in cases prior to the dissolution of the corporation. According to Brennan, on March 4, 1997, the attorneys agreed that if a case had been settled or a fee earned prior to the dissolution date of February 28, 1997, the fee would stay with the dissolved corporation for the purpose of winding up. If a fee was generated after February 28, 1997, it belonged to the person who had the file.

¶ 15 The issue of the outstanding fees from the Connors legal representation agreement became an issue of contention between Cates and Brennan and was discussed frequently during dissolution negotiations. Brennan took the position that, pursuant to the March 4, 1997, agreement concerning the dissolution of the corporation and also consistent with the employment contract and stock redemption agreement they signed when they initially formed the corporation, the Connors file belonged to him and the outstanding legal fees were owed to him personally, not to the corporation. Cates disagreed and maintained that the outstanding legal fees were an asset of the law firm.

¶ 16 Meanwhile, around the time that Cates announced that she was leaving the law firm, Connors decided that he was ready to transfer the 458,333 shares of Argosy stock to Brennan, and Connors began the process necessary for the transfer. Ledger sheets from Harris Bank indicate that on February 27, 1997, Connors' shares of Argosy stock were separated into two certificates, one in the amount of 458,333 shares and the other for the balance of the remaining shares.

¶ 17 According to Brennan, sometime during the first couple weeks of March 1997, after the March 4, 1997, meeting, he received a telephone call from Tim Spivey of Magna Bank who told him that Connors had approved the Argosy stock transfer. Spivey wanted to know what name to put on the 458,333 shares of Argosy stock. Brennan told Spivey that everything was "up in the air," that he was not sure what name to put on the stocks, and to hold off on the transfer.

¶ 18 Brennan testified that he told Constance about his telephone conversation with Spivey after he received a letter from Cates dated March 10, 1997, that outlined some of their corporate dissolution issues. He testified that he told Constance toward the end of March that Connors was offering the stock since it was at an all-time low and that they needed to know whose name should go on it. He testified that he told Constance that the stock should be his since the firm had already been paid $1.1 or $1.2 million for the work that he did while a member of the firm. According to Brennan, Constance agreed that the firm had been more than adequately compensated for his efforts while they were together in the firm. Brennan also testified that he told Constance that the stock transfer was his under the stock redemption agreement and that Constance agreed. Constance denied having this conversation with Brennan or knowing anything about Brennan's telephone conversation with Spivey or the proposed stock transfer.[1]

¶ 19 On March 7, 1997, the Argosy stock shares were recombined and the transfer

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[1]For purposes of our statute of limitations analysis below, we construe this disputed factual issue in favor of Constance and base our analysis on the conclusion that Constance did not speak with Brennan about Spivey's telephone call at this time and did not have knowledge of the stock tender.

authority was destroyed. On March 31, 1997, Brennan received a letter from Argosy's corporate counsel, Joe Walsh, that indicated that the certificates created on February 27, 1997, inadvertently failed to include some required restrictions in the stock's ledger.

¶ 20 On May 19, 1997, Cates filed a lawsuit against the law firm, Brennan, and Connors. Count I of the complaint requested the court to dissolve the parties' professional corporation and assist in winding up the corporation. Count II stated a shareholder's derivative action against Brennan alleging that he violated his fiduciary duty that he owed to the corporation by failing to collect the attorney fees that Connors owed to the corporation under the legal representation agreement. Count III of Cates' complaint alleged a cause of action against Connors for breach of contract in failing to pay the fees owed to the corporation. Cates brought the action against Connors "in her capacity as a shareholder" of the law firm.

¶ 21 Cates' claim against Connors was reported in local newspapers, which angered Connors, and at that point, he was no longer willing to transfer the Argosy stock shares.

¶ 22 In May 1997, Brennan retained attorney Donald Weihl to represent him in Cates' lawsuit. According to Weihl, Constance did not want to take any part in the Connors fee collection lawsuit because he was afraid that Connors would sue him in return. Constance's position was that he did not want any of the money owed from the Connors legal representation agreement and that he did not need the money. At this time, however, he had no knowledge that Connors had tendered the Argosy stock in February or March 1997.

¶ 23 On June 2, 1997, the court granted Cates' motion to voluntarily dismiss the claim against Connors without prejudice.

¶ 24 A meeting of the corporation's shareholders took place on June 19, 1997. Constance had given Cates his proxy to vote at the meeting. At the meeting, Cates and Constance removed Brennan from the board of directors. A meeting of the board of directors was held two days later, on June 21, 1997, and Brennan was removed as the president of the corporation. Cates became the president of the corporation; Constance became the vice-president and also remained the secretary/treasurer. It was also resolved that all bank accounts of the corporation would require a joint signature of Cates and Constance. In addition, the directors approved litigation against Brennan for a breach of fiduciary duty.

¶ 25 Because the directors subsequently voted to voluntarily dissolve the corporation, Cates moved to dismiss count I of her complaint which had requested the court to dissolve the corporation. After the dismissal of count I, the only remaining count in Cates' lawsuit was her shareholder derivative count against Brennan alleging that he breached his fiduciary duty. At the June 21, 1997, directors meeting, it was resolved that the corporation would take over the prosecution of count II of the lawsuit and that the corporation should be substituted as the plaintiff.

¶ 26 Also in June 1997, Brennan filed a lawsuit against Cates and Constance alleging that they breached their fiduciary duties in winding up the corporation.

¶ 27 On July 3, 1997, attorney Bruce Cook, representing Connors, sent a letter to one of Brennan's attorneys, Robert Becker. In his letter, Cook wrote that he had advised Connors that the legal representation agreement with Brennan was void, voidable, and was terminated. Brennan interpreted Cook's letter to mean that Connors' offer to transfer the Argosy stock had been revoked, and if he were to be paid anything further, it would be on a *quantum meruit* basis.

¶ 28 Brennan, Cates, and Constance met again on July 23, 1997, to discuss the continuing issues relevant to the dissolution of the law firm including, among other issues, the outstanding Connors fees. In a letter dated July 29, 1997, Cates wrote her attorney and noted that at the July 23 meeting Brennan continued to insist that any money due from Connors was due to him personally and not to the corporation. According to Cates, she and Constance took the position that because he rendered the services as an employee of the corporation, the corporation should receive the benefits of any monies due. At the meeting, Cates told both Brennan and Constance that there could not be any type of "global settlement" concerning the dissolution of the corporation unless "the matter involving Jimmy Connors was resolved."

¶ 29 According to Cates' letter, at the July 23, 1997, meeting, Constance "offered the following deal: If [Brennan] would join with [Cates] to bring in the Connors fee and a lawsuit was not filed, then [Constance] would waive any interest he has in the Connors money. However, if a lawsuit had to be filed on behalf of the corporation against Jimmy Connors, then [Constance] would want an interest in that money." Brennan, however, insisted that the money was his and that he would not be a part of suing a client. Also according to Cates' letter, Constance explained to her that he was willing to give up his interest in the Connors' fees for a settlement because he was financially secure and did not need the hassles of litigation.

¶ 30 On October 17, 1997, Brennan filed a second complaint against Cates. He alleged that he filed the complaint individually and in his capacity as a shareholder and alleged that Cates breached her fiduciary duties that she owed to the corporation. He also alleged claims for breach of contract and misappropriation of corporate funds.

¶ 31 Negotiations between the parties concerning all of their respective claims continued into November 1997. On November 22, 1997, Brennan and Constance signed a memorandum purporting to resolve many of the remaining issues between themselves concerning the dissolution of the law firm. Paragraph 12 of the memorandum stated that Brennan would make efforts to collect the Connors fee, including the filing of a lawsuit if a generic demand was not successful within 30 days. The memorandum provided that Cates "will receive 30% of the net amount collected from Connors and *** Brennan will receive 70%."

¶ 32 In a letter dated November 25, 1997, Constance wrote to Jimmy Connors' attorney, Cook, as follows: "I have now been able to get [Brennan and Cates] to agree to a percentage amount and, as I told you in August, I had no intention of sharing or taking any of this money since I was only interested in a final firm settlement. I am sorry if I left you with the impression that the firm had been fully compensated because I didn't personally want any of the money for myself."

¶ 33 On March 6, 1998, Brennan, Cates, and Constance finalized a settlement of all of their claims stemming from the dissolution of the corporation, pending lawsuits, and allegations concerning breaches of fiduciary duty. They each signed a joint and mutual release on March 24, 1998. The release contained the specific terms for settling the various disputes, including the collection of and rights to the fees owed to the corporation under the Connors legal representation agreement. Under the terms of the release, Brennan, Cates, and Constance agreed that Brennan would receive 70% of the net fees collected from Connors and that Cates would receive 30% of the net fees. Brennan was authorized by the corporation to demand that Connors pay the attorney fees owed to the corporation and to file litigation against Connors if the demand did not result in a satisfactory settlement within 30 days.

¶ 34 Under the terms of the release, Constance agreed to waive any interest he had in the fees, and in return, he was "to be held harmless for any damages, costs or attorneys' fees in the event a counterclaim is filed."

¶ 35 The terms of the release stated that the parties agreed to dismiss, with prejudice, all pending litigation against one another. The release stated that the "Principals *** hereby release and forever discharge one another from any and all liability for claims, including but not limited to all costs, expenses and damages whatsoever in consequence of any act or omission by the said Principals in the operation of Brennan, Cates and Constance, a professional corporation." The release further provides as follows:

"The parties hereto do mutually, fully and completely release and forever discharge and acquit each other *** for any and all claims, demands, actions, choses in action, losses, damages, grievances or any other complaints or suits of whatsoever kind, direct or indirect, known or unknown, which each of the undersigned may presently or in the future have against each other as a result of their relationship in the professional corporation known as Brennan, Cates & Constance."

¶ 36 The circuit court subsequently entered orders dismissing with prejudice all of the pending lawsuits between the attorneys.

¶ 37 On July 1, 1998, Brennan filed a complaint against Connors seeking the outstanding attorney fees pursuant to the legal representation agreement. The complaint sought money damages in the amount equal to the market value of the 458,333 shares. The lawsuit against Connors resulted in protracted litigation lasting over 10 years. In 2003, the court granted Cates' petition to intervene in the lawsuit as a party plaintiff.

¶ 38 During the course of Brennan's litigation against Connors, Brennan's attorney took the deposition of Tim Spivey on June 5, 2001. Brennan's attorney asked Spivey questions about the stock transfer tender that Connors authorized in February 1997. The following colloquy took place:

"Q. As you understand it, there would have also been a transfer, a third-party transfer signed by [Connors] and if that's the correct amount, 458,333, that would have been reflected on that third-party transfer document?

A. Yes.

Q. Okay. And that third-party transfer document would have been a document that would have allowed the transfer of shares from Jimmie Connors to Ed Brennan?

A. That is correct.

Q. What do you know about that transfer or that attempted transfer?

* * *

A. [Connors] had requested that we *** be in a position to transfer those shares to Mr. Brennan and the only way that we could do it since they were in street name was to have A. G. Edwards give us this third-party transfer document which he signed and we held waiting for notification from Mr. Brennan on how to register the shares.

* * *

Q. Do you know what the reason for the transfer was, did he tell you?

A. That was part of an agreement they had for Mr. Brennan helping with the Argosy account.

Q. Did you understand from [Connors] that that was essentially payment to [Brennan] for the work that he had performed in servicing [Connors]?

A. That was payment for then and in the future, yes.

* * *

Q. Did you have any conversations at that time with Ed Brennan regarding the transfer?

A. I did.

Q. And what did Mr. Brennan and you talk about?

A. I asked him–I told him where we were, that we had the third-party transfer signed by [Connors] and we were ready to transfer it to Mr. Brennan. All he needed to do was tell us in what name to style.

Q. And what did he say?

A. And he said he wasn't able to do that at that time. There was other things involved and he would get back to me at a later date.

Q. Okay. Did he tell you what other things were involved?

A. No, he did not.

Q. But he was not able to give you the name that it should be transferred into?

A. Right.

Q. What happened then with regard to that? I mean, did you hear from anybody else thereafter?

A. No. I held on to that document for a while then and since it was a negotiable instrument, I didn't feel like I could keep it hanging around too long.

Q. Did you ever receive any additional instruction from Jimmie Connors with regard to the document?

A. Well, he asked me later on what had happened and I told him that I had voided the document because I didn't–if we needed it again, we could prepare another one.

* * *

A. [Connors] probably had told me somewhere along the line that he didn't want to transfer them anymore because he thought there was problems and everybody hadn't followed through with what they were supposed to do."

¶ 39 Later during his deposition, Spivey further testified as follows:

"Q. Now, the reason why the stock was prepared to be transferred and could have been transferred, what, electronically within a day or–

A. Yes.

Q. And the reason that it wasn't in January because Mr. Brennan asked you not to, is that true?

A. Yes, sir.

Q. And the reason that he asked you not to is his law firm was breaking up, is that true?

A. Well, he explained at that time that he wasn't in a position to tell me how to register it."

¶ 40 Constance testified that in the fall of 2003, one of Connors' attorneys, Chris Cueto, gave him a copy of Spivey's deposition. At this time, Brennan's lawsuit against Connors was still ongoing. In giving Constance a copy of the deposition, Cueto told Constance, "You may be interested to know that Tim Spivey has testified that Jimmy Connors had tendered the stock in February of 1997." When Constance received the deposition, he did not read it immediately. He testified that he read the deposition in early 2004 and learned for the first time that the Argosy stock tender had taken place in February and March 1997. According to Constance, Brennan never disclosed the Argosy stock tender to him. At that time, he believed that Brennan had concealed the tender.

¶ 41 Constance testified that he had known Spivey since kindergarten and had gone to grade school and high school with him. He also testified that if he had previously heard Spivey's name in discussions concerning an Argosy stock tender, he would have contacted Spivey immediately. However, after reading Spivey's deposition in early 2004, he did not attempt to speak with Spivey because he thought it would be improper because of the pending lawsuit against Connors.

¶ 42 Although he did not speak with anyone concerning Spivey's deposition, Constance admitted that after "seeing Spivey's deposition, I quickly realized what was going on in January of 1997, and I knew exactly what happened and why [Cates] and I weren't included." Constance agreed that Spivey's deposition made "it clear that Mr. Spivey talked to *** Brennan and offered to transfer the Argosy stock" and that "Brennan rejected the offer."

¶ 43 In May 2005, Constance went by Brennan's office to speak with him about Spivey's deposition.[2] According to Constance, Brennan told him "[b]asically *** that it didn't happen

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[2]Brennan believed that this conversation took place in late February 2004 or early March 2004.

that way; that there was no ability for him to take the stock." Constance testified that he waited until May 2005 to speak with Brennan because he had a case pending in which Cueto represented the opposing side. He waited until that case settled, which was on May 13, 2005, before discussing the Spivey deposition with Brennan because he "was concerned [that he] had a terrible conflict if some benefit enured to me out of this."

¶ 44 During Brennan's lawsuit against Connors, Connors' accountant, Harnacker, was also deposed on July 16, 2009, and questioned about the February 1997 Argosy stock tender. The record in the present case includes only a four-page excerpt from Harnacker's deposition. In the excerpt, Harnacker testified that he was aware that Connors provided Spivey a transfer document in order to transfer the shares of Argosy stock to Brennan in early 1997. Harnacker testified as follows:

> "A. What had happened is the stock price had dropped down to three or three-fifty a share. As a result of that, the tax consequence was not nearly as great to transferring the shares. I called [Connors] at that point and said, 'Well, if you want to give Brennan the shares, this is about the smallest tax consequence that you are going to have, so let's do that.' We contacted Brennan and then Brennan didn't want them.
>
> Q. You contacted him?
>
> A. We contacted Brennan and he said he didn't want them. He is busting up with his partners. He didn't want them, hold on. He rejected the offer as far as I'm concerned.
>
> Q. Did you have that conversation with him?
>
> A. Yes.
>
> Q. Didn't he tell you the reason he didn't want them transferred is because he didn't know where they needed to be placed?

A. No; no. He told me he had a problem with his firm. It was busting up with his partners and he didn't want them now.

Q. When did that occur?

A. He also wanted the shares in his name and not the name of the firm.

Q. Wait a minute. He didn't want them or he did want them?

A. If he wanted the shares, he wanted them in his name, all right, he didn't want them in the name of the firm. There had been one or two conversations where he was busting up with his partners. This was in February 1997 when we had decided we were going to transfer the shares because of tax consequences was low. He decided he didn't want it at that time.

* * *

Q. When did you have these conversations with Ed?

A. February 13, 1997."

¶ 45 Litigation in Brennan's lawsuit against Connors continued until December 2009, when, after mediation, Brennan and Cates reached a settlement with Connors in which Connors agreed to pay $10.5 million dollars. After payment of litigation expenses out of the settlement proceeds, Brennan received $6,563,183.64, representing 70% of the net settlement proceeds, and Cates received $2,169,935.85, representing 30% of the net settlement proceeds.

¶ 46 Before Connors would agree to settle the attorney fee litigation with Brennan and Cates, he wanted a release from Constance against any claims Constance might have against him. Connors' attorney, Cueto, had a telephone conversation with Constance about the release. During this telephone conversation, Constance told Cueto that he wanted more information concerning the stock transfer power that Spivey mentioned during his deposition. Cueto then told Constance about Harnacker's deposition testimony described above. Cueto told Constance that the deposition testimony indicated that Harnacker called Brennan on February 13, 1997, and told Brennan that Connors had executed the third-party transfer in order to transfer the Argosy stock.

¶ 47 Following his conversation with Cueto, on January 21, 2010, Constance sent a letter to Brennan which read, in part, as follows:

> "Before I would give the release, I wanted information related to the stock power mentioned in Quinten Spivey's deposition which I talked to you about in the Spring of 2005. (Interestingly, you denied to me the stock was in the process of being transferred to the firm when [Cates] resigned in February, 1997). Of course, I learned the opposite before I gave Mr. Connors a release.
>
> Obviously, you owed a fiduciary duty to me and all the stockholders of the corporation in February of 1997.
>
> You never disclosed to me in 1997, nor in 1998 when I released any interest in the Argosy stock, nor in 2005 when I questioned you about the Spivey deposition that the stock (an asset of the firm) was on the way to the firm when you called the stock power back from Chicago.
>
> You deceived me and you violated your fiduciary duty to me as a stockholder of the firm. These actions were punitive.
>
> You clearly violated 735 ILCS 5/13-215 and are guilty of fraudulent concealment.
>
> I have spoken to an attorney. I advised him of what I have learned. He urged me to write you instead of immediately suing.
>
> Since the Statute of Limitations is running this Spring, please give me a call if you want to try and work this out."

¶ 48 Brennan responded in a letter dated January 29, 2010, in which he denied that he did anything to dissuade Connors from paying the law firm his obligation under the contract. He wrote, in part, as follows:

> "[A]s Spivey stated in his deposition, when he talked to me about the stock transfer he wanted to know how the stock should be issued and I told him that the firm was in dissolution and I would have to get back to him. It was shortly after that that Judy Cates brought suit and Connors changed his mind with regard to the payment of the contract fee."

¶ 49 Constance responded to Brennan's January 29, 2010, correspondence with a letter dated February 11, 2010, accusing Brennan of breaching his fiduciary duty that Brennan owed to him and the corporation. Constance requested Brennan to determine the value of his (Constance's) share of the Argosy stock.

¶ 50 After the February 11, 2010, correspondence, Brennan and Constance had a conversation about the undisclosed stock tender in which Brennan stated that Harnacker was not truthful in his deposition testimony. Constance told Brennan that he did not have a copy of Harnacker's deposition and asked for a copy. Constance subsequently received a copy of Harnacker's deposition from one of Connors' lawyers on March 12, 2010. Constance read Harnacker's deposition the following week.

¶ 51 On April 29, 2010, Constance filed his lawsuit against Brennan alleging that Brennan fraudulently concealed the February 1997 Argosy stock tender. The circuit court's judgment in this lawsuit is the subject matter of the present appeal.

¶ 52 Constance's complaint against Brennan alleged, in part, that in May 2005, Brennan denied to Constance "that Connors had tendered or offered to transfer the stock in 1997 and fraudulently concealed that information from *** Constance." Constance further alleged that he relied upon Brennan's representations "until about mid-November 2009 when he became aware that Richard Harnacker, James Connors' accountant and CPA, had testified in a deposition conducted on July 16, 2009 that defendant Brennan was informed in February 1997 that Jimmy Connors wished to transfer the stock in question," but that Brennan had "refused the offer" because the law firm was splitting up. Constance requested that the court "enter an equitable estoppel barring [Brennan] from raising any time related defense including *** the Statute of Limitations" and find that Brennan "fraudulently concealed *** Constance's cause of action and that any period of limitations has not expired." He asked the court to award him a "fair share" of Brennan's portion of the Connors settlement proceeds.

¶ 53 Brennan raised a number of issues as affirmative defenses, including, among other issues: the joint and mutual release signed by Brennan, Cates, and Constance on March 6, 1998; the *res judicata* effect of the dismissal of the previous dissolution-related lawsuits with prejudice; and the five-year statute of limitations for breach of fiduciary duty.

¶ 54 Constance's claim proceeded to a 19-day bench trial that began on September 12, 2012, and concluded on October 13, 2012.

¶ 55 On December 16, 2012, the circuit court entered a judgment in favor of Constance, finding that Constance proved by clear and convincing evidence that Brennan had a fiduciary duty to fully disclose the Argosy stock tender to his partners, including Constance, that Brennan refused to accept the Argosy stock tender from Connors, and that Brennan deliberately concealed the stock tender from Constance. With respect to Brennan's affirmative defense based on the release Constance signed on March 24, 1998, the court found that Constance proved "the necessary elements for the invocation of an estoppel preventing [Brennan] from raising any agreement whereby [Constance] waived his interest in the Connors fee." The court further found against Brennan on his other affirmative defenses, including the five-year statute of limitations, but did not elaborate on this portion of its ruling.

¶ 56 The court awarded Constance a "constructive trust" of Brennan's settlement proceeds in the amount of $1,640,796, representing 25% of Brennan's share of the settlement proceeds. Brennan timely appealed the circuit court's judgment, and Constance timely filed a cross-appeal to challenge the amount of the judgment.

¶ 57 DISCUSSION

¶ 58 Although Brennan has raised several issues on appeal, we need not review the other issues or consider the cross-appeal, because we believe that the statute of limitations issue is dispositive. As a matter of law, Constance filed his complaint after the statute of limitations had expired. Accordingly, we must reverse the circuit court's judgment.

¶ 59 Constance's sixth amended complaint requested the circuit court to impose a constructive trust on a portion of Brennan's share of the Connors fee settlement funds, representing Constance's "fair share" of the settlement proceeds. The basis of Constance's claim is an alleged breach of fiduciary duty by Brennan. Specifically, Constance alleged that he signed the 1998 release, waiving his interest in the Connors fee settlement, due to Brennan's failure to disclose that Connors had tendered the stock around the time the law firm began the dissolution process. He maintained that the failure to disclose the stock tender constituted a breach of fiduciary duty that justified setting aside the 1998 release and that the statute of limitations for bringing his action based on breach of fiduciary duty was tolled due to Brennan's fraudulent concealment.

¶ 60 In Illinois, actions based on breach of fiduciary duty are governed by the five-year statute of limitations. *DeSantis v. Brauvin Realty Partners, Inc.*, 248 Ill. App. 3d 930, 933-34, 618 N.E.2d 548, 550-51 (1993) (applying five-year statute of limitations to actions in fraud and breach of fiduciary duty). In addition, the five-year statute of limitations applies to actions for constructive trusts. *Hagney v. Lopeman*, 147 Ill. 2d 458, 462, 590 N.E.2d 466, 468 (1992). The parties in the present case agree that the five-year statute of limitations provided in section 13-205 of the Code of Civil Procedure (the Code) applies to Constance's claim. 735 ILCS 5/13-205 (West 2010). They disagree, however, on when the statute of limitations began to run.

¶ 61 "Generally, the statute of limitations begins to run from, and not until, the time that the cause of action or right of action accrues, *i.e.*, when facts exist which authorize the bringing of an action." *Schreiber v. Hackett*, 173 Ill. App. 3d 129, 131, 527 N.E.2d 412, 413 (1988). However, the common law "discovery rule" tolls the running of the relevant statute of limitations even after the cause of action accrues until the injured plaintiff "knows or reasonably should know that he has been injured and that his injury was wrongfully caused." *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 360-61, 657 N.E.2d 894, 898 (1995). In addition, "the operation of the statute of limitations is tolled if a party can prove that some fraud prevented the discovery of the cause of action." *Hagney*, 147 Ill. 2d at 462, 590 N.E.2d at 468.

¶ 62 With respect to fraudulent concealment, section 13-215 of the Code provides as follows:

> "If a person liable to an action fraudulently conceals the cause of such 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 he or she has such cause of action, and not afterwards." 735 ILCS 5/13-215 (West 2010).

¶ 63 "Generally, the concealment must consist of affirmative acts or representations that are calculated to lull or induce a claimant into delaying filing his claim or to prevent a claimant from discovering his claim." *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 257, 694 N.E.2d 604, 608 (1998). However, "a fiduciary who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of a cause of action, has fraudulently concealed that action, even without affirmative acts or representations." (Emphasis omitted.) *DeLuna v. Burciaga*, 223 Ill. 2d 49, 77, 857 N.E.2d 229, 246 (2006). The plaintiff must allege that the defendant concealed a material fact when he was under a duty to disclose that fact to the plaintiff. *Id*. The fraudulent concealment statute incorporates the discovery rule, and under the statute, a plaintiff has five years after his discovery of the cause of action within which to file suit. *Gredell v. Wyeth Laboratories, Inc.*, 346 Ill. App. 3d 51, 60, 803 N.E.2d 541, 548 (2004).

¶ 64 As noted above, under the discovery rule, the statute of limitations begins to run "when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused." *Knox College v. Celotex Corp*., 88 Ill. 2d 407, 415, 430 N.E.2d 976, 980 (1981). A plaintiff who knows that he has suffered from a "wrongfully caused" injury has the duty to investigate further concerning the existence of a cause of action. *Witherell v. Weimer*, 85 Ill. 2d 146, 421 N.E.2d 869 (1981). Even though the plaintiff might not have knowledge that an *actionable* wrong was committed, the statute of limitations, nonetheless, begins to run when the plaintiff is put on inquiry notice. *Pruitt v. Schultz*, 235 Ill. App. 3d 934, 936, 601 N.E.2d 1372, 1374 (1992). In other words, "when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed. In that way, an injured person is not held to a standard of knowing the inherently unknowable [citation], yet once it reasonably appears that an injury was wrongfully caused, the party may not slumber on his rights." *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171, 421 N.E.2d 864, 868 (1981); *Knox College*, 88 Ill. 2d at 416, 430 N.E.2d at 980-81 ("At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved."). In addition, it is not necessary for the plaintiff to know the full extent of his injuries before the statute of limitations begins to run. *Golla*, 167 Ill. 2d at 364, 657 N.E.2d at 899-900.

¶ 65 "Ordinarily, whether plaintiff knew or reasonably should have known both of his injury and that it was caused by a wrongful act are genuine issues of fact to be determined by the finder of fact." *McIntyre v. Christ Hospital*, 181 Ill. App. 3d 76, 81, 536 N.E.2d 882, 885 (1989). However, the question becomes one for the court if only one conclusion can be drawn from the undisputed facts. *Id*.

¶ 66 *Melko v. Dionisio*, 219 Ill. App. 3d 1048, 580 N.E.2d 586 (1991), provides an example where the court addressed the issue of inquiry notice, as a matter of law, in a situation where a plaintiff alleged that a fiduciary fraudulently concealed her cause of action. In *Melko*, the plaintiff alleged that the defendant engaged in a scheme to defraud her by selling her corporate notes that he had misrepresented as "CDs" when her investments were actually uninsured corporate notes of a closely held company.

¶ 67 The trial court dismissed the complaint as being untimely pursuant to the five-year statute of limitations for fraud. The plaintiff, however, argued that there was a factual issue concerning whether she was on notice of the alleged fraud. The plaintiff argued that the defendant was her fiduciary and, therefore, she was not obligated to inquire into the facts that might have put her on notice that she had a cause of action, but was entitled to rely on the defendant's fraudulent assurances that she was purchasing "CDs" that were safe investments. *Id*. at 1057, 580 N.E.2d at 590.

¶ 68 On appeal, the court disagreed with the plaintiff's argument as follows: "Even granting the existence of a fiduciary relationship, the evidence before the trial court establishes that, more than five years before she filed her complaint, plaintiff had actual information sufficient to put her on notice of any alleged fraud. Given this actual knowledge, plaintiff could not invoke fraudulent concealment to extend the statute of limitations." *Id*. The court noted that the plaintiff invested in the "CDs" in 1984 and that by the end of 1984, she had ample evidence that her investments were not what she allegedly had assumed they were. *Id*. at

1058-59, 580 N.E.2d at 591. Specifically, by the end of 1984, the plaintiff had received documents stating that (1) her investments were corporate notes and not certificates issued by a financial institution, (2) interest payments on the notes had been suspended since July, and (3) half of her investment was being converted from a note into common stock. *Id*. at 1059, 580 N.E.2d at 592. Although the plaintiff claimed that the defendant made fraudulent misrepresentations about the investments, the court noted the actual information the plaintiff had by the end of 1984 imposed upon her a duty of inquiry. *Id*. at 1060, 580 N.E.2d at 593. The court held that "[w]here such actual information is available, a plaintiff must take heed of it even though the defendant makes representations to the contrary." *Id*.

¶ 69 In the present case, the subject matter of the alleged breach of fiduciary duty, the concealment of the Argosy stock tender, took place in February or March 1997. Construing the facts presented at the trial in the light most favorable to Constance, he did not know about the stock tender when he signed the mutual release in which he waived any claim he had to the Connors fees that were owed to the law firm. Had he known about the stock tender, he would not have signed the release.

¶ 70 The record further establishes, however, that Constance was on inquiry notice in early 2004, at the latest, when he read Spivey's deposition. Spivey's deposition would put a reasonable person on notice that the stock tender took place in February 1997, that Brennan told Spivey to hold off on the transfer, and that Brennan did not disclose the stock tender to any shareholders of the law firm. We believe that this conclusion is not something about which reasonable minds could differ. Constance himself admitted that he knew exactly what happened when he read Spivey's deposition. Therefore, when Constance read Spivey's deposition, he had sufficient notice of his "wrongful injury" for the statute of limitations to begin running on his claim, and he then had five years to file his lawsuit. He did not file his lawsuit until April 29, 2010, after the statute of limitations on his claim had expired.

¶ 71 On appeal, Constance emphasizes Brennan's fiduciary responsibility to him and the corporation as the president, shareholder, and employee of the professional corporation. However, as established by the court's analysis in *Melko*, although the fiduciary relationship would excuse Constance's initial failure to discover the Argosy stock tender, it does not operate to excuse his failure to act once he had actual notice of the stock tender by reading Spivey's deposition. *Melko*, 219 Ill. App. 3d at 1062, 580 N.E.2d at 594 ("[A]lthough the existence of a fiduciary relationship may excuse a plaintiff's failure to investigate diligently to ascertain facts that would put her on notice of possible injury, there is plainly a difference between the failure to *ascertain* facts through diligent inquiry and the failure to *act upon* facts of which the plaintiff *already* has actual knowledge." (Emphasis in original.)). "That is, a fiduciary relationship does not eliminate the plaintiff's duty to investigate wrongdoing once an injury is known." *Clark v. Robert W. Baird Co.*, 152 F. Supp. 2d 1040, 1044 (N.D. Ill. 2001) (discussing *Melko*).

¶ 72 In *Clark*, the plaintiff alleged that he lost money because the defendant corporation that had been entrusted with his money made unauthorized transactions from his account. The transactions took place from 1991 through 1994, and the plaintiff filed his lawsuit in October 1999. The defendant moved to dismiss the complaint as being untimely under Illinois's five-year statute of limitations for fiduciary duty claims. *Id*. at 1042-43. The plaintiff, however, argued that his broker invested the money with the defendant and that, although he was aware of his broker's wrongdoing when he sued the broker in 1998, he did not know about the defendant's role until a deposition that was taken in August 1999. *Id*. at 1043. The plaintiff maintained that the defendant was his fiduciary and that the existence of the fiduciary relationship eliminated the requirement that he conduct a reasonable investigation or exercise diligence in discovering his injury. *Id*. The court, however, disagreed and held that the plaintiff had sufficient notice to begin the running of the statute of limitations.

¶ 73 For purposes of its analysis, the court assumed that there was a fiduciary relationship between the plaintiff and the defendant. *Id*. at 1044. The court, however, held that the fiduciary relationship did not eliminate the plaintiff's duty to investigate wrongdoing once he became aware that a wrongful injury had occurred. *Id*.

¶ 74 The defendant in *Clark* had sent the plaintiff monthly account statements from June 1991 to September 1994. *Id*. The court held that, as a matter of law, these statements were sufficient to put the plaintiff on inquiry notice because the March 1994 statement showed one of the unauthorized transactions that was part of the plaintiff's claim. *Id*. at 1045. It was insignificant that the statement did not list all the transactions that were the basis of his claim or identify who authorized the transaction. He did not have to know the full extent of his injury, and all the plaintiff "needed to know to determine that he was wronged was that he did not authorize [the transaction] himself." *Id*. The court stated, "Even the existence of a fiduciary duty does not excuse [the plaintiff]'s inaction in the face of information in his possession." *Id*. at 1046

¶ 75 Likewise, in the present case, this same analysis applies to Constance's claim. As a matter of law, he had sufficient notice of his wrongful injury when he read Spivey's deposition and "quickly realized what was going on in January of 1997" and "knew exactly what happened." The Spivey deposition provided Constance with actual knowledge of all the facts he needed to know to bring his lawsuit. Once his injury was known, he had a duty to investigate regardless of any fiduciary relationship between him and Brennan, and he had five years to file his claim.

¶ 76 Illinois's discovery rule is objective in nature, not subjective. *In re The Northwestern Mutual Life Insurance Co. Sales Practices Litigation*, 70 F. Supp. 2d 466, 485 (D. N.J. 1999) (applying Illinois law). While Constance alleged in his complaint that he did not become fully aware of Brennan's fraudulent concealment until he read Harnacker's deposition in mid-November 2009, the uncontradicted evidence at the trial was that he read Spivey's deposition in early 2004 and that he immediately knew at that time what had occurred. Specifically, Spivey testified during his deposition about the stock tender and that Brennan did not accept the transfer of the stock because he did not know how to title the stock. Constance admitted that Spivey's deposition "makes it clear that Mr. Spivey talked to Ed Brennan and offered to transfer the Argosy stock" and that the deposition "makes it clear that Mr. Brennan did not accept the stock at that time." Harnacker testified: "We contacted Brennan and he said he didn't want them. He is busting up with his partners. He didn't want them, hold on. He rejected the offer as far as I'm concerned." Harnacker's deposition testimony was merely consistent with and cumulative to Spivey's deposition testimony.

¶ 77 Constance also argues that he was not aware that he suffered any damages until after Brennan was successful in the Connors lawsuit. He argues that "the actionable injury is when [Brennan] accrued [Constance]'s interest in the fee and refused to allow [Constance] his share (the December 2009 settlement)." This argument is incorrect. "[A] plaintiff's cause of action accrues at the time its interest is invaded; the mere fact that the extent of its damages is not immediately ascertainable does not postpone the accrual of a plaintiff's claim." *Hyon Waste Management Services, Inc. v. City of Chicago*, 214 Ill. App. 3d 757, 762-63, 574 N.E.2d 129, 132 (1991).

¶ 78 In *DeSantis*, 248 Ill. App. 3d at 935-38, 618 N.E.2d at 551-53, the court held that the five-year statute of limitations for fraudulent misrepresentation concerning an investment in a limited partnership began to run on the date on which the plaintiff could have asserted that the partnership defrauded him and sought rescission of the contract as a remedy. The court ruled that the date the plaintiff suffered actual injury was irrelevant. The court emphasized that a party " 'is not permitted to lie back and speculate as to whether avoidance or affirmance of a contract will ultimately prove more profitable.' " *Id*. at 938, 618 N.E.2d at 553 (quoting *Kaiser v. Olson*, 105 Ill. App. 3d 1008, 1014, 435 N.E.2d 113, 118 (1981)).

¶ 79 Likewise, in the present case, Constance's claim is based on the assertion that he signed the mutual release waiving his interest in the Connors fees because Brennan concealed the stock tender. The evidence at the trial also established that Constance did not want to be involved in the litigation against Connors to recover the fees because he did not want to be countersued by Connors. In early 2004, Constance had actual knowledge of the Argosy stock tender. Armed with that knowledge, neither the discovery rule nor the fraudulent concealment statute tolled the running of the statute of limitations after that point. Once Constance learned of the Argosy stock tender, the statute of limitations on his claim began to run, and he then had five years to file his lawsuit to claim a share of any funds generated by Brennan's suit against Connors. He is not allowed to lie back and wait until the Connors lawsuit was resolved to determine whether avoidance or affirmance of the release would ultimately prove more profitable.

¶ 80 Finally, Constance argues that Brennan should be equitably estopped from invoking the statute of limitations. Specifically, Constance argues for the application of equitable estoppel because "[a]ny delay in action by [Constance] which [Brennan] uses to support his defenses was induced by [Brennan]'s conduct." For the reasons discussed above, we believe that, as a matter of law, equitable estoppel is not available to Constance as grounds to bar the application of the statute of limitations to his claim.

¶ 81 "To establish equitable estoppel, the party claiming estoppel must demonstrate that: (1) the other party misrepresented or concealed material facts; (2) the other party knew at the time the representations were made that the representations were untrue; (3) the party claiming estoppel did not know that the representations were untrue when the representations were made and when they were acted upon; (4) the other party intended or reasonably expected the representations to be acted upon by the party claiming estoppel or by the public generally; (5) the party claiming estoppel reasonably relied upon the representations in good faith and to their detriment; and (6) the party claiming estoppel has been prejudiced by his reliance on the representations." *Parks v. Kownacki*, 193 Ill. 2d 164, 180, 737 N.E.2d 287, 296 (2000).

¶ 82 " 'A party claiming the benefit of an estoppel cannot shut his eyes to obvious facts, or neglect to seek information that is easily accessible, and then charge his ignorance to others.' " *Nickels v. Reid*, 277 Ill. App. 3d 849, 856, 661 N.E.2d 442, 447 (1996) (quoting *Vail v. Northwestern Mutual Life Insurance Co.*, 192 Ill. 567, 570, 61 N.E. 651, 652 (1901)). Estoppel is ordinarily a question of fact, but it becomes a matter of law where there is no dispute of material fact and only one inference can be drawn. *Beaudette v. Industrial Comm'n*, 308 Ill. App. 3d 188, 191, 719 N.E.2d 191, 193 (1999).

¶ 83 For the reasons noted above, equitable estoppel does not operate to toll the statute of limitations beyond the date when Constance read Spivey's deposition. "Although case law developed the doctrine of equitable estoppel and the legislature promulgated fraudulent concealment, the principles behind the two are substantively the same." *Turner v. Nama*, 294 Ill. App. 3d 19, 26, 689 N.E.2d 303, 308 (1997); see also *J.S. Reimer, Inc. v. Village of Orland Hills*, 2013 IL App (1st) 120106, ¶ 44, 990 N.E.2d 831 ("[F]or the Village to have relied upon Barclay's assertions, it would have had to turn a blind eye to the mounting evidence that Barclay authorized an inadequate excavation of the project site."); *Pack v. Santa Fe Park Enterprises, Inc.*, 209 Ill. App. 3d 648, 652, 568 N.E.2d 360, 363 (1991) ("The record shows that plaintiff had reason to know that the date stated in Crawford's correspondence was inaccurate, and that her reliance on Crawford's letters to determine the precise date of her injury was unreasonable."). Constance learned by reading Spivey's deposition in early 2004 that Brennan had turned down the Argosy stock transfer at the time the law firm was being dissolved. Equitable estoppel cannot serve as a basis for tolling the running of the statute of limitations beyond that date. As a matter of law, any equitable estoppel grounds for tolling the five-year statute of limitations disappeared in early 2004 when Constance read Spivey's deposition and immediately understood the significance of Spivey's testimony.

¶ 84 The undisputed facts establish that Constance read Spivey's deposition in early 2004 and that the Spivey deposition informed Constance of everything he needed to know to file a claim for breach of fiduciary duty against Brennan. Therefore, as a matter of law, the five-year statute of limitations began to run in early 2004, and Constance did not file his claim until after the statute of limitations expired. Accordingly, his claim was time-barred, and we must reverse the circuit court's judgment. Because Constance's claim has expired, we need not examine the record to determine whether the evidence supports a finding that Brennan breached his fiduciary duty, analyze any of Brennan's other affirmative defenses, or consider Constance's cross-appeal concerning the amount of the circuit court's judgment.

¶ 85 CONCLUSION

¶ 86 For the foregoing reasons, the circuit court's judgment is hereby reversed.

¶ 87 Reversed.