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Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007-2016 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2017 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2016 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Kemp Klein is a member of LEGUS a global network of prominent law firms.

He is a member of the Society of American Baseball Research (SABR).

For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller."

DT: July 20, 2017
RE: **In re H&L Brennan Distributors, Inc.**
STATE OF MICHIGAN COURT OF APPEALS

"Alan, you cannot write about baseball all your life"
- **Mrs. Pollinger**
- **12th Grade English Comp**
- **Mumford High - 1959**

BASEBALL STATS:

I want to welcome those members of LEGUS who are receiving their first combined baseball and probate article. LEGUS is a worldwide network of prominent lawyers.

July 19th was Sue Halligan's birthday and in celebration of her birthday, let us review July 19th and see what happened of interest on that day throughout the history of major league baseball.

Back in 1909 Cleveland shortstop Neal Ball executed the 20th Century's first unassisted triple play against the Boston Red Sox. With runners on first and second, the batter hit a line drive to Ball who stepped on second and tagged the runner coming in from first. He homered in that endeavor also and Cleveland took the game from Boston 6 to 1.

The following year, in 1910, Cy Young logged his 500th victory on July 19th.

In 1911 history repeated itself because on July 19th Walter Carlisle executed an unassisted triple play.

July 19, 1914 was an important day. The Boston Braves became the first team to go from last place to first place, and on July 19, 1914 they won the game that started them on their journey out of last place.

Baseball suffered a blow on July 19, 1918 when the Secretary of War ruled that baseball was a non-essential occupation and many left for either the military or essential occupations.

On July 19, 1933 the Red Sox faced the Cleveland Indians. The Red Sox boasted a catcher by the name of Rick Farrell who faced his brother Wes Farrell a pitcher for Cleveland. Both Rick and Wes hit home runs that day, the first time ever brothers from opposing teams had hit home runs in the same game.

On July 19, 1936 Bob Feller made his debut and pitched a no-hitter "sorta". He came in as a relief pitcher and pitched eight innings without allowing a hit. This was a harbinger of things to come.

With World War II beginning, July 19, 1942 was a bad day for Pete Reiser. Reiser would have gone on to be one of the greatest players of all time but he crashed into the wall while in St. Louis head-first and from there his career slid downward.

In 1950, on July 19th the Yankees finally broke the colored barrier landing outfielder and catcher Elston Howard. It took the Tiger's another eight years.

On July 19, 1955 pitcher Vernon Law did something that no contemporary pitcher will do and that is that he pitched 18 straight innings.

Remember the Pine Tar scandal? On July 19, 1975 Thurman Munson got a base hit which was nullified because he had too much pine tar on his bat.

Thank you for celebrating July 19 with us and Happy Birthday to Sue Halligan.

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE**:**

Referenced Files:

- Laches – Time Period May Not Be Relevant – party to be charged must be prejudiced
- Statute of Limitations – Specific Over General
- Standards of Review – C7-C4-C10
- Statute of Limitations – Revival – Must Be Unqualified
- Fraudulent Concealment – Must Be Pleaded with Particularity
- Subject Matter Jurisdiction Regarding Breach of Limited Liability Company Act

STATEMENT OF FACTS

Plaintiff was cheated by defendant's deceased. They made an agreement which defendant's decedent continued to breach. After death, plaintiff sued decedent's estate.

Statute of limitations, laches, lack of jurisdiction, subject matter were pleaded.

The probate court threw out all claims on the basis of laches and some based on statutes of limitation. The court of appeals reversed only those claims where it was arguable Plaintiff was unaware of the breach and allowed a trial on some claims rendered void by the statute of limitations when the statute of limitations had not yet run. Regarding laches, there was a partial reversal as it was arguable that the defendant's deceased could have argued prejudice, but he was not around to tell his story.

ANALYSIS

1. Standards on Appeal Summary Disposition.

The court sets forth at p. 4 of its Opinion the three different standards regarding the three different subsections under which the motion for summary disposition was granted.

2. Laches.

There was also a very good definition of laches and the two high points are that time is not an absolute and the party to be charged must be able to show prejudice. In the instant case decedent's estate was able to show prejudice because he was sick for years and then dead.

The court of appeals makes an interesting statement that favors a wrongdoer. It says that because the defendant's deceased was a constant breacher that plaintiff could not reasonably rely upon the statements. "Fool me once, shame on you. Fool me twice, shame on me."

3. Regarding the statute of limitations.

The court of appeals makes an appropriate statement that revival based on acknowledgement which would bar the running of the statute of limitations must be in writing and it must be an unqualified acknowledgement. It later goes on to say that the circumstances cannot constitute an unqualified acknowledgement. This is another way of saying that it cannot be inferred.

Fraudulent concealment could cause an extension, but it must be pleaded with particularity. It was not.

When one act sets forth an action based on a statute which contains a three year statute of limitations pleading contract with a six year period is not a winner.

By the way I thought we used the phrase limitations of action and not statute of limitation.

4. Regarding subject matter jurisdiction.

Because an action was brought under the Michigan Limited Liability Company Act, the lower court ruled that there was a lack of subject matter jurisdiction. The court of appeals approves this as a matter of law and then goes on to approve the lower court's decision as a matter of fact. I believe the first is erroneous. The second is appropriate.

The court of appeals correctly says that a member of a limited liability company "may" bring an action in the circuit court. "May" is precatory not mandatory. Add to this the *Butterfield* case which says that this type of asset when solely owned or nearly solely owned by the decedent the probate court has jurisdiction of the company under *Butterfield*.

I agree with the court of appeals that the failure to express the reasons why the court had jurisdiction should lead to the affirmation of the decision, but not their blanket statement as a matter of law because I do believe that the probate court does have concurrent jurisdiction, especially in light of the precatory language of the act cited by the court of appeals and the lower court.

878449

STATE OF MICHIGAN

COURT OF APPEALS

H&L BRENNAN DISTRIBUTORS INC. doing business as HARRY'S FURNITURE, HJB LEASING LLC, H. MICHAEL BRENNAN individually and as successor trustee of the LILLIAN M. BRENNAN TRUST and as successor trustee of the HARRY J. BRENNAN TRUST. Plaintiffs-Appellants, v CRYSTAL ACKRON as personal representative of the ESTATE OF MARK DEAN BRENNAN, Defendant-Appellee.	UNPUBLISHED June 20, 2017 No. 332926 Washtenaw Probate Court LC No. 14-001210-CZ

Before: SWARTZLE, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Plaintiffs appeal the order of the trial court that granted defendant's motion for summary disposition. The trial court dismissed all of plaintiff's claims on the basis of laches and alternately dismissed some counts based on statute of limitations and lack of subject-matter jurisdiction. For the reasons provided below, we affirm in part, reverse in part, and remand.

I. BASIC FACTS

Plaintiff H. Michael Brennan ("Michael") was the brother of defendant, decedent Mark Brennan.[1] This civil suit involves claims relating to defendant's handling of assets in their parents' trusts and the handling of funds and property of the family businesses. As early as 2002, Michael suspected that defendant was acting improperly with respect to their mother's trust and the family businesses. The brothers entered into an agreement in 2002, where the brothers hired a special master "to conduct a full review and internal examination" of the

[1] Although the defendant in this case is Crystal Ackron, as the personal representative of the estate of Mark Brennan, for simplicity sake, we will refer to Mark as "defendant" in this opinion.

family's businesses. The special master found the operation of the businesses to be highly dysfunctional, with neither Michael nor defendant "capable of running the Company." The special master found that Michael had an aversion to confrontation, which possibly contributed to him not getting access to company information. The special master also noted that the brothers' issues "appeared to extend well beyond the immediate business environment" and were based on "deep-seated family problems."

In October 2003, Michael filed a suit against defendant. Michael alleged, in pertinent part, that defendant should be removed as an officer of the companies, that defendant misappropriated trust property, and that defendant breached his fiduciary duties to the trusts and to the companies. The claims were later dismissed without prejudice. Michael explained in his deposition that he stopped the prior action because, after talking with defendant, defendant agreed to repay some funds that his daughter allegedly misappropriated from the company. Defendant initially took steps to allow Michael to have more access to the company information, but that access was curtailed over time. As an example, defendant gave Michael access to the company's computer system, but defendant later took that computer access away. Michael testified that these types of "changes," i.e. restrictions or limitations on access to information, occurred "a few years" before defendant left the business in September 2011.

In July 2013, defendant passed away. In December 2014, plaintiffs filed the instant suit and alleged 23 counts. The breakdown of the counts consists of the following:

Claims regarding Harry's Furniture

> Counts I-IV (claims related to use of company funds for personal use and claims related to company funds illegally taken by him and his family members)
> Counts V-VII (claims related repayment/reimbursement for insurance premiums)

Claims regarding Harry Brennan Trust

> Counts VIII and IX (claims related to improper distributions from Harry Brennan Trust)

Claims regarding HJB Leasing

> Counts X and XI (claims related to failure to repay HJB Leasing buy-in loan)
> Counts XVII-XVIII (claims related to unauthorized payments made on behalf of HJB Leasing)
> Counts XIX-XX (claims related to defendant's use/disposition of HJB Leasing property)
> Counts XXI-XXIII (claims related to both the unauthorized payments defendant made and his disposition of HJB Leasing property)

Claims regarding Lillian Brennan Trust

Counts XII-XIII (claims related to agricultural lease proceeds for Trust)
Counts XIV-XVI (claims related to personal property that Trust owned)

Defendant moved for summary disposition under MCR 2.116(C)(10) and argued that the entire complaint should be dismissed on the equitable ground of laches. Specifically, defendant argued that Michael knew for over 10 years before defendant's death that there were unresolved issues with regard to how defendant handled the company businesses and the trusts and that Michael should not be able to sit on his claims and raise them only after defendant passed away. With defendant no longer available to testify, defendant claimed that it unfairly limits the estate's ability to defend against the claims.

Defendant also moved for summary disposition under MCR 2.116(C)(7) and argued that, alternatively, certain claims were nonetheless barred by the statute of limitations. Defendant asserted that Counts I-IV, X, and XI were based on contract theory and therefore were barred by the six-year limitations period provided in MCL 600.5807(8). Defendant also argued that Counts VIII, XII, and XVIII, which were based on the tort of conversion, were barred by the three-year limitations period set forth in MCL 600.5805(10). Likewise, defendant argued that Counts IX and XXII, which dealt with a breach of fiduciary duty, were barred by the three-year limitations period as provided in MCL 600.5805(10). And for Count XVII, defendant argued that, while the claim was framed as a breach of contract claim, it in essence is a claim arising out of defendant's alleged failure to perform certain duties that were required under the Michigan Limited Liability Company Act, MCL 450.4101 *et seq.* And under MCL 450.4404(6) of the act, claims must be brought within three years of the date of the loss or injury or two years after the cause of action is discovered, whichever occurs first. Thus, defendant claimed that Michael could not take advantage of the six-year limitations period for a breach of contract claim.

Defendant further argued that Counts XVII and XXII were brought under the Limited Liability Company Act, which clearly provides that such claims are to be brought to circuit court. Hence, defendant argued that, under MCR 2.116(C)(4), these two counts should be dismissed because the probate court lacked jurisdiction to hear them.

After a hearing, the trial court granted defendant's motion. The court dismissed all 23 counts on the basis of laches and additionally dismissed Counts I-IV, VII,[2] IX-XII, XVII, XVIII, and XXII because they were barred by the applicable statute of limitations. Further, the court dismissed Counts XVII and XXIII[3] for lack of subject-matter jurisdiction.

II. STANDARDS OF REVIEW

[2] We will discuss in Part III-B of this opinion the fact that the trial court dismissed Count XVII when dismissal was requested for Count XVIII.

[3] We will discuss in Part III-C of this opinion the fact that the trial court dismissed Count XXIII when dismissal was requested for Count XXII.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010).

"A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id.* Under this subrule, a court considers "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The motion is properly granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

A motion for summary disposition is proper under MCR 2.116(C)(7) if, among other things, a claim is barred by the statute of limitations. *Dillard v Schlussel*, 308 Mich App 429, 442; 865 NW2d 648 (2014). When reviewing under this subrule, "this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true." *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010) (quotation marks, citations, and brackets omitted).

"A summary disposition motion pursuant to MCR 2.116(C)(4) tests the trial court's subject-matter jurisdiction." *Braun v Ann Arbor Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004). "When reviewing a motion for summary disposition under MCR 2.116(C)(4) alleging a lack of subject-matter jurisdiction, we must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Manning v Amerman*, 229 Mich App 608, 610; 582 NW2d 539 (1998).

This Court also reviews a trial court's decision to apply the doctrine of laches de novo. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013).

III. ANALYSIS

A. LACHES

> Laches is an affirmative defense based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff. The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. The doctrine of laches is founded upon long inaction to assert a right, attending by such intermediate change of conditions as renders it inequitable to enforce the right. But it has long been held that the mere lapse of time will not, in itself, constitute laches. The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created. [*Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010) (quotation marks, citations, and brackets omitted).]

Here, the trial court dismissed all of plaintiffs' claims on the basis of laches. Plaintiffs aver that the trial court erred because the court failed to make the requisite finding that plaintiffs lacked due diligence in bringing their claims. We disagree.

At the hearing on defendant's motion for summary disposition, the trial court stated that it was dismissing all of plaintiffs' claims for the reasons provided in defendant's accompanying brief. And in defendant's brief, it states:

> Michael was aware of his dispute with [defendant] regarding the family trusts and business for more than ten years prior to [defendant's] death in 2013 without seeking relief. Further, *despite knowing that the defendant would be prejudiced by [his] unavailability and that [defendant] had been sick for years before his death, Michael still choose [sic] to sit by and wait until after [defendant] died to take action against his estate.* Clearly, given these circumstances, Plaintiff can provide no justifying reason for his delay in bringing the present action until after [defendant's] death, a circumstance he knew would limit Defendants' [sic] ability to defend the claims.
>
> Plaintiff's [sic] delay has prevented Defendant from presenting [defendant's] side of the story. [Defendant] may very well have had legitimate explanations for his actions if he were around to testify; and the Estate is clearly prejudiced by the fact that he is not. [Emphasis added.]

Accordingly, contrary to plaintiffs' argument on appeal, it is evident from the emphasized portion above that the trial court did determine that the evidence proved that plaintiffs did not act with due diligence.

Plaintiffs also argue on appeal that there were questions of fact as to whether plaintiffs were sufficiently diligent in pursuing their claims against defendant. Plaintiffs rely on the fact that when Michael would bring these concerns up to defendant, defendant would assure Michael that he would take care of it. We do not find plaintiffs' argument very persuasive. A reasonable person in Michael's position would not take such assurances at face value. Michael's testimony shows that these conversations happened countless times, where Michael sought either information or action from defendant, and defendant simply demurred that he would "take care of it." The record shows that defendant never came through with his purported promises. It also is important to note that these interactions occurred after defendant said he would give Michael computer access to the company information but later unilaterally withdrew that access. We are reminded of the old adage, "Fool me once, shame on you. Fool me twice, shame on me." Thus, it was inherently unreasonable for plaintiffs to think that this type of repeated interaction with defendant, with no results to show for it, somehow constitutes the exercise of due diligence. See Black's Law Dictionary (10th ed) (defining "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.—Also termed *reasonable diligence* . . . .").

However, we agree with plaintiffs that laches cannot be applied to claims that were not discoverable until after defendant's death. Laches is concerned with the prejudicial effect of a plaintiff's unwarranted delay in bringing an action. Here, the unwarranted delay is plaintiffs

waiting until after defendant passed away to bring this suit when, in general, it could have been brought much earlier, when defendant was capable of defending himself. If the claims were only discoverable after defendant passed away, then it cannot be said that plaintiffs failed to exercise due diligence to bring those claims before defendant passed away. Consequently, it is improper for laches to bar these types of claims that could not have been brought before defendant passed away. On remand, the trial court is to determine which of plaintiffs' counts fall under this category.

B. STATUTE OF LIMITATIONS

Plaintiffs also argue that the trial court erred when it dismissed several claims on the grounds that they were time being barred by the statute of limitations.

Plaintiffs acknowledge that the claims related to Counts I-IV, X, and XI would normally be barred by the statute of limitations. However, they assert on appeal, as they did at the trial court, that defendant's written acknowledgment of the debts turned these otherwise stale claims valid. We agree that a new promise to pay a debt that is otherwise barred by the statute of limitations can revive a claim upon written acknowledgment of the debt. MCL 600.5866 provides the following:

> Express or implied contracts which have been barred by the running of the period of limitation shall be revived by the acknowledgment or promise of the party to be charged. But no acknowledgment or promise shall be recognized as effective to bar the running of the period of limitations or revive the claim unless the acknowledgment is made by or the promise is contained in some writing signed by the party to be charged by the action.

Further, while "no set form of words is necessary to constitute a sufficient acknowledgment of indebtedness," *In re Booth's Estate*, 326 Mich 337, 343; 40 NW2d 176 (1949), the acknowledgment nonetheless "must contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay and be unaccompanied by any circumstances or declaration which repel the presumption of a promise or intention to pay," *Adams v Detroit*, 232 Mich App 701, 707; 591 NW2d 67 (1999).

However, a review of the purported acknowledgment reveals that it is not "an unqualified and direct admission" of a debt. The purported admission is contained in a memo that *Michael wrote to defendant* that was dated June 21, 2011. The memo states, in pertinent part:

> I must also remind you that our balance sheet still contains the note payable you are responsible for in the amount of approximately $112,000, and your receivables account for your personal expenses, AKA farm expenses, having been paid by the company, has now grown to almost $38,000 without any re-imbursements having been made to the company. Again, the company is in a crisis cash position and must maintain some cash reserves in this economy. So, I have contacted all of our suppliers and suspended any personal expense charging on any company charge account. The company simply cannot afford to absorb

> these expenses, unless you intend on regular monthly re-imbursements paid to the company to off-set those expenses.
>
> I know you have your issues; issues that you say make it hard for you to maintain any regular presence in the store. But I need you to understand that I am trying to do everything I can to balance things out in the store and maintain our salaries for as long as we can, despite your lack of active involvement the past few years. Your cooperation is with what I am trying to accomplish is essential to keeping the business operative.

While the memo was written by Michael and addressed to defendant, both Michael and defendant signed the document.

The quoted portion above does not contain "an unqualified and direct admission of a present subsisting debt." Nowhere does defendant agree that he owes the money and is willing to pay it. Instead, at best, the document shows that defendant acknowledged that Michael believes defendant owes the money. While this distinction may be somewhat subtle, it nevertheless is important in this context. This situation is distinguishable from the one in *In re Booth's Estate*, where Mr. Booth signed a document that specifically asked him to "kindly certify to our auditors" that he owed the money. *In re Booth's Estate*, 326 Mich at 341. And under "Certified to be correct," Mr. Booth signed the document. *Id.* Thus, in that case, it was clear that Mr. Booth was making an unqualified and direct admission of a present subsisting debt. But here, there is no statement in the memo that Michael wrote that shows that defendant, by signing the memo, actually agreed to what the memo purported to say, instead of merely acknowledging its receipt.

As a result, Michael's June 2011 memo is inadequate to revive plaintiffs' stale claims for Counts I-IV, X, and XI against defendant, and the trial court properly dismissed these counts because they are barred by the statute of limitations.

Defendant also moved for summary disposition on Counts VIII, XII, and XVIII, which all pertain to claims of conversion/embezzlement. However, the trial court granted the motion with respect to Counts VII, XII, and XVIII. The court did not explain why it dismissed Count VII on statute of limitations grounds when defendant sought dismissal of Count VIII. We believe that it likely was a clerical error on the trial court's part to list Count VII instead of Count VIII. Regardless, as defendant concedes that dismissal of Count VII was incorrect, the trial court erred when it dismissed that count.

The parties agree that the three-year limitations period in MCL 600.5805(10) applies to claims of conversion.

Count VIII alleged that defendant impermissibly took money from the Harry Brennan Trust in March 2005, in December 2005, on November 1, 2011, and in November 2012. The complaint was filed on November 26, 2014. Thus, only the claim related to the conversion in

November 2012 was timely. Accordingly, the trial court should have granted summary disposition on this count with respect to the earlier alleged conversions.[4]

Count XII states a conversion action based on rental proceeds from farmland that was collected from 2001 through 2012. Based on the three-year limitations period and the fact that the complaint was filed on November 26, 2014, any claims that accrued prior to November 26, 2011, were time-barred. Thus, the trial court erred, in part, when it dismissed the entire count on the basis of statute of limitations.

Count XVIII alleged that defendant made unauthorized payments through HJB Leasing for his own personal benefit. Again, any claims related to unauthorized payments made prior to November 26, 2011, are time-barred. Thus, while the claims related to payments made in December 2005, April 2009, and early November 2011 were barred, the claims with respect to payments made on November 30, 2011, December 16, 2011, and May 25, 2012, were not barred. Thus, the trial court erred when it dismissed this count in its entirety.

We reject plaintiffs' position that the doctrine of fraudulent concealment allows the claims related to instances of conversion that occurred before November 26, 2011, to be considered timely. MCL 600.5855 provides that

> [i]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim . . . , the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim . . . , although the action would otherwise be barred by the period of limitations.

However, in order to invoke this doctrine, "[t]he plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996), citing *In re Estate of Farris*, 160 Mich 14, 18; 408 NW2d 92 (1987). Here, plaintiffs did not plead fraudulent concealment. Accordingly, they cannot now try to circumvent the statute of limitations through the doctrine.

Counts IX and XXII alleged breaches of fiduciary duty. The period of limitations for breach of fiduciary duty is three years.[5] *Wayne Co Employees Ret Sys v Wayne Co*, 301 Mich

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[4] Although defendant did not cross-appeal the trial court's decision to not grant summary disposition on this count based on the statute of limitations, because the court ultimately dismissed this count on the basis of laches, we nonetheless will affirm the trial court's decision on the alternate basis of statute of limitations. See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

[5] Plaintiffs contend on appeal that the five-year limitations period in MCL 700.7905(3) applies, but MCL 700.7905(1) makes clear that the statute applies to "proceedings" in probate court. And MCR 5.101(A) clarifies that there are two forms of actions in the probate court, "proceeding[s]" and "civil action[s]." And plaintiffs, by filing a complaint, initiated a civil action. MCR 5.101(C).

App 1, 67 n 37; 836 NW2d 279 (2013), aff'd in part and vacated in part on other grounds 497 Mich 36 (2014); *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005); *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977).

Count IX asserts a breach of fiduciary duty based upon distributions from the Harry Brennan Trust. Plaintiffs acknowledge that, under this three-year limitations period, all of the alleged distributions are time-barred except for one that was allegedly made in November 2012. But plaintiffs again claim that the doctrine of fraudulent concealment allows all of the claims to be timely. We disagree, as we have already held that plaintiffs failed to properly plead fraudulent concealment. Consequently, the trial court improperly dismissed all of the claims associated with Count IX, as it is clear that the claim regarding the November 2012 distribution was brought within the three-year limitation period.

Count XXII asserts that defendant breached his fiduciary duty when he made unauthorized payments on behalf of HJB Leasing. The same analysis as we did for Count XVIII would apply here because they both involve the same facts and same three-year limitations period. Accordingly, the claims with respect to payments made on November 30, 2011, December 16, 2011, and May 25, 2012, were not time-barred.

Count XXII further asserts that defendant breach his fiduciary duty when he disposed of HJB Leasing property for his own benefit. Defendant concedes on appeal that this "personal property" portion of the claim "was not properly dismissed under the statute of limitations at this stage of the litigation."

Therefore, with respect to Count XXII, the trial court properly dismissed the claims with respect to the unauthorized payments that occurred prior to November 26, 2011, but the court erred when it dismissed all of the other claims.

In Count XVII, plaintiffs purport to raise breach of contract claims with regard to the unauthorized payments defendant allegedly made though HJB Leasing. However, as defendant correctly notes, the claim actually sets forth an action arising out of defendant's alleged failure as manager of the company to perform required duties, which is a claim governed by the Michigan Limited Liability Company Act. "A plaintiff may not evade the appropriate limitation period by artful drafting." *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993). MCL 450.4404(6) of the act states that "[a]n action against a manager for failure to perform the duties imposed by this act shall be commenced within 3 years after the cause of action has accrued or within 2 years after the cause of action is discovered or should reasonably have been discovered by the complainant, whichever occurs first."

Once again, while the claims related to the payments made prior to November 26, 2011, were not timely, the claims related to the three payments made afterward on November 30, 2011, December 16, 2011, and May 25, 2012 were within the three-year limitations period. As a result, the trial court erred when it dismissed the count in its entirety based on the statute of limitations.

C. SUBJECT-MATTER JURISDICTION

Defendant moved for the dismissal of Counts XVII and XXII on the ground of lack of subject-matter jurisdiction. In defendant's brief at the trial court, defendant claimed that "Count XXII . . . asserts willful and oppressive conduct under the LLC Act" and had to be brought in the circuit court. The trial court, however, dismissed Counts XVII and XXIII for lack of subject-matter jurisdiction. The court did not explain its reasoning for dismissing Count XXIII when dismissal was requested for Count XXII. But we note that in the complaint, Count XXIII is listed as "Willful and Oppressive Conduct," while Count XXII is listed as "Breach of Fiduciary Duty." Thus, we believe that, here, because defendant's argument was premised on the count alleging willful and oppressive conduct, defendant erroneously referred to Count XXIII in his brief instead of Count XXII, and the trial court recognized this and intentionally dismissed Count XXII.

Count XVII alleges that defendant breached a contract when he made unauthorized payments on behalf of HJB Leasing. However, as explained earlier, the gravamen of this claim alleges a violation of the Limited Liability Company Act. Count XXIII alleged willful and oppressive conduct, which also is a claim under the Limited Liability Company Act. MCL 450.4515 of the act provides, in relevant part, that

> [a] member of a limited liability company may bring an action *in the circuit court* of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. [Emphasis added.]

Thus, because the complaint was filed with the probate court instead of the circuit court, defendant successfully argued that the probate court should dismiss the counts.

Plaintiffs state on appeal, in a single sentence, that the probate court had exclusive jurisdiction under MCL 700.1302(a)(*iii*) because the claims relate to "the declaration of rights that involve an estate." Because plaintiffs do not provide any analysis as to how this statute applies, we deem this argument to be abandoned. See *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007) ("A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim."). In any event, MCL 700.1302(a)(*iii*) provides that a probate court has exclusive jurisdiction over "[a] matter that relates to the *settlement* of a deceased individual's estate." (Emphasis added.) "Settlement" is defined as "the full process of administration, distribution, and closing." MCL 700.1107(d). As this Court explained in an unpublished opinion,[6]

> [I]n order to fall under the exclusive jurisdiction provided in MCL 700.1302(a), the claim at issue must itself relate to the process of administering, distributing or

[6] Although not binding precedent, unpublished opinions of this Court can be considered instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). We find *Moss* to be both instructive and persuasive.

> closing the estate. The fact that a particular suit involves an estate or has some tangential connection to the administration or distribution of an estate will not by itself be sufficient to invoke the probate court's exclusive jurisdiction. [*Moss v UAW Legal Services-Ford Legal Services Plan*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2006 (Docket No. 270641), p 3.]

Like the plaintiff in *Moss*, plaintiffs here do not bring any claims that involve the actual administration, distribution, or closing of an estate. Thus, the probate court does not have exclusive jurisdiction over the claims contained in this count.

Plaintiffs also argue that the probate court had concurrent jurisdiction over the claims under MCL 700.1303(1)(a).[7] At the time the suit was filed,[8] MCL 700.1303(1)(a) provided, in pertinent part:

> (1) In addition to the jurisdiction conferred by [MCL 700.1302] and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:
>
> (a) Determine a property right or interest.

Again, plaintiffs fail to explain how this particular statute applies. Instead, they merely cursorily claim that "these claims involve a determination of a properly [sic] right or interest of the estate." Accordingly, we deem this issue to be abandoned as well.[9] See *Nat'l Waterworks*, 275 Mich App at 265.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs, as no party prevailed in full.

/s/ Brock A. Swartzle
/s/ Henry William Saad
/s/ Peter D. O'Connell

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[7] In their brief on appeal, plaintiffs listed all 11 subsections under MCL 700.1303(1) but failed to explain which subsections were pertinent or how any one of them conferred jurisdiction on the probate court for these claims. But in their reply brief, plaintiffs explain that their reliance is solely on subsection (a). Hence, we will focus solely on that subsection.

[8] MCL 700.1302 was later modified by 2016 PA 287 and 2016 PA 490, but the subsequent changes did not affect subsection (1)(a).

[9] In any event, it is clear that the probate court lacked jurisdiction to hear these counts because Count XVII only requested damages related to alleged unauthorized payments and Count XXIII similarly requested damages due to defendant's alleged unfair and oppressive conduct. Neither of these counts involves the determination of a property right or interest.