IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D18-3563

LOWER TRIBUNAL CASE NO. CACE 12-034123 (07)

PHILIP J. VON KAHLE,

Appellant,

v.

FRANK AVELLINO,

Appellee,

APPELLANT PHILIP J. VON KAHLE'S INITIAL BRIEF

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I. PRELIMINARY STATEMENT

Appellant Philip Von Kahle appeals the trial court's ruling that, as to Counts II, III and IV of the Fourth Amended Complaint ("FAC") as against Appellee Frank Avellino, those Counts were time-barred because they did not relate back to the filing of the initial Complaint ("IC"). The sole basis for the grant of Frank Avellino and Michael Bienes' Motion to Dismiss Fourth Amended Complaint ("Motion to Dismiss") was the trial court's determination that, for statute of limitations purposes, the FAC did not relate back to the filing of the IC. As a result, the trial court did not rule on whether Von Kahle could proceed on fraud-based claims based on misrepresentations occurring after the 12-year statute of repose, Fla. Stat. § 95.031(2)(a), or whether, if the trial court were to determine that the FAC did not relate back, P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership's ("S&P," with P&S, "Partnerships" or "Plaintiffs") claims were preserved by the delayed discovery doctrine or the continuous tort doctrine.

Given the general rule that appellate courts do not address issues not ruled upon by trial courts,[1] if this Court agrees with Von Kahle that the trial court erred in denying relation-back it should, as part of reversing that determination, instruct the trial court on remand to address whether the Partnership's fraud-based claims based

[1] *Milan Inv. Group, Inc. v. City of Miami*, 172 So. 3d 458, 463 n.11 (Fla. 3d DCA 2015).

on misrepresentations and omissions more than 12 years prior to the filing of the IC are barred by the statute of repose. Alternatively, if this Court were to agree with the trial court that there is no relation back, it should nevertheless remand this matter with direction for the trial court to determine whether the Partnerships' fraud-based and breach of fiduciary duty claims within the applicable statute of limitations period are preserved by the delayed discovery and continuous tort doctrines.[2] These two issues, as well as the issue regarding the statute of repose identified in the preceding paragraph, were extensively brief by the parties before the trial court, R.1469-1477; R.1492-1498; R.1524-1528, but again not adjudicated by that court.

II. STATEMENT OF THE CASE

On December 10, 2012, Plaintiffs filed the IC, asserting the following claims against Frank Avellino ("Avellino") and Michael Bienes ("Bienes"): (i) Count II (aiding and abetting breaches of fiduciary duty by Defendant Michael Sullivan ("Sullivan"), the Partnership's former Managing General Partner); (ii) Count III (unjust enrichment); and (iii) Count IV (monies had and received). R.1-43.

On October 5, 2014, Plaintiffs filed the FAC, R.1369-1438, asserting the following claims against Avellino and Bienes: (i) Count I (breaches of fiduciary duty owed to the Partnerships); (ii) Count II (fraudulent misrepresentation); (iii) Count

[2] *See, e.g.*, *Metro PCS Commc'ns, Inc. v. Porter,* No. 3D17-375, 2018 WL 6786813, *3 n.3 (Fla. 3d DCA Dec. 26, 2018); *Stark v. State Farm Fla. Ins. Co.,* 95 So. 3d 285, 289 (Fla. 4th DCA 2012).

III (fraudulent inducement); Count IV (negligent misrepresentation); (iv) Count VII (unjust enrichment); (v) Count VIII (fraudulent transfer claims to recover kickbacks they received); (vi) Count IX (unjust enrichment); (vi) Count X (money had and received); and Count XI (civil conspiracy) . R.1369-1438.[3]

On December 4, 2014, the trial court conducted a hearing, R.7065-7124 (Hr'g Transcript), on Avellino and Bienes' Motion to Dismiss, R.1461-66.

On December 15, 2014, the Court entered the *Order Granting in Part, and Denying in Part, Frank Avellino and Michael Bienes' Joint Motion to Dismiss Fourth Amended Complaint* ("Dismissal Order"), R.1549-1552, dismissing with prejudice on limitations grounds Counts II, III and IV as against Avellino and Bienes. R.1550, ¶3.

On November 2, 2018, after the parties had reached a settlement in connection with Plaintiffs' Fifth Amended Complaint, the trial court entered its *Agreed Final Judgment,* R.6958-6962, which, in part, provided that final judgment was entered in favor of Avellino and Bienes and against Plaintiffs on Counts II, III and IV of the FAC, but that Plaintiffs "shall retain the right to appeal the Dismissal Order…, and nothing in this Judgment shall prejudice Plaintiffs' right to prosecute such an appeal." R.6960, ¶¶4 and 6.

[3] The named Defendants in the IC and FAC are the same with one exception: Kelco Foundation, Inc. and Vincent Kelly were named as Defendants in the IC, R.1-43, but not the FAC, R.1369-1438.

On November 30, 2018, Von Kahle, Plaintiffs' Conservator, timely filed his Notice of Appeal, R.7125-7138, from the *Agreed Final Judgment*.[4] This appeal is properly before this Court pursuant to Fla. R. App. P. 9.110(a)(1) and 9.030(b)(1)(A).

III. STATEMENT OF FACTS

A. Avellino and Bienes' Relationship with BLMIS

"This is not a simple case," and it arises from "the biggest fraud in the history of the United States of America." R.7081 (lines 16, 22-23). Specifically, this case involves the efforts to recover money associated with the Ponzi scheme run by Bernard Madoff ("Madoff") through Bernard L. Madoff Investment Securities, LLC ("BLMIS"), and the investment by the Partnerships in BLMIS. Avellino and Bienes, through their firm, Avellino & Bienes ("A&B"), secured funds from, among others, the Partnerships, which were invested with BLMIS, and derived a significant profit from their efforts to steer investments into BLMIS. Madoff originally operated BLMIS from the offices of Alpern & Heller, where Avellino worked as an accountant. R.1371, ¶11. Saul Alpern, Madoff's father-in-law, and Avellino,

[4] Von Kahle does *not* challenge dismissal of Counts II, III and IV of the FAC as to Bienes (now deceased), only Avellino. Nevertheless, since their actions and omissions are relevant to this appeal (as well as their pleadings below, primarily their jointly-filed Motion to Dismiss), this Brief recounts, among other things, the allegations directed at both Avellino and Bienes in the IC and FAC and related legal issues regarding this appeal.

operated a feeder fund called Alpern & Avellino, that pooled money from its customers for investments with BLMIS. R.1371, ¶12. After Alpern retired, the firm was renamed Avellino & Bienes which, like its predecessor, operated a feeder fund and raised substantial funds which were invested with BLMIS. R.1371, ¶¶13-14. Given their intimate familiarity with Madoff's and BLMIS's operations, Avellino and Bienes knew or should have known that BLMIS was a Ponzi scheme. R.1372-1374, ¶¶15-17; R.1380-1381, ¶¶38, 40, 44; R.1382, ¶46; 1383, ¶51; R.1386, ¶¶72-73; R.1387, ¶78; R.1388, ¶84; R.1389, ¶90. Nonetheless, they used their close relationship with BLMIS, and their control over the Partnerships to cause partners of the Partnerships to invest with the Partnerships, and ultimately BLMIS, so that they could improperly derive benefits, in the form of kickbacks, for themselves. R.1374, ¶¶15, 17; 1378, ¶25; R.1379, ¶¶28, 30; 1382, ¶41; 1383, ¶¶42-43.

B. The Initial and Fourth Amended Complaints[5]

Prior to the appointment of Margaret Smith, Von Kahle's predecessor, Sullivan served as the Partnerships' Managing General Partner. R.2, ¶4; R.1370, ¶4.

[5] The IC was filed on December 10, 2012. R. 1. The FAC was filed almost 2 years later on October 5, 2014. R.1369. Both the IC (R.16-43) and FAC (R.1405-141418, 1420-1433) attached as Exhibit A and B, the Amended and Restated Partnership Agreement of S&P, and P&S, respectively (collectively, "P'ship Agreements"). Other than the names of the partnerships, the P'ship Agreements are mirror images of each other (i.e., the business of the partnerships is investing (§2.02), the business address is the same (§1.03), the date of organization is the same (§3.01), the managing partners are the same (§8.01) and both agreements are governed by Florida law (§14.07)). *See id.*

A&B, like Alpern & Avellino, A&B's predecessor, operated a feeder fund to facilitate exclusive investments in BLMIS. R.3-4, ¶¶13-16; R.1371, ¶¶11-14.

The Partnerships invested (and lost) millions of dollars with BLMIS. R.4, ¶¶16, 17; R.1376, ¶27; R.1377-1378, ¶31; R.1383, ¶51. A substantial amount of Partnerships' funds were misappropriated. R.4, ¶¶18-19, 22-23; R.5, ¶26; R.6-7, ¶¶31(b), 32; R.8, ¶34; R.1371-1372, ¶¶12-15, 17(c), (e). "Avellino and Bienes knew or should have known that millions of dollars of Partnership assets were being misappropriated." R.7, ¶32.

Avelino and Bienes received substantial funds as a result of investments by the Partnerships in BLMIS, including "fees," commissions and kickbacks. *See* R.6-7, ¶31(b) ("Sullivan earmarked tens of thousands of dollars in 'fees' to Frank Avellino and Michael Bienes…."); R.7, ¶32 ("Avellino and Bienes received many thousands of dollars in commissions from Sullivan…."); R.10 ¶46 ("The Partnerships conferred a direct benefit on, among others, Avellino and Bienes, by virtue of the millions of dollars they collectively received."); R.11, ¶52 (same); R.1372, ¶15 (Avellino and Bienes profited by making millions of dollars from personal investments and monies paid to them for convincing others (i.e., the Partnerships)) to invest in BLMIS); R.1383, ¶52 ("In return for Avellino and Bienes giving the Partnerships access to BLMIS, and in addition to providing a steady stream of new investors for BLMIS, Avellino and Bienes received commissions for

those investors that they referred to the Partnerships."); R.1386, ¶61(a) ("Through entities controlled by Avellino, Avellino received approximately $307,790.84 in [k]ickbacks from the Partnership….").

Many of the general partners were introduced to the Partnerships through Avellino and Bienes. R.7, ¶32; R.1371, ¶9; R.1377, ¶30; R.1383, ¶50.

The roots of the investments in BLMIS were grounded in trust carefully cultivated for years, stemming from participation in church. R.5, ¶25; R.1378-1379, ¶¶32-36; R.1384; ¶57; R. 1385, ¶58.

Given scrutiny by, among others, the SEC, front-men (i.e., Sullivan) were used in connection with investments in BLMIS in order to pool money and avoid the scrutiny of regulators. R.3-4, ¶15; R.5, ¶27; R.6-7, ¶31(b) (recounting allegation in suit by Trustee for liquidation of BLMIS that despite an SEC prohibition from participating in the sale of securities). Avellino and Bienes found people such as Sullivan, who were willing to act as 'front men to operate partnerships so that they could continue to raise and pool money from others to invest with BLMIS but avoid the scrutiny of regulators,'" and referencing Plaintiffs as examples of such investment vehicles; R.1375, ¶¶23-24; R.1376, ¶¶23-27; R.6-7, ¶31(b) ("Avellino and Bienes found people such as Sullivan who were willing to act as 'front men' to operate partnerships so that they could raise and pool money from others to invest in BLMIS but avoid the scrutiny of the regulators.").

Avellino and Bienes were active in the management of the Partnerships, that is, they were given and exercised a significant, inappropriate and unlawful level of control over the Partnerships, including with respect to funds they invested with BLMIS. R.6-7, ¶31(b) ("Avellino was given a significant, inappropriate and unlawful level of control over the Partnerships."); R.7, ¶32 ("[U]pon information and belief, Avellino was active in the management of the Partnerships itself."); R.8, ¶34 (describing, among others, Avellino and Bienes, as "collaborators" of Sullivan in taking substantial fees without correlation to distribution methodology under the Partnerships' agreements); R.9, ¶38(f) and 42(f) ("Sullivan breached his fiduciary duties of loyalty and care to the Partnerships through his actions, including… [a]llowing Avellino and Bienes to participate in the management of the Partnerships."); R.1376, ¶25 ("In fact, Avellino and Bienes were able to exert … control over the Partnerships…."); R.1376-1377, ¶27 ("[E]ach of the Partnerships exclusively invested with BLMIS based on Avellino's and Bienes' advice. The Partnerships could not establish accounts with BLMIS on their own, as [Michael] Sullivan did not have a prior direct relationship with BLMIS" as did Avellino and Bienes); R.1377, ¶28 (Partnerships "would never have invested with BLMIS and suffered the substantial losses that are the subject of this lawsuit, without the assistance of Avellino and Bienes in setting up an account with BLMIS."); R.1377, ¶30 ("Avellino and Bienes ensured that they could continue to profit through BLMIS

by assisting the movement of A&B customers and accounts to S&P and P&S, and maintaining a degree of involvement and control over the Partnerships."); R.1380-1382, ¶¶41-47; R.1382-1383, ¶¶49-50; R.1387, ¶65 ("Avellino continued to be active in the management of the Partnerships and assisted in the concealment [sic] the [k]ickbacks received until 2012."); R.1388, ¶66 ("Sullivan attempted to prevent general partners of the Partnerships from accessing the Partnerships' books and records to further conceal Avellino and Bienes' involvement in the Partnerships.").

(i) Time-based allegations in the FAC

The FAC identifies investments made by the Partnerships in BLMIS between 1993 and 2008. R.1377-1378, ¶3.1 The FAC alleges that, from 2002 and on, Sullivan tracked the Partnerships' investments and capital they held "based exclusively on Avellino's advice, and by using software that Avellino's son provided. R.1381, ¶45. The FAC further alleges that in July, 2004, November, 2007 and late 2008, Avellino and Bienes interacted with partners in the Partnerships with regard to investments in BLMIS. R.1382, ¶¶47-49. The FAC further alleges that through 2008, Avellino gave the Partnerships advice on how to structure themselves, and communicate with BLMIS. R.1381, ¶42. The FAC further alleges that from the Partnerships' inception (in 1993) through 2008, Avelino and Bienes failed to disclose to the Partnerships that BLMIS was a Ponzi scheme, and intentionally omitted disclosing that fact in order to induce Sullivan and the Partnerships to continue to invest funds with BLMIS

to ensure they would not withdraw funds from BLMIS which directly benefitted Avellino and Bienes. R.1390, ¶¶77, 79; R.1391-1392, ¶¶83, 85, 89; R.1393, ¶91. Finally, the FAC further alleges that Avellino continued to be active in management of the Partnerships and assisted in concealing the kickbacks received until 2012. R.1387, ¶65.

C. Hearing on Bienes' and Avellino's Motion to Dismiss

On December 4, 2014, the trial court conducted a hearing on the Motion to Dismiss. R.7065-7124 (Hr'g Transcript). In response to Avellino and Bienes' contention that the theory of Plaintiffs' case changed from Sullivan being the culprit, and Avellino and Bienes aiding and abetting his breaches of fiduciary duty, to one asserting a continuing pattern of fraud by Avellino and Sullivan regarding investments by the Partnerships in BLMIS, R.7079 (lines 4-22), the trial court noted that Plaintiffs, through Von Kahle, have been learning additional material since filing the IC, and "[t]his is not a simple case," but instead it involves "the biggest fraud in the history of the United States of America." R.7081 (lines 16, 22-23). With respect to Counts II, II and IV of the FAC, the trial court remarked about what it described as "an entirely different set of claims and damages" against Avellino and Bienes, but tentatively rejecting a possible argument that the claims would not relate back for purposes of Fla. R. Civ. P. 1.190(c). *See* R.7083 (lines 12-25).

The trial court specifically noted the expanded scope of the relief sought regarding the Partnerships' investments in the Ponzi scheme (i.e., BLMIS, based on actions by Avellino and Bienes). R.7084 (lines 7-11). The trial court stated that the allegations in the IC dealt with kickbacks, commissions and management fees, R.7087 (lines 12-19), and that the FAC sought all funds lost by the Partnerships resulting from Avellino's and Bienes' omissions regarding investments by the Partnerships in the Ponzi Scheme. R.7093 (lines 12-24). Plaintiffs' counsel conceded that the relief sought in the FAC had been expanded, but noted that it was still premised on the allegations that Avellino and Bienes exercised an improper level of control over the Partnerships. R.7091 (lines 8-9, 16-19); R.7092 (line 24); R. 7092 (lines 24-25) through R.7093 (line 1).

Ultimately, the trial court concluded that there was no relation back given that Plaintiffs "completely extended the scope of the entire case. [Plaintiffs] made it just from kickbacks and commissions and fees to damages for the entire Ponzi [scheme] suffered by the [P]artnerships. That changes everything. And we scrapped the whole case management [schedule and trial calendar]. … I don't see how [Counts II, II and IV of the FAC] could relate back based on that analysis because of the difference in the accusations, the difference in the damages." R.7098 (lines 7-16). The trial court announced from the bench that Counts II, III and IV were dismissed with prejudice. R.7102 (lines 1-2). The trial court then entered an Order dated December

18, 2014 which provides, in relevant part, that "[t]he Court dismissed … Counts II, III, and IV of the Fourth Amended Complaint with prejudice on the grounds that they are barred by the statute of limitations because they do not relate back to the filing of the original Complaint in this action." R.1550, ¶4.

IV. SUMMARY OF THE ARGUMENT[6]

The trial court erroneously focused on the fact that the FAC asserted different, additional claims against Avellino and Bienes, and sought substantially greater damages beyond that in the IC, that is, beyond kickbacks, fees and commissions to damages suffered by the Partnerships as a result of its investments in BLMIS. Because the trial court failed to apply the plain language of Fla. R. Civ. P. 1.190(c), which focuses *solely* on whether claims in an amended complaint arise out of the same "conduct, transaction or occurrence" as that underlying the initial complaint, confirmed in *Kopel v. Kopel,* 229 So. 3d 812 (Fla. 2017), that is, the "same general factual situation," *Associated Television & Commcn's, Inc. v. Dutch Village Mobile Homes of Melbourne, Ltd.*, 347 So. 2d 746, 748 (Fla. 4th DCA 1977), which is the case here.

[6] The Dismissal Order is properly before the Court as part of Von Kahle's appeal of the *Agreed Final Judgment*. *See Auto Owners Ins. Co. v. Hillsborough County Aviation Auth.,* 153 So. 2d 722, 723 (Fla. 1956) ("The appeal from the final judgment brings up for review all interlocutory orders entered as a necessary step in the proceeding.") (citation omitted).

The claims in the IC and FAC are premised on funds the partnerships invested in the same Ponzi scheme (through A&B), and a significant, inappropriate and unlawful level of control that Avellino and Bienes exercised over the Partnerships. By focusing on the fact that additional claims and damages were being asserted and sought, the trial court committed reversible error in concluding that there was no relation back. Accordingly, this Court should reverse and remand this matter to the trial court with directions that it reinstate Counts II, III and IV of the FAC as against Avellino, and conduct further proceedings on those claims in the ordinary course.

V. ARGUMENT

A. Standard of Review

This appeal involves an order dismissing certain counts of an amended complaint based on a conclusion of law that those counts did not, for statute of limitation purposes, "relate back" to the date of the filing of the initial complaint under Fla. R. Civ.. P. 1.190(c). A trial court's ruling on a motion to dismiss, and a determination of whether an amended complaint relates back, are reviewed *de novo*. *Kopel*, 229 So. 3d at 815. Under a *de novo* review, no deference is due to the trial court's judgment. *Van v. Schmidt,* 122 So. 3d 243, 246 (Fla. 2013).

B. Applicable Legal Standards

Fla. R. Civ. P. 1.190(c) provides that "[w]hen the claim…asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to

the date of the original pleading." *Id.* "It is well-settled that the rule permitting amendments to pleadings, and the relation-back doctrine, are to be liberally construed and applied." *Arch Specialty Ins. Co. v. Kubicki Draper, LLP*, 137 So. 3d 487, 490 (Fla. 4th DCA 2014) (quotation omitted).

In *Kopel*, the Supreme Court held that the relation back determination must comport with the plain language in Rule 1.190(c). Specifically, the Supreme Court rejected one line of cases holding that an amended pleading does not relate back if it states a new, different, or distinct cause of action from the original pleading, and instead adopted a second line of cases which allow relation back where, like here, the claims from the amended pleading arise out of the same conduct, transaction, or occurrence as in the initial complaint, as contemplated by Rule 1.190(c). *Kopel*, 229 So. 3d at 816-17; *Caduces Props., LLC v. Graney*, 137 So. 3d 987, 992 (Fla. 2014).

Restating the rule emanating from the second line of cases it adopted, the Supreme Court explained that "as long as the initial complaint gives the defendant fair notice of the general factual scenario or factual underpinning of the claim, amendments stating new legal theories can relate back." *Kopel*, 229 So. 3d at 816. Continuing, the Supreme Court explained that "[t]his is true even where the legal theory of recovery has changed or where the original and amended claims require the assertion of different elements." *Id.*; *Janie Doe 1 ex rel. Miranda v. Sinrod*, 117 So. 3d 786, 789 (Fla. 4th DCA 2013) ("…a new cause of action—and even a new

legal theory—can relate back to the original pleading so long as the new claim *is not based on different facts*, such that the defendant would not have fair notice of the general factual situation.") (quotation omitted) (emphasis added); *Associated Television,* 347 So. 2d at 748 ("If the amendment shows the same general factual situation as that alleged in the original pleading, then the amendment relates back even though there is a change in the precise legal description of the rights sought to be enforced, or a change in the legal theory upon which the action is brought.").

C. The trial court committed reversible error in concluding that the claims in Counts II, III and IV of the FAC did not relate back

The named Defendants in the FAC are the same as in the IC.[7] The basis for the underlying claims asserted by the Partnerships is also the same in both the IC and FAC—damages sustained by the Partnerships in connection with monies invested in BLMIS through misappropriation or otherwise, and by the significant, inappropriate and unlawful level of control that Avellino and Bienes exercised over the Partnerships.

Both the IC and FAC allege that Avelino and Bienes operated the feeder fund, A&B, that was used to facilitate investments into BLMIS, and that Avellino and Bienes were precluded from trading in securities by the SEC. IC, ¶¶25, 26, 31(b), 34, 35; FAC, ¶¶12-15, 24. That allegation is premised on the fact that A&B was

[7] Through a settlement, Plaintiffs dismissed their claims against Vincent Kelly and Kelco, two other defendants.

investigated by the SEC for selling unregistered securities, and through the course of that investigation, Avellino and Bienes knew or should have known that BLMIS was a fraud. FAC, ¶17. Because Avellino and Bienes were prohibited from selling securities, they found people such as Sullivan, "who were willing to act as 'front men to operate partnerships so that they could continue to raise and pool money from others to invest with BLMIS but avoid the scrutiny of regulators.'" IC, ¶ 31(b); FAC, ¶¶ 23-27. The foregoing allegations put Avellino and Bienes on notice of the fact that the claims asserted against them would be based on whether they knew or should have known that BLMIS was a fraud. *See infra* Footnote 6.

Several of the claims against Avellino and Bienes in both the IC and FAC are based upon monies they received in connection with their exercise of control over the Partnerships and the investments made by them in BLMIS. Avellino and Bienes profited substantially from guiding monies into the Partnerships and the Partnerships' subsequent investments in BLMIS, which resulted in substantial losses, and which Avellino and Bienes knew or should have known was operated as a Ponzi scheme given their "uniquely close relationship with Madoff." R.1383, ¶15. Avellino and Bienes were actively involved in management of the Partnerships, including as it related to the Partnerships' investments in BLMIS, ensuring that a constant stream of investments would be funneled into BLMIS. IC, ¶¶31(b), 32, 34, 35, 38(f), 42(f); FAC, ¶¶15, 23, 25, 27, 28, 29, 30, 37, 41.

For the reasons explained herein, because the claims asserted and damages sought in the FAC went beyond those in the IC is legally irrelevant, the trial court's reliance thereon in finding no relation back constituted reversible error as departing from the plain language in Rule 1.190(c).

(i) Claims asserted

As to Avellino and Bienes, the IC sought damages based on aiding and abetting breaches of fiduciary duty by Sullivan to the Partnerships for which he served as Manager in connection with investments in BLMIS, as well as for unjust enrichment and monies had and received premised on monies Avellino and Bienes received in the form of kickbacks (i.e., fees and commissions), for facilitating those failed investments. *See* IC, ¶¶14-19, 23, 26, 30, 31(b), 32, 35, 40-56.

As to Avellino and Bienes, the FAC asserted claims for breaches of fiduciary duty, fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, unjust enrichment, fraudulent transfers, monies had and received and civil conspiracy. *See* FAC, ¶¶11-46, 49-97, 108-156. While there were additional claims asserted in the FAC, and an expanded claim for damages, there are, critically, substantial similarities in the claims asserted in the IC and FAC and more critically, the factual circumstances from which those claims arose.

For example, the claim for breach of fiduciary duties was premised in large, if not exclusive, part on the control that Avellino & Bienes exercised over the

Partnerships, a contention raised in both the IC and FAC. *See* IC, ¶¶31(b), 32, 34, 38(f), 42(f); FAC, ¶¶25, 27, 28, 30, 41-47, 49, 50, 65, 66, 69-71, 74. In a letter attached as Exhibit C to the FAC, R.1436-1438, from Sullivan to the wife of his then-deceased partner, Greg Powell, Sullivan stated, in part, that Avellino was "the main source," that Avellino "would never have allowed" Mrs. Powell to become a partner in the Partnerships after Powell's death, and that the business could be worth nothing if, among other things, Avellino died. *Id.* These statements confirm Avellino's involvement with, his exercise of control over, and centrality to the Partnerships and their continued existence and success. The breach of fiduciary duty claim was also premised on the contention that Avellino and Bienes knew or should have known that BLMIS was operated as a Ponzi scheme, an allegation made in both the IC and FAC. *See* IC, ¶¶14-16, 31(b)[8], 32, 34; FAC, ¶¶15-17, 38, 40, 44, 46, 51, 72, 73, 78, 84, 90.

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[8] The FAC focuses on the fact that Avellino and Bienes knew or should have known that BLMIS was a Ponzi scheme based on the allegation that:

> Madoff mislead the SEC by providing false documents during an investigation into Avellino, Bienes, and A&B, so the frauds of Madoff, Avellino, and Bienes would not be discovered. Avellino and Bienes knew or should have known that the documents provided to the SEC were false because Annette Bongiorno, a then-BLMIS employee, and others revised three years' worth of A&B's records to make it appear as though it had let risky investments and was solidly protected by its holdings of U.S. Treasury bills, and Madoff provided records for A&B to the SEC that A&B itself could not produce;

Similarly, like the IC, the FAC asserted claims for monies received in the form of kickbacks (i.e., fees and commissions) by Avellino and Bienes in connection with monies the Partnerships were to invest in BLMIS, and for recovery of those kickbacks as fraudulent transfers. *See* IC, ¶¶23, 31(b), 45-56; FAC, ¶¶52, 61(a) and (b), 109-146.

The additional claims asserted against Avellino and Bienes in the FAC that were not asserted in the IC were for breaches of fiduciary duty, discussed above, as well as for fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation and civil conspiracy. The gravamen of all of the claims asserted by the Partnerships was based on the allegation that Avellino and Bienes, and specifically Avellino, exercised an improper level of control over the Partnerships, consistent with paragraphs 31(b), 32, 38(f), 42(f) of the IC, an allegation made in the FAC, too. FAC, ¶¶25, 30, 37, 52, 69-71.

As to the fraud-related claims, that is, fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation,[9] those centered on Avellino and Bienes'

FAC, ¶17(j).This is consistent with the allegation of Paragraph 31(b) of the IC which describes how Avellino and Bienes were investigated by the SEC. Moreover, Paragraph 31(b) of the IC, and 17(n) of the FAC, provide that Avellino and Bienes did not register with the SEC. There is no question that paragraph 31(b) of the IC was sufficient to put Avellino and Bienes on "fair notice of the general factual situation." *Janie Doe 1 ex rel. Miranda*, 117 So. 3d at 789.

[9] Under Florida law, a negligent misrepresentation claim sounds in fraud. *Ostreyko v. B.C. Morton Org., Inc.,* 310 So. 2d 316, 318 (Fla. 3d DCA 1975).

involvement in management of the Partnerships and the directly-related contention that they knew or should have known that BLMIS was being operated as a Ponzi scheme, both of which were asserted in the IC and FAC. *See* IC, ¶¶14-16, 31(b), 32, 34, 38(f), 42(f); FAC, ¶¶15-17, 25, 27, 28, 30, 38, 40-47, 49, 50, 51, 65, 66, 69-71, 72, 73, 74, 84, 90.

The remaining claim for civil conspiracy was based on "a pattern of tortious conduct – including but not limited to breaches of fiduciary duties and fraudulent misrepresentations," FAC, ¶149, as well as with respect to the "kickbacks," misappropriation of Partnerships' assets and Avellino and Bienes' exercise of control over the Partnerships. FAC, ¶¶150-152. As explained above, the conduct underlying the allegations concerning breaches of fiduciary duty, including the control exercised by Avellino and Bienes over the Partnerships, as well as kickbacks and misappropriation of Partnership assets was raised in both the IC and FAC.

(ii) Damages asserted

In the IC, damages sought as against Avellino and Bienes were based upon their aiding and abetting breaches of fiduciary duties by Sullivan to the Partnerships in connection with monies to be invested in BLMIS, including by "[a]llowing Avellino and Bienes to participate in the management of the Partnerships," IC, ¶42(f), which breaches resulted in damages in the form of misappropriation of not less than $10 million dollars. *See* IC,¶¶26 (approximately $6.4 million paid to

Sullivan's firm, Michael D. Sullivan & Associates, as management fees), 30 (approximately $3.1 million paid to Sullivan's firm, Michael D. Sullivan & Associates, as management fees), 31(b) (Sullivan earmarked payment of "tens of thousands of dollars" in "fees" to Avellino and Bienes), and 31(d) (more than $740,000 to the Kelco Foundation).

In the FAC, as to claims asserted against Avellino and Bienes through Counts I-IV, the Partnerships seek damages, including special damages in the amount of monies the Partnerships lost. As to claims asserted against Avellino and Bienes through Counts VII-X of the FAC, as 2 of the 3 "Kickback Defendants," FAC ¶63, n.3, the Partnerships seek damages in the form of the kickbacks received; as to Avellino, $307,790.84 (FAC, ¶61(a)) through Sullivan's company, Michael D. Sullivan & Associates. As to claims asserted against Avellino and Bienes through Count XI of the FAC, the Partnerships seek damages in an unspecified amounts.

In short, because the claims asserted and damages sought in the FAC arose out of the conduct, transaction, or occurrence as contemplated by Rule 1.190(c), that is, "the same general factual situation," *Associated Television,* 347 So. 2d at 748, the trial court committed reversible error in concluding that, for statute of limitation purposes, the FAC did not relate back in time to the filing of the IC.

D. Even if the FAC did not relate back, the trial court erred by failing to consider the effect of the continuing tort and delayed discovery doctrine.[10]

"Only under extraordinary circumstances where the facts in the complaint, taken as true, conclusively show that the action is barred by the statute of limitations, should a motion to dismiss on this ground be granted." *Ambrose v. Catholic Soc. Servs., Inc.*, 736 So. 2d 146, 149 (Fla. 5th DCA 1999) (also considering statute of repose). In light of the foregoing, the trial court erred by finding that the Partnerships' claims were barred by the applicable statute of limitations without considering the effect of the delayed discovery or continuous tort doctrines.

Even if the facts which gave rise to the discovery of claims against *Avellino and Bienes*, and not Madoff was established in the FAC, it specifically pleads that Avellino and Bienes concealed their conduct and involvement with the Partnerships through 2012. FAC, ¶¶ 1, 50-52, 65-66. Specifically, the FAC alleges that "Avellino *continued* to be active in the management of the Partnerships and assisted in the concealment the Kickbacks received until 2012," FAC, ¶65 (emphasis added). "Avellino's conduct was intended to shield him and Bienes from the ramifications

[10] As explained above, if this Court were to agree with the trial court that there is no relation back, it should nevertheless remand this matter with direction for the trial court to determine whether the Partnerships' fraud-based and breach of fiduciary duty claims within the applicable statute of limitations period are preserved by the delayed discovery and continuous tort doctrines, an issue briefed below by the parties. Nevertheless, Von Kahle's argument on this issue is briefly set forth above for purposes of completeness.

of their various breaches of fiduciary duties," and that "in concealing his conduct, Avellino acted for himself and for Bienes." FAC, ¶65. Additionally, the FAC pleads that "Sullivan attempted to prevent general partners of the Partnerships from accessing the Partnerships' books and records to further conceal Avellino and Bienes' involvement in the Partnerships[,]" and in 2012, denied that Avellino and Bienes had any involvement with the partnerships. FAC, ¶66. These facts, taken in the light most favorable to the Plaintiffs, are clearly sufficient to establish that issues of fact exist as to when Avellino and Bienes' fraudulent conduct should have been discovered, and there is no allegations in the FAC that indicates that Defendants' conduct could have been discovered on or before December 11, 2008.[11] *See Goodwin v. Sphatt*, 114 So. 3d 1092, 1094 (Fla. 2d DCA 2013) ("dismissal was not warranted because the complaint does not specify when [the plaintiff] knew or should have known of the [defendant's] misrepresentations.").

Under the continuing tort doctrine, the statute of limitations runs from the date that the tortious conduct ceases, or the date that the last tortious *act occurs*. *Laney v. Am. Equity Inv. Life Ins. Co.*, 243 F. Supp. 2d 1347, 1357 (M.D. Fla. 2003) (applying Florida law); *Millender v. State DOT*, 774 So. 2d 767, 769 (Fla. 1st DCA 2000) (the

[11] This Court can take judicial notice of the litigation required to appoint the Conservator and gain access to the books and records of the Partnerships. *See Carone, et al. v. Sullivan*, No. 12-24051 (07) (Broward Cnty. Circuit Ct., Jan. 27, 2013) (*Order Appointing Conservator*).

statute of limitations, in a continuing tort action, runs from the date of the last tortious act). The continuing tort doctrine permits parties to assert claims in connection with conduct that has occurred outside of the statute of limitations period, so long as the last act in furtherance of tortious conduct occurred within that period. *City of Quincy v. Womack*, 60 So. 3d 1076, 1078 (Fla. 1st DCA 2011).

The FAC alleged that Avellino and Bienes breached and continued to breach their fiduciary duties through 2012 by taking action to the Partnerships' detriment for their own benefit. IC¶¶1, 31, 66, 74; FAC, ¶¶1, 31, 66, 74.

Because the allegations concerning Avellino and Bienes' continuing breaches of fiduciary duty as set forth in the FAC were sufficient to establish a continuing tort, Plaintiffs' breach of fiduciary claim should not have been dismissed on statute of limitations grounds, as Plaintiffs' claims did not accrue until Avellino and Bienes' tortious conduct ceased in 2012, even absent relation back. *Goodwin*, 114 So. 3d at 1094. However, the trial court simply found that because the FAC did not relate back to the IC, the FAC was time-barred. Such a determination was premature, and constituted reversible error. *Pearson v. Ford Motor Co.*, 694 So. 2d 61, 68-69 (Fla. 1st DCA 1997).

VI. CONCLUSION

The trial court's Dismissal Order and the *Agreed Final Judgment*, to the extent based on the Dismissal Order, should be reversed. Instead of applying Rule 1.190(c)

as written and construed by the Florida Supreme Court and this Court, it erroneously relied on the fact that the FAC asserted different breaches and sought expanded damages then in the IC. This Court should reverse and remand this matter to the trial court with directions that it reinstate Counts II, III and IV of the FAC and conduct further proceedings on those claims in the ordinary course, including adjudicating the issue of whether the Partnerships' fraud-based claims based on misrepresentations and omissions more than 12 years prior to the filing of the IC are barred by the statute of repose.

Alternatively, if this Court were to agree with the trial court that there is no relation back, it should remand with direction for the trial court to determine if the Partnerships' fraud-based claims within the applicable statute of limitations period and breach of fiduciary duty claims are preserved by the delayed discovery and continuous tort doctrines. This Court should further direct the trial court that, if it concludes that Partnerships' fraud-based claims within the applicable statute of limitations period and breach of fiduciary duty claims are preserved by the delayed discovery and continuous tort doctrines, those claims as asserted in Counts II, III and IV should be reinstated.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's Initial Brief is in compliance with the requirements of Rule 9.100(b)(1), Florida Rules of Appellate Procedure. This Initial Brief of Appellant is Times Roman 14-point and otherwise complies with the requirements of Rule 9.210(a) and (b), Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic mail upon Haile, Shaw, Pfaffenberger, P.A., *Attorneys for Appellee Frank Avellino*, Gary A. Woodfield, Esq. (gwoodfield@haileshaw.com) (bpetroni@haileshaw.com) (eservices@haileshaw.com) and Susan Yoffee, Esq. (Syoffee@haileshaw.com), 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 on this 18th day of February, 2019.

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