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

4TH DCA CASE NO: 4D18-3563

PHILIP J. VON KAHLE,

Appellant,

vs.

FRANK AVELLINO,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

LOWER TRIBUNAL CASE NO. 12-034123 (07)

APPELLEE'S ANSWER BRIEF

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I. PRELIMINARY STATEMENT

The initial complaint ("IC") was filed on December 10, 2012. Over the next two years, Appellant, Philip Von Kahle ("Von Kahle"), the court appointed Conservator of the P&S and S&P Partnerships (the "Partnerships"), amended the complaint five times, culminating with the Fifth Amended Complaint ("5AC") filed on January 9, 2015. Appellee, Frank Avellino ("Avellino"), along with other Defendants, filed Motions to Dismiss as to all the amended complaints, which were granted, at least, in part. Von Kahle, in an effort to avoid the inevitable dismissal based on statute of limitations, asserted diametrically opposed facts and claims in the latter filed amended complaints, and then unsuccessfully sought to have the trial court find that they related back to the IC.

Von Kahle appeals only the dismissal of Counts II, III and IV[1] of the Fourth Amended Complaint ("FAC") by the trial court on December 18, 2014. Von Kahle incorrectly states that the sole basis for the dismissal was the trial court's determination that the FAC did not relate back to the filing of the IC for statute of limitation purposes. Brief at 1. However, other arguments were raised and considered by the trial court as a basis for dismissing the counts, including, for

[1] In his Notice of Appeal Von Kahle states he is appealing the dismissal of these three counts and in his Initial Brief ("Brief"), seeks for this Court to reinstate these three counts. [R. 7125-7138]. However, the Brief at 17-17, 20, 22-24, discusses the breach of fiduciary duty (Count I), which was dismissed with prejudice, with leave to amend only as to the alleged "Kickbacks". [R. 1549-1550]. Thus, in an abundance of caution Avellino also addresses Count I herein.

example, the proximity of the trial date, which had already been reset multiple times. In addition, contrary to Von Kahle's statement, the doctrines of delayed discovery, continuous tort doctrine, and statute of repose were raised, argued by the parties, and ruled upon by the trial court, adversely to Von Kahle.[2] They were also the subject of a later Motion for Summary Judgment filed by Avellino, granted by the trial court, and not appealed by Von Kahle. Accordingly, there is no valid basis for remanding these issues to the trial court.[3] Von Kahle tried unsuccessfully six times to assert valid claims that were not time barred. He should not be afforded another opportunity.

II. STATEMENT OF THE CASE

The IC was filed on December 10, 2012; the Amended Complaint on December 2, 2013; the Second Amended Complaint ("2AC") on January 31, 2014,

[2] These doctrines were first raised and ruled upon adversely by the trial court when it granted Avellino's Motion to Dismiss the Third Amended Complaint ("3AC"). [R. 1210-1215, 1216-1226, 1278-1292, 1295-1306, 1342-1344].

[3] The cases cited by Von Kahle, Brief at 1-2, for his request to remand to the trial court for consideration of these doctrines are factually inopposite. *Milan Inv. Group, Inc. v. City of Miami*, 172 So.3d 458, 463, n.11 (Fla. 3d DCA 2015) (trial court determined it was foreclosed from reaching the constitutional issue); *MetroPCS Communications, Inc. v. Porter*, No. 3D17-375, 2018 WL 6786813 *3, n. 3 (Fla. 3rd DCA Dec. 26, 2018) (trial court did not rule on issue of unconscionability of arbitration agreement because found there was not a binding agreement); *Stark v. State Farm Fla. Ins. Co*., 95 So.3d 285, 289, n. 4 (Fla. 4th DCA 2012) (transcript of hearing revealed trial court based summary judgment only on failure to provide timely notice).

the 3AC on June 27, 2014, the FAC on October 5, 2014 and the 5AC on January 9, 2015. [R 1-43; 244-293; 368-428, 1111-1169, 1369-1438, 1577-1634].

Von Kahle seeks to focus this Court's attention only to the order dismissing three counts in the FAC. However, Von Kahle first included diametrically opposed facts and claims from the IC in the 3AC, and based on the new alleged facts, asserted claims of fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation and a revised claim for breach of fiduciary duty against Avellino.[4] [R. 1111-1169]. On August 25, 2014, the trial court dismissed these claims as barred by the statute of repose and statute of limitations, but did so without prejudice, giving Von Kahle leave to file an amended complaint with regard to the dismissed claims, but no further amendments to the complaint were permitted. [R. 1342-1344]. In dismissing these claims in the 3AC the trial court considered Von Kahle's defenses of continuing tort, delayed discovery and relation back to the IC, and found they did not save the time-barred causes of action. [R. 1210-1215, 1216-1226, 1278-1292, 1295-1306].

In the FAC Von Kahle again sought to include some of the same new facts and claims raised in the 3AC, along with other new facts and claims. Since the claims remained time-barred and did not relate back to the IC, the trial court

[4] Identical claims were asserted in all of Von Kahle's complaints against not only Avellino, but also Michael Bienes ("Bienes"). Although both Avellino and Bienes are defendants in the final judgment, Von Kahle has appealed only as to Avellino.

dismissed the claims with prejudice. Von Kahle was permitted to file an amended complaint as to Count I (fiduciary duty) only for the alleged "Kickbacks". [R. 1549-1552]. The 5AC was served on January 9, 2015, and included the amended fiduciary duty count, along with six other counts, all seeking damages for the "Kickbacks", management fees and commissions. [R. 1577-1634].

The issue of statute of limitations and Von Kahle's defenses of continuing tort and delayed discovery[5] were again raised in opposition to Avellino's Amended Motion for Summary Judgment as to the counts in the 5AC. [R. 3744-3749, 3750-3764, 4574-4697, 5261-5346]. The trial court's October 28, 2016 order determined that Von Kahle's defenses were not applicable and did not save the time-barred claims, and thus, granted the motion dismissing all counts of the 5AC, except for fraudulent transfer, based on the one year savings clause of Section 726.110(a)(1). [R. 5847-5857]. This order and its findings have not been appealed, and thus, are final and binding on Von Kahle.

III. STATEMENT OF THE FACTS

Von Kahle's Statement of Facts are intentionally skewed to lead this Court to believe the underlying litigation, from its inception, involved the Partnerships seeking to recover all the monies they invested in Bernard L. Madoff Investment Securities, LLC ("BLMIS"), which simply is not true. For example, Von Kahle

[5] Von Kahle also raised equitable estoppel and equitable tolling, both of which were rejected by the trial court. [R. 5847-5857].

opens with a quote from the record below inferring it describes this litigation. Brief at 4. However, not only has Von Kahle misquoted what was stated in the record, the statements made below were not about this case at all – they were the trial judge's statements about the case against Bernard Madoff ("Madoff"), and the fraudulent actions Madoff took. [R. 7081-7082].

Von Kahle continues, under the guise that he is presenting facts to this Court, and states "…this case involves the efforts to recover money associated with the Ponzi scheme run by Madoff through BLMIS, and the investment by the Partnerships in BLMIS." Brief at 4.[6] However, this statement is not only inaccurate[7], but it is indicative of Von Kahle's entire Brief, in which he conflates the factual allegations of the IC and FAC, and distorts and misquotes allegations, in a blatant attempt to create bias against Avellino[8], and to try to show similarities in the two pleadings, when, in fact, they do not exist. Other examples of distortion of the facts in the Brief are:

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[6] The "facts" under Section A to support this statement are from the FAC, not the IC, which was filed two years after the case commenced. Brief at 4-5. [R. 1369 - 1438].

[7] From its inception, this case involved the Partnerships seeking monies which had allegedly been improperly paid to the Defendants; not the monies invested in BLMIS. [R. 1-43].

[8] Throughout the Brief, it is implied, if not stated, that Avellino was intricately involved with BLMIS, to ascribe Madoff's fraud on Avellino, even though no proof of such has been presented.

a. Citing to paragraphs 13-16 of the IC, the Brief states: "A & B, like Alpern & Avellino, A & B's predecessor, operated a feeder fund to facilitate exclusive investments in BLMIS". Brief at 6.

However, these paragraphs do not include these allegations, nor do they refer to Alpern & Avellino. [R. 3-4].

b. Citing to paragraphs 16 and 17 of the IC, the Brief states: "The Partnerships invested (and lost) millions of dollars with BLMIS." Brief at 6.

However, the Brief improperly combines allegations from two separate paragraphs in the IC. There is no allegation in the IC that the Partnerships lost millions of dollars in its investments with BLMIS. [R. 4 ¶¶16, 17].

c. Citing to several paragraphs in the IC, the Brief states: "A substantial amount of Partnerships' funds were misappropriated", and "Avellino and Bienes knew or should have known that millions of dollars of Partnership assets were being misappropriated". Brief at 6.

However, the misappropriations referred to in the paragraphs cited in the IC are the monies allegedly improperly distributed by Sullivan to himself and the other Defendants; not monies invested in BLMIS. [R. 4 ¶¶18-19; 22-23; R. 5 ¶26; R. 6-7 ¶¶31; R. 7 ¶33; R. 8 ¶34].

d. The Brief citing to paragraph 31(b) of the IC states: "Avellino and Bienes received substantial funds as a result of investments by the Partnerships in BLMIS, including 'fees', commissions and kickbacks". Brief at 6.

However, paragraph 31(b) does not allege substantial funds, nor does it allege that the fees paid to Avellino and Bienes are as a result of investments by the Partnerships in BLMIS. [R. 6].

e. Purporting to quote from paragraph 52 of the IC, and from paragraph 15 of the FAC, the Brief states: "The Partnerships conferred a direct benefit on, among others, Avellino and Bienes, by virtue of the millions of dollars they collectively received." Brief at 6.

However, paragraph 15 of the FAC has no allegations regarding the Partnerships and paragraph 52 of the IC states: "The Partnerships conferred a benefit on Sullivan, Michael D. Sullivan & Associates, Inc., Jacob, Avellino and Bienes by virtue of the millions of dollars they collectively received." [R. 1372 ¶15; R. 11 ¶52.]. Sullivan is the individual in the IC who was alleged to have received many millions of dollars. [R. 4 ¶22; R. 5 ¶26; R. 6 ¶30].

f. Citing to Paragraph 25 in the IC, the Brief states: "The roots of the investments in BLMIS were grounded in trust carefully cultivated for years, stemming from participation in church". Brief at 7.

However, Paragraph 25 in the IC refers to the Partnerships as a Ponzi scheme, and Sullivan cultivating trust for years from his participation in the church. There is no mention of BLMIS or Avellino in paragraph 25. [R. 5 ¶25].

g. Citing to Paragraphs 31(b) and 32 of the IC, the Brief states: "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". Brief at 8, 16.

However, neither of the paragraphs cited refer to control by Avellino or Bienes "…with respect to funds they invested with BLMIS". [R. 6-7 ¶31(b); R. 7 ¶32].

h. Citing to paragraphs 14-16, 31(b), 32, 34, 38(f), 42(f) of the IC, the Brief refers to a fiduciary duty claim, and states: "…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", and "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". Brief at 17-18.

However, there was no breach of fiduciary claim against Avellino in the IC. [R. 1-43]. The only breach of fiduciary claim in the IC was against Sullivan. [R. 8-9]. And none of the paragraphs cited allege knowledge by Avellino or Bienes that BLIMIS was operated as a Ponzi scheme. [R. 3-4 ¶¶14-16; R. 6-7 ¶31(b); R. 7 ¶32; R. 8 ¶43; R. 9 ¶¶38(f), 42(f)].

An accurate recital of the differences in the pleadings is set forth below.[9]

A. The Initial Complaint (IC)

In the IC, Defendant Michael Sullivan ("Sullivan"), the former Managing General Partner of the Partnerships, was the alleged instigator of the wrongdoing to the Partnerships. [R. 2 ¶4; R. 3-4 ¶¶ 15, 21; 22; R. 5 ¶¶ 24, 25; R. 6-7 ¶31; R. 8-9 ¶¶34-39]. Sullivan carefully cultivated the trust of the investors from his participation in his church and abused his trust to facilitate his scheme. [R. 5 ¶25]. Sullivan, along with Defendant Steven Jacob ("Jacob"), delayed producing the books and records of the Partnerships, which when turned over, revealed that much of the investors' money was never invested in BLMIS by Sullivan. [R. 4 ¶¶21-22]. Instead, such funds were used by Sullivan to pay entities Sullivan established to receive unearned and excessive management fees. [R. 4-5 ¶¶ 22, 24, 26, 30; R. 7

[9] In order to determine if the FAC relates back to the IC for purposes of statute of limitations, it is necessary to compare the factual allegations in both and see whether the initial pleading gives fair notice of the factual basis for the newly asserted claims. *Flores v. Riscomp Industries, Inc.*, 35 So.3d 146, 148 (Fla. 3rd DCA 2010).

¶31(c)]. The IC further alleged that Sullivan's management fees came directly from the capital contributions of other partners, rather than from the Partnerships' profits and that Sullivan paid tens of thousands of dollars in the form of "commissions" or "referral fees" to Avellino, Bienes, Kelco Foundation, and others. [R. 4 ¶23; R. 5 ¶24; R. 6-7 ¶30].

Avellino played a "supporting role" to Sullivan's wrongdoing in the IC. [R. 9-10 ¶¶ 40-44]. Sullivan allowed Avellino to participate in the management of the Partnerships, and Avellino, along with Jacob and Bienes, allegedly had knowledge of Sullivan's breaches of fiduciary duty and thus aided and abetted Sullivan (Count II). [R. 9 -10 ¶¶38(f), 40-44]. The only other counts of the seven count IC against Avellino are Unjust Enrichment (Count III) and Money Had and Received (Count IV). [R. 10-11]. In these counts, Avellino, along with the other defendants, are accused of improperly receiving commissions or fees (in later complaints referred to as "Kickbacks"), and the relief sought against Avellino was a judgment in the amount he allegedly directly received.[10] [R. 10-11 ¶¶ 45-50, 51-56].

B. The Fourth Amended Complaint (FAC)

In the FAC, the facts not only differ dramatically, but "new" facts were added along with new causes of action, and the damages sought against Avellino are not the "Kickbacks" he allegedly received, but instead, based on the new facts

[10] Although not pled in the IC, the Amended Complaint alleges $307,790.84 in "Kickbacks" was paid to Avellino. [R. 249 ¶28(a)].

alleged, the damages sought were every dollar the Partnerships lost, including the monies lost as a result of the Partnerships investing in BLMIS. [R. 1388-1393]. As the trial court stated, "it changes the entire scope of the trials [sic] and the discovery… It's an entirely different accusation." [R. 7095-7096].

Sullivan, who in the IC was the instigator and mastermind of the scheme, is now, as alleged in the FAC, the victim, and Avellino is alleged to be the "mastermind". [R. 1375-1378 ¶¶24, 25, 27, 28-31]. In the FAC Sullivan is no longer the person controlling the Partnerships and diverting the Partnerships' monies to himself and others, but, rather, the FAC alleges Sullivan lacked control over the Partnerships, and it was Avellino and Bienes who were the schemers, and who controlled the Partnerships and Sullivan's actions. [R. 1375-1378 ¶¶24, 25, 27, 28-31; R. 1378-1380 ¶¶32-39].

In addition, new facts are alleged in the FAC regarding Avellino's involvement with A & B, a company that invested with BLMIS, and which in 1993 entered into an SEC consent judgment and ceased operations.[11] [R. 1371-1372 ¶¶11-15; R. 1374-1375 ¶¶18-22]. It is alleged for the first time in the FAC that

[11] In an attempt to explain why these and other new facts suddenly appeared in the FAC, Von Kahle's counsel argued they were developed from discovery obtained from Irving Picard, the court appointed trustee for BLMIS. [R. 7085, 7116]. However, that argument was debunked by the fact that such "new" allegations were in fact almost verbatim from the allegations in a complaint Picard filed against Avellino in December 2010, almost four years before the FAC was filed. [R. 7085-7086, 7115-7116].

Avellino knew or should have known that BLMIS was a Ponzi scheme generating false profits, and in order to continue to make profits from the BLMIS Ponzi scheme, Avellino made Sullivan and the Partnerships his "unwitting victims" [R. 1372-1374 ¶¶16-17; R. 1375 ¶24]. Avellino, who in the IC was allowed by Sullivan to be involved in the management of the Partnerships, now in the FAC, controlled the Partnerships[12], advised the Partnerships to exclusively invest with BLMIS, and the Partnerships would not have invested in BLMIS if Avellino had not so advised.[13] [R. 1376 ¶¶25, 27; R. 1377 ¶¶28, 31].

In the FAC not only did Avellino make affirmative misrepresentations to the investors, but he intentionally omitted telling Sullivan and the investors that Madoff operated BLMIS as a Ponzi scheme. [R. 1377 ¶31]. Another new fact alleged was that in late 2008 various investors were prevented by Avellino from withdrawing their funds from BLMIS, and had Avellino not prevented it, the investors, would have withdrawn some, if not all of their investments with BLMIS prior to its collapse. [R. 1382-1383 ¶49].

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[12] Not only is this a new fact which is inconsistent with the facts alleged in the IC, but it is also inconsistent with allegations in the FAC that Sullivan exclusively controlled the Partnerships, and made distributions to Avellino, Bienes, himself and others. [R. 1385 ¶ 60].

[13] Not only is this a new fact which is inconsistent with the facts alleged in the IC, but it is also inconsistent with allegations in the FAC that Sullivan was the one who approached Avellino, because Sullivan wanted to invest the Partnership monies with BLMIS. [R. 1375 ¶ 23].

In an effort to avoid dismissal based on events which occurred more than twenty years ago in 1992, when Avellino allegedly advised the Partnerships to invest their funds in BLMIS, Von Kahle included new allegations in the FAC that the damages sought are the result of a continuous pattern of fraudulent conduct. [R. 1370 ¶1)]. Additionally, in an attempt to create a fiduciary relationship between Avellino and the Partnerships which was not alleged in the IC, the FAC alleged that Avellino, not Sullivan, used his relationship in the church to gain the trust of the Partnerships' investors. [R. 1378-1379 ¶¶32, 33, 36].

Based on these new and inconsistent facts, Von Kahle included new causes of action against Avellino in the FAC for breach of fiduciary duty, fraudulent misrepresentations, fraudulent inducement, negligent misrepresentations and civil conspiracy, and sought damages not only for the "Kickbacks" initially sought in the IC ($307,790.84), but now for all the monies the Partnerships ever had, and lost, in the form of management fees, "Kickbacks" and the investments made in BLMIS (over $11 million). [R. 1369-1438 ¶¶67-93].

C. The Hearing on the Motion to Dismiss the FAC

Judge Jeffrey Streitfeld presided over this matter from its inception in December 2012 through 2014, during which time he reviewed all four amended

complaints, and was familiar with the allegations first made in the IC[14], as well as the allegations made in the subsequent amended complaints.[15] [R. 7089-7090].

Avellino's Motion to Dismiss the FAC was directed at the causes of action based on the new facts alleged, including that Avellino knew BMLIS was a Ponzi scheme, and were seeking to hold Avellino responsible for all the damages incurred by the Partnerships for investing with BLMIS. [R. 1461-1466]. As the trial judge noted during the hearing, "That's an entirely different set of claims and damages"; he recalled "being surprised" and that the expanded scope of the allegations caused him not to be able to try the case that year as scheduled. [R. 7083-7084].

Initially, Judge Streitfeld expressed his skepticism in granting the motion to dismiss. [R. 7083-7084]. He recognized that the issue was whether the new facts and theories alleged in the FAC related back to the IC to avoid being barred by the statute of limitations. [R. 7086, 7089]. As reflected in the transcript of the hearing, the trial court and attorneys discussed the differences between the IC and FAC. [R. 7078-7081, 7083-7084, 7086-7095]. The trial judge reread the complaints and found that the allegations of and damages sought in the IC all dealt

[14] The IC was filed by Margaret J. Smith, as Managing General Partner of the Partnerships, and shortly thereafter Judge Streitfeld appointed Von Kahle as Conservator for the Partnerships. The law firm of Berger Singerman represented both Ms. Smith and Von Kahle. [R. 1-43, 7097].

[15] The case was assigned to Judge Tuter in 2015 upon Judge Streitfeld's retirement.

with the "Kickbacks", and the payment of the unlawful and unauthorized commissions and management fees. [R. 7087, 7090]. In marked contrast, the trial court found the FAC added allegations for the first time that Avellino knew or should have known that BLMIS was a Ponzi scheme, failed to disclose that BLMIS was a Ponzi scheme and knowingly controlled the Partnerships and misled Sullivan and the Partnerships to invest in BLMIS, and thus, sought damages for all the monies which were lost by the Partnerships as a result of its investment in BLMIS. [R. 7087-7088, 7090, 7093-7096].

When asked by Judge Streitfeld, Von Kahle's counsel could not identify where such allegations were made in the IC, and ultimately had to admit that the first time these allegations appeared was in the 3AC, which was filed on June 27, 2014.[16] [R. 7093-7095].

The trial court found that the newly alleged facts in the FAC completely expanded the scope of the entire case; changed everything; scrapped the whole case management; was "entirely different scope of discovery and damages and

[16] Von Kahle's counsel tried to argue that there was a breach of fiduciary duty claim in the 2AC. [R. 7094-7095]. However, the breach of fiduciary duty claim in the 2AC against Avellino and others was based on receiving "Kickbacks" and failing to register as investment advisors; it did not include the new allegations regarding the alleged knowledge by Avellino of BLMIS as a Ponzi scheme, and it was filed on January 31, 2014, after the statute of limitations had run, so even if the new allegations had been raised in the 2AC, they would have been untimely. [R. 368, 397-398].

expands it significantly" and "it's like starting all over again". [R. 7098]. As the Judge Streitfeld explained:

> The reality is that it's one thing to say you breached a duty by taking improper fees and taking money that should have gone to the partnerships and putting it in your own pocket than saying by knowingly participating in the biggest fraud in the history of the United States and controlling these partnerships, to control, to invest exclusively in the biggest, in the biggest fraud in the history of the country, we want you to pay for every dollar that we lost as a result of what, the way that money invested. It's an entirely different accusation.

[R. 7095-7096].

The trial court determined that the new allegations could not relate back based upon the analysis of the difference in accusations and the difference in the damages. [R. 7098, 7101-7102].

Judge Streitfeld recognized that courts typically find that amendments relate back for purposes of statute of limitations, and that during his twenty-four year career he could count on one hand how often he found an amendment did not relate back. [R. 7100]. However, in finding that this was one of those rare cases, he stated:

> This is one of those. It's all new. And not only is it new, it's extraordinarily humongous. It's new. It blew the case off the trial docket. It scrapped the case management orderly[sic] we had been working on since day one and toss[sic] it right out the window

[R. 7100].

Statute of repose, delayed discovery, continuing tort, along with equitable estoppel, were all raised and briefed by the parties in their written submissions, which were read by the trial court, and the arguments were presented to the trial court during the hearing. [R. 1461-1466, 1467-1486, 1487-1506, 1522-1533, 7080-7081, 7082, 7084, 7096]. Von Kahle's counsel specifically inquired whether the court considered the delayed discovery doctrine in granting the dismissal, which the court confirmed it did. [R. 7115-7116]. These defenses had also been previously raised and rejected in opposition to Avellino's motion to dismiss the 3AC, where relation back of newly asserted facts was at issue. [R. 1210-1226, 1278-1292, 1295-1306, 1342-1344].

They were again raised, considered and rejected by the trial court in granting Avellino's Amended Motion for Summary Judgment. [R. 5847-5857]. That order has not been appealed by Von Kahle.

SUMMARY OF THE ARGUMENT

The trial court properly found that the new claims raised in the FAC which were based not only on new facts, but also on facts which were diametrically opposed to those alleged in the IC, did not relate back, and thus were time barred. The new claims asserted in the FAC were based on alleged knowledge by Avellino of BLMIS being a Ponzi scheme, and sought damages for all the monies the Partnerships lost as a result of investing in BLMIS. In contrast, the claims asserted

in the IC were based on Sullivan cultivating the trust of the investors of the Partnerships and his misappropriation of the Partnerships' monies, which he (Sullivan) distributed to himself, Avellino and others, in the form of commissions and fees.

The allegations against Avellino in the IC were that he was allowed by Sullivan to participate in the management of the Partnerships and that he along with others had knowledge of and abetted Sullivan's breaches of fiduciary duty. The damages sought against Avellino in the IC were the specific monies he allegedly received in the form of commissions (i.e. $307,790.84). Furthermore, the trial court did not abuse its discretion in dismissing the claims in the FAC and not allowing any further amendments because Von Kahle had abused the privilege to amend, and Avellino would be unfairly prejudiced if a further amendment were permitted.

In making the determination that the new claims were time barred, the trial court considered the continuing tort and delayed discovery doctrines and properly denied that neither saved the new causes of action from being barred by the statute of repose or statute of limitations.

ARGUMENT

I. Standard of Review

The trial court's determination that Counts I, II, III and IV in the FAC do not relate back to the IC, and dismissing those counts, are questions of law which are subject to *de novo* review. *Kopel v. Kopel,* 229 So.3d 812, 814 (Fla. 2017). The standard to review the trial court's dismissal of Counts I, II, III and IV, and not allowing further amendments because of abuse of the privilege to amend and the unfair prejudice to Avellino is abuse of discretion. *Versen v. Versen,* 347 So.2d 1047, 1050 (Fla. 4th DCA 1977).

II. Counts I, II, III and IV of the FAC do not relate back

Florida Rule of Civil Procedure 1.190 (c) provides that a claim asserted in an amended pleading which arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading shall relate back to the date of the original pleading for purposes of statute of limitations. Recently the Florida Supreme Court disapproved the line of cases which established a bright-line rule that amendments asserting new claims cannot relate back under any circumstances. *See Kopel,* 229 So.3d at 816-818; *Palm Beach County School Board v. Doe*, 210 So.3d 41, 47 (Fla. 2017). However, although the bright-line rule has been disapproved, the law remains that a new claim based on new or different facts from those alleged in the original complaint, or a new claim involving a

factually distinct claim does not relate back. *Kopel*, 229 So.3d at 816-818; *Doe*, 210 So.3d at 47.

Amendments which have been found to relate back to the original pleading did not alter the underlying facts, circumstances or parties of the original complaint; *Mender v. Kauderer*, 143 So.3d 1011, 1015 (Fla. 3rd DCA 2014); included more specific allegations, but the substantive factual situation remained the same as that found in the original complaint; *Doe*, 210 So.3d at 47; included new legal theories but arises from the same occurrence - "same plaintiff, the same injuries and the same damages", or from a "common core of operative facts" or "nexus of facts" as the original complaint; *Fabbiano v. Demings*, 91 So.3d 893, 896 (Fla. 5th DCA 2012); added new facts but the same general factual situation applied from the original complaint, providing fair notice of the claims to the defendant; *Anderson v. Epstein*, 202 So.3d 893, 899 (Fla. 3rd DCA 2016); and added allegations of facts as the litigation progressed, and the legal theories of recovery were supplemented and modified, when the substantive factual situation remained the same. *Flores*, 35 So.3d at 147.

Von Kahle argues that the FAC relates back to the IC because the underlying claims asserted are the same in both the IC and the 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". Brief at 15. He admits new claims were asserted, but disingenuously asserts that they only sought "…an expanded claim for damages". Brief at 17. However, a comparison of the IC and the FAC belies Von Kahle's argument.

The damages sought against Avellino in the IC were the "Kickbacks" in the amount of $307,790.84 he allegedly was paid by Sullivan, the manager of the Partnerships.[17] [R. 10-11 ¶¶45-50, 51-56; R. 249 ¶28(a)]. The substantive factual allegations in the IC were the mismanagement of the Partnerships by Sullivan, who breached his fiduciary duties to the Partnerships, and paid monies from the Partnerships to himself and others, such as Avellino, in the form of "Kickbacks" and unearned management fees. [R. 4-5 ¶¶21-27; R. 6-7 ¶¶30 -32; R. 8-9 ¶¶36-39]. Despite Von Kahle's assertions to the contrary, Brief at 17-18, 20, there was no fiduciary cause of action against Avellino in the IC;[18] there were no allegations in the IC that Avellino knew or should have known that BLMIS was a Ponzi scheme; that Avellino caused the Partnerships to invest in BLMIS; or that the Partnerships were seeking all monies they had invested in BLMIS as damages

[17] Damages sought against the other defendants in the IC were also the monies they allegedly received as "Kickbacks", or in the case of Sullivan, alleged unearned and excessive management fees he received. [R. 9-11].

[18] The breach of fiduciary duty claim in the IC was against Sullivan only. [R. 8-9].

against Avellino (or any other defendant).[19] [R. 1-43]. The causes of action against Avellino in the IC were aiding and abetting Sullivan's breach of fiduciary duty; unjust enrichment and monies had and received, and the damages sought against Avellino were the "Kickbacks" of approximately $307,790.84 he allegedly received. [R. 9-11 ¶¶40-56; R. 249 ¶28(a)].

In stark contrast, the substantive factual allegations in the FAC are that Avellino was the instigator and schemer who controlled the Partnerships and Sullivan's actions; knew or should have known that BLMIS was a Ponzi scheme, and in order to continue to make profits from the BLMIS Ponzi scheme, advised and made the Partnerships invest exclusively with BLMIS; intentionally withheld the information that Madoff operated BLMIS as a Ponzi scheme; prevented some of the investors of the Partnerships from withdrawing their funds from BLMIS; and had Avellino not controlled and advised the Partnerships to invest in BLMIS the Partnerships would not have invested in BLMIS. [R. 1372-1374 ¶¶16, 17; R. 1375 ¶24; R. 1376 ¶26; R. 1377-1378 ¶¶28, 31; R. 1380 ¶¶38, 39; R. 1380-1383 ¶¶40-51]. Based on these new allegations, the damages sought in the FAC are all the monies the Partnerships ever had, and lost, in the form of management fees,

[19] The paragraphs in the IC cited by Von Kahle, 14-16, 31(b), 32, 34, 38(f) and 42(f), do not allege knowledge by Avellino or Bienes that BLMIS was operated as a Ponzi scheme. Brief at 18, 20. [R. 3-4, 6-7, 8, 9].

"Kickbacks" and the investments made in BLMIS (over $11 million). [R. 1369-1438 ¶¶67-93].

Von Kahle's position is essentially that the IC included allegations relating to the Partnerships' investments in BLMIS, and Avellino was a named defendant, and thus, Avellino was on notice that any claims relating to this "transaction" could be brought against him by way of an amended pleading. When asked by the trial court where the IC alleged that Avellino knew or should have known that BLMIS was a Ponzi scheme and failed to disclose that information to the Partnerships, which is the substantive factual basis for the FAC, Von Kahle's counsel could not do so. [R. 7093-7095]. Von Kahle now argues that the allegations in Paragraph 31(b) of the IC put Avellino on notice of that fact that claims asserted against him would be based on whether he knew or should have known that BLMIS was a fraud and cites to *Janie Doe I ex rel. Miranda*, 117 So.3d 786, 789 (Fla. 4th DCA 2013) as authority that the allegations provided "fair notice of the general factual situation."[20] Brief at 18-19. However, such assertion rings hollow.

[20] In a footnote, Von Kahle states that the allegations in ¶17(j) in the FAC is consistent with allegations in paragraph 31(b) in the IC. Brief at 18-19. However, once again Von Kahle is misrepresenting the facts. Paragraph 17(j) in the FAC refers to Madoff misleading the SEC by providing false documents, and that Avellino and Bienes knew or should have known the documents were false because a BLMIS employee revised A & B's records. Paragraph 31(b) in the IC alleges Sullivan paid fees to Avellino and Bienes, who had been prohibited by the

Paragraph 31(b) in the IC alleges Sullivan paid fees to Avellino, who had been prohibited (in 1992) by the SEC from participating in the sale of securities. It does not mention BLMIS as a Ponzi scheme, or Avellino having knowledge of same. [R. 6-7]. The only mention of a Ponzi scheme in the IC is in paragraph 25. [R. 5]. However, paragraph 25 in the IC alleges the Partnerships are a Ponzi scheme, and Sullivan used the trust he cultivated in the church to get the investors to trust him, and then abused that trust to facilitate his (Sullivan) Ponzi scheme. [R. 5]. Neither Avellino nor BLMIS is mentioned in paragraph 25 of the IC. [R. 5].

Miranda, cited by Von Kahle, is inapplicable, because unlike the instant case, it does not involve the insertion of new substantive facts, or the changing of substantive facts from the initial complaint to the amended complaint, nor does it involve seeking substantively different damages based on the new, and often, contradictory, facts.

Miranda involved allegations of sexual abuse by a teacher against children, who initially brought claims of negligence against the school board based on the sexual abuse allegations. Later, the complaint was amended to add a Title IX claim, based on the same factual allegations, which was dismissed by the trial court

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SEC from participating in the sale of securities. The only "consistency" between the two paragraphs is the SEC is mentioned in both. [R. 6, 1373].

because it was a new claim.[21] In reversing this finding, this Court found that the amendment showed the same general factual situation as the initial complaint, and both claims arose from the same conduct and resulted in the same injury, and thus, the amendment related back. The same cannot be said about the IC and FAC.

Von Kahle's argument that the IC provided fair notice to Avellino of the additional new causes of action pled in the FAC also falls short. The new causes of action in the FAC alleged against Avellino which Von Kahle is appealing are: breach of fiduciary duty (Count I);[22] fraudulent misrepresentations (Count II); fraudulent inducement (Count III); and negligent misrepresentations (Count IV). [R. 1388-1393]. Von Kahle alleges that the gravaman of these claims is based on the allegation that Avellino exercised an improper level of control 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". Brief at 19-20.

Von Kahle's argument is disingenuous at best. Avellino's alleged control of the Partnerships is not the gravamen, nor even a factual basis, of the causes of

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[21] *Miranda* was decided before the recent Florida Supreme Court cases of *Kopel* and *Doe*, which eliminated the bright-line rule that new causes of action cannot relate back.

[22] The trial court dismissed this count with prejudice based on Avellino's alleged failure to disclose to the Partnerships that BLMIS was a Ponzi scheme, but allowed Von Kahle to amend the claim only as to the alleged "Kickbacks" received by Avellino on or before January 9, 2015. [R. 1549].

action at issue.[23] The gravamen of the causes of action at issue is the alleged knowledge by Avellino of BLMIS being operated as a Ponzi scheme, which as discussed above is a totally new and different fact never raised or discussed in the IC. The factual allegations in the IC did not provide notice that such new (and contradictory) factual allegations and new and factually distinct causes of action would be brought against Avellino two years later, on the eve of trial. Even the trial judge was surprised by the new facts and claims,[24] and aptly stated:

> And, in fact, I recall being surprised and turning – and that's what caused me not to be able to try this case. But for this change in scope I would have probably been able to try this case this year. [R. 7084].
>
> But the fact is that while you do allege in the initial complaint that how much money allegedly came through the accounts and that Avellino and Bienes knew or should have known that partnership assets were being misappropriated and Avellino was acting in the matter within the partnerships, all of this dealt with the kickbacks, the payment of unlawful and unauthorized commissions, management fees, et cetera. [R. 7087].
>
> That's what led me to take a step back and say, wow, this most recent pleading changes this completely. They're not just saying, wait a minute, you unlawfully paid yourselves monies and took money that

[23] Even assuming *arguendo* Avellino's alleged control over the Partnerships was relevant to the counts, the allegations in the IC regarding Avellino's control of the Partnerships were in conjunction with aiding Sullivan in his control of the Partnerships, [R. 9-10 ¶¶38(f), 40-44], and thus, would not have provided fair notice to Avellino of the new and contradictory allegations in the FAC of Avellino's alleged total control of the Partnerships.

[24] The trial judge commented that he was fully aware of the claim initially filed, because he was the one who provided permission for it to be filed, "[A]nd it did not say one word saying [sic] Avellino and Bienes were part of the Ponzi, they knew it was a Ponzi". [R. 7089-7090].

> should have been distributed to the partners and put them in your pocket. You now add for the first time that they knew it was a Ponzi but yet led the partnerships knowingly to invest in a Ponzi. [R. 7087-7088].
>
> And, again, for the record, it changes the entire scope of the trials [sic] and the discovery. [R. 7095].
>
> The reality is that it's one thing to say you breached a duty by taking improper fees and taking money that should have gone to the partnerships and putting it in your own pocket than saying by knowingly participating in the biggest fraud in the history of the United States and controlling these partnerships, to control, to invest exclusively in the biggest, in the biggest fraud in history of the country, we want you to pay for every dollar that we lost as a result of what, the way that money invested. It's an entirely different accusation. [R. 7095-7096].

Von Kahle would have this Court paint a broad brush over the factual allegations in the IC and the FAC and conclude they are similar enough because they involve the Partnerships and its investments, and thus, the amendment should be found to relate back. However, relation back is not determined based on the broad sense of the facts surrounding a transaction. As this Court stated in *Lefebvre v. James*, 697 So.2d 918 (Fla. 4th DCA 1997), when it found that an amendment for a negligent delivery of chicken feed instead of the intended hog feed did not relate back to the original complaint which alleged negligence in the delivery process:

> We recognize that in a very broad sense the facts surrounding negligent preparation of pig feed and the facts incident to proving a negligent delivery of an entirely different product are part of the same commercial transaction. But, clearly, a lawsuit alleging and proving negligence in preparing a pig feed formula resulting in a defective product is totally different than one founded simply on general

> negligence by loading the wrong order on the truck. Each case would rely not only on a different theory of recovery, but on separate ultimate facts. [citation omitted].

Lefebvre, 697 So.2d. at 920.

The disallowance of Von Kahle's time barred claims comports with the purpose of statute of limitations, which is "[T]o promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared." *Caduceus Properties, LLC v. Graney*, 137 So.2d 987, 992 (Fla. 2014). Avellino is entitled to the protections provided by statute of limitations from unfair surprise and stale claims.

Von Kahle's relation back argument fails for another obvious reason – the FAC has no timely filed initial pleading to relate back to. Rule 1.190(c) enables otherwise time-barred claims to be asserted if the requisite standard is satisfied and such claims relate back to a timely filed pleading. *See Flores*, 35 So.3d at 147. However, the claims asserted in the IC were dismissed as time-barred by the court's granting Avellino's amended motion for summary judgment. [R. 5847-5857].

The IC asserted claims against Avellino for Aiding and Abetting Breach of Fiduciary Duty (Count II), Unjust Enrichment (Count III) and Money Had and Received (Count IV). [R. 9-11]. These claims were carried through to the FAC as

Counts VII and IX (Unjust Enrichment) and Count X (Money Had and Received). [R. 1396-1398, 1400-1402]. The Aiding and Abetting Breach of Fiduciary Duty claim of the IC morphed into a Breach of Duty Claim (Count I) first asserted in the FAC.[25] [R. 1388-1390].

Discovery revealed that the last alleged "Kickback" paid to Avellino and Bienes was made in October 2008, more than four years before the filing of the IC on December 10, 2012. [R. 3766, ¶¶4-5]. Accordingly, on March 4, 2016, Avellino and Bienes filed their amended joint motion for summary judgment on the ground that the claims were time-barred. [R. 3744-3749]. Conceding that his claims were time-barred by the applicable four year statute of limitations, Von Kahle raised doctrines of delayed discovery, equitable estoppel and continuing tort in opposition to the summary judgment motion. [R. 4575-4697]. On October 28, 2016, the court entered an order rejecting Von Kahle's tolling arguments and granted summary judgment dismissing as time barred all claims in the 5AC, but for the fraudulent conveyance claim, initially asserted in the IC. [R. 5847-5857].

Thus, Von Kahle asks this Court to reinstate concededly time-barred claims because they relate back to the IC which, itself, was time-barred. Not only do the claims sought to be reinstated not satisfy the relation back criteria, the relation

[25] These claims were included in the 5AC regarding "Kickbacks" in Count I (Breach of Fiduciary Duty), Counts III and V (Unjust Enrichment), and Count VI (Money Had and Received). [R. 1588-1590, 1592-1593, 1596-1598].

back argument is fatally defective since the pleading which Von Kahle seeks to relate back to is also time-barred.

Avellino recognizes that a dismissal with prejudice based on the expiration of the statute of limitations is not often granted. However, this is one of those cases which warrants such dismissal. Over a two year time span, Von Kahle was given six opportunities to plead causes of action which were not time barred. In a blatant attempt to avoid the inevitable, he omitted dates which had been pled in earlier complaints, such as when the Partnerships allegedly relied on Avellino to invest in BLMIS (1992), or when the last payment was made to Avellino (October 2008); he pled facts which were diametrically opposed to those pled in earlier complaints; he pled inconsistent facts within the same pleading; and he included conclusory allegations and unwarranted deductions.[26] But none of those tactics changed the facts, nor could they revive claims based on actions commencing in 1992. The trial judge properly determined that the claims were time-barred and dismissed them with prejudice.[27]

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[26] The court does not have to accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions or mere legal conclusions when ruling on a motion to dismiss. *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So.2d 297, 300 (Fla. 1st DCA 1999); *Stein v. BBX Capital Corp.*, 241 So.3d 874, 876 (Fla. 4th DCA 2018).

[27] Von Kahle did not object below to the trial court considering facts or matters outside the four corners of the complaint in deciding the motion to dismiss, nor did he dispute facts which were discussed, and thus, has waived that argument on

III. The trial court properly exercised its discretion in dismissing the FAC pleading.

Even if the contested claims related back to the IC, the trial court's dismissal of such claims was appropriate. A trial court has the discretion to deny an amendment if it is so late in the proceedings that the opposing party would be unfairly prejudiced or the privilege to amend has been abused. Rule 1.190(a), Fla.R.Civ.P.; *Caduceus Properties,* 137 So.3d at 994. Von Kahle's FAC violates both these tenets, and thus, the court properly exercised its discretion in dismissing the counts with prejudice and denying any further amendments.

As stated previously, Von Kahle first attempted to assert new causes of action based on new allegations of Avellino's alleged knowledge of BLMIS being a Ponzi scheme in the 3AC. [R. 1118 ¶29]. Avellino moved to dismiss these new claims based on statute of repose and statute of limitations, and that relation back could not save these time-barred causes of action. [R. 1210-1215]. On August 25, 2015, the court granted Avellino's motion to dismiss and provided Von Kahle one last time to file an amended complaint as to these claims. [R. 1342-1344]. The order stated: "No further amendments to the complaint shall be permitted". [R. 1342].

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appeal. *Metropolitan Casualty Insurance Co. v. Tepper*, 969 So.2d 403, 405 (Fla. 5th DCA 2007).

While affording Von Kahle leave to amend, the court clearly did not intend that Von Kahle would reallege the dismissed time-barred claims based upon the new allegation of Avellino's alleged knowledge of BLMIS being a Ponzi scheme. However, Von Kahle did just that – rather than remove the allegations regarding Avellino's alleged knowledge of BLMIS as a Ponzi scheme, the FAC added even more allegations relating to Avellino's alleged knowledge and based on all the new allegations asserted the same four causes of action which the court previously dismissed as barred by the statute of limitations and statute of repose. [R. 1369-1438].

At the time the court granted Avellino's motion to dismiss the FAC on December 18, 2014, almost two years had elapsed since the IC was filed; four amendments of the complaint had been requested by Von Kahle and granted by the court; extensive discovery had been engaged in by the parties as to the then pending claims; and the action was on the trial docket commencing March 30, 2015, having been previously set multiple times.[28] Von Kahle had abused the

[28] The action did not proceed to trial in March 2015, because Von Kahle filed the 5AC in violation of the court's December 18, 2014 order which limited leave to amend only as to Count I. [R. 1549-1552, 1577-1634]. Instead, the 5AC included changes to the facts and claims requiring Avellino and Bienes to seek a continuance of the trial. [R. 1639-1652]. On July 21, 2015 the court entered an order modifying its case management order rescheduling the trial to the first quarter of 2016 and extending the discovery cutoff until October 9, 2015. [R. 2530-2532].

amendment process by totally abandoning facts, and creating new, sometimes contradictory ones, in each successive complaint, including the FAC. The alleged events on which the causes of action were based commenced in 1992, and spanned more than twenty years, with the last alleged "Kickback" to Avellino paid in October 2008.

Had the trial court allowed Von Kahle to revive these time-barred claims the prejudice to Avellino and the other defendants is self-evident. The extensive discovery already taken would have to be retaken, and the risk existed that evidence would have been lost, discarded and/or destroyed, memories of witnesses faded, and witnesses missing, disappearing or deceased. Based on all these factors, the trial court had the discretion to deny the amended complaint. *See Brown v. Montgomery Ward & Company,* 252 So.2d 817, 819 (Fla. 1st DCA 1971) (no abuse of discretion to deny an amended complaint two weeks before trial, where case had been previously set for trial five times and amendment would materially change or introduce new issues into the case); *Kohn v. City of Miami Beach,* 611 So.2d 538, 539 (Fla. 3rd DCA 1993) (generally not an abuse of discretion to deny amendments past third attempt; there is a point in litigation when defendant is entitled to be relieved from the time, effort, energy and expense of defending himself); *Feigin v. Hospital Staffing Services, Inc.,* 569 So.2d 941, 942 (Fla. 4th DCA 1990) (no abuse of discretion to deny leave to amend seventh complaint over four year period when

court warned that it was plaintiff's last bite at the apple); *Noble v. Martin Memorial Hosp. Ass'n. Inc.*, 710 So.2d 567, 568 (Fla. 4th DCA 1997) (not an abuse of discretion to deny the plaintiff's motion to amend after litigation pending for five years and motion for summary judgment had been filed; party should not be permitted to amend pleadings to defeat summary judgment; the rule of liberality gradually diminishes as the case progresses to trial, and there becomes a point of litigation where each party is entitled to some finality).

It is clear the trial judge considered these factors in making his decision to not give any further leave to Von Kahle to amend the claims, but, rather, to dismiss them with prejudice. During the hearing, the trial judge stated that the expansion of the facts and claims caused him not to be able to try the case in 2014; the amendment changed the scope of the trial and discovery and involved entirely different accusations. [R. 7084, 7095-7096]. In the trial judge's own words:

> And, again, all I can do is work with the facts. The fact is that I recall specifically when I looked at that and realized, wait a minute, you're on the fourth quarter trial docket, you've just completely extended the scope of the entire case…That changes everything. And we scrapped the whole case management. It's like starting all over again.

[R. 7098]

Accordingly, the trial court did not abuse its discretion in denying Von Kahle an

opportunity to amend these causes of action yet again, but instead, dismissing them with prejudice.[29]

Were this Court to reinstate Von Kahle's time-barred claims, the prejudice to Avellino would be severe. Michael Bienes died on April 5, 2017. [R. 6885-6886]. Although his deposition had been taken on September 10, 2015, [R. 4956] it addressed the claims then pending, which did not include the newly asserted claims of the FAC which had been dismissed with prejudice. Accordingly, Bienes' testimony addressing Von Kahle's dismissed claims that the Partnerships were the "unwitting victims of Avellino and Bienes" who had knowledge of Madoff's Ponzi scheme was never taken or preserved. If the dismissed claims were now permitted, Avellino would be substantially prejudiced as he would have to defend such claims without the testimony of Bienes.

IV. The trial court considered and properly denied the effect of the continuing tort and delayed discovery doctrines.

Von Kahle erroneously asserts that the trial court did not consider the effect of the continuing tort and delayed discovery doctrines when it found the claims were barred by the applicable statute of limitations and, therefore, this Court should remand so such issues may be ruled upon. Brief at 22. These issues were

[29] Von Kahle did not object to the claims being dismissed with prejudice below, nor did he request leave to amend these claims, and thus, waived this issue on appeal. *Vorbeck v. Betancourt*, 107 So.3d 1142, 1148 (Fla. 3rd DCA 2012); *Mulligan v. State Farm Florida Insurance Co*., 127 So.3d 852, 853 (Fla. 4th DCA 2013).

extensively briefed by the parties, which were read by the trial court and argued during the hearings for both Avellino's Motions to Dismiss the 3AC and the FAC.[30] [R. 1216-1226, 1278-1292, 1295-1306, 1461-1466, 1467-1486, 1487-1506, 1522-1533, 7080-7082, 7084, 7096, 7098-7099, 7101, 7115-7116]. Further, at the hearing on the motion to dismiss the FAC, Von Kahle's counsel specifically brought the issue of delayed discovery to the attention of the trial judge stating: "And I want to make sure this is being considered by the Court…" [R. 7115]. The trial judge confirmed that the doctrines had been discussed; that he had read the briefs in which the doctrines were discussed; he was familiar with the doctrines; had considered them and had ruled adversely to Von Kahle. [R. 7080-7082, 7084, 7096, 7098-7099, 7101, 7115-7116]. The court's ruling was proper.

As presented to the trial court, neither delayed discovery nor continuing tort doctrines apply to the statute of repose. Florida's statute of repose provides that an action for fraud "…must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered." §95.031(2), Florida Statutes; *See also Woodward v. Olson*, 107 So.3d 540, 544 (Fla. 2d DCA 2013) (continuing tort is not applicable to statute of

[30] Although there is no transcript for the hearing on the Motion to Dismiss the 3AC, there is record evidence these issues were raised and argued at that time. [R. 1216-1226, 1278-1292, 1295-1306, 7080, 7086]. These issues were also considered by the trial court and determined adversely to Von Kahle on Avellino's Amended Motion for Summary Judgment on the FAC. [R 5847-5857].

repose).[31] The fraud claims by Von Kahle in the FAC are based on alleged misrepresentations and/or omissions by Avellino in 1992 regarding his alleged knowledge of BLMIS as a Ponzi scheme, and were allegedly relied upon by the Partnerships to invest in BLMIS, which investing began in 1992.[32] [R. 1372-1374 ¶¶ 16, 17; R. 1376 ¶ 27; R. 1377-1378 ¶31; R. 1380 ¶38; R. 1382-1383 ¶¶49,-51]. Clearly the fraud claims are barred based on the statute of repose.

Furthermore, neither of these doctrines saves the fraud and breach of fiduciary claims from the applicable statute of limitations. "A continuing tort is 'established by continual tortious *acts*, not by continual harmful effects from an original completed act'". *Black Diamond Properties, Inc. v. Haines*, 69 So.3d 1090, 1094 (Fla. 5th DCA 2011). Only actions which are continued elements of the cause of action can constitute the continuation of a cause of action sufficient to defeat the statute of limitations. *Bloom v. Alvereze*, 498 Fed.Appx. 867, 874 (11th Cir. 2012); *See also Effs v. Sony Pictures Home Entertainment, Inc.*, 197 So.3d 1243, 1245 (Fla. 3rd DCA 2016). The continuing tort doctrine only allows a plaintiff to recover damages for tortious acts committed within the limitations

[31] *Ambrose v. Catholic Soc. Servs., Inc.*, 736 So.2d 146, 149 (Fla. 5th DCA 1999) cited in the Brief at 22, did not apply continuing tort or delayed discovery to the statute of repose. The facts alleged in *Ambrose* were the fraud occurred in 1986, so the 1998 complaint was within the 12 years of statute of repose.

[32] It is alleged in the 3AC that Avellino and Bienes advised the Partnerships to invest their funds in BLMIS in 1992. [R. 1116 ¶25]. Von Kahle removed the 1992 date in the FAC, but removing it, did not change the date the alleged advice was given.

period prior to filing the suit. *Black Diamond Properties*, 69 So.3d at 1094; *Woodward*, 107 So.3d at 544.

The last damages for the alleged tortious acts occurred in October 2008 when the last payment was made to Avellino. [R. 3766 ¶4]. The FAC was filed six years later on October 5, 2014, two years beyond the statute of limitations for both fraud and fiduciary duty causes of action. [R. 1369]. Von Kahle argues it is specifically pled in the FAC that Avellino and Bienes concealed their conduct and involvement with the Partnerships through 2012, which was sufficient to establish a continuing tort. Brief at 22, 24. However, Von Kahle's argument is both factually and legally insufficient.

There are no allegations in the FAC of actions taken by Avellino after 2008 which constitute an element in the breach of fiduciary duty or fraud causes of action. The paragraphs cited by Von Kahle in the Brief at 22-23, 24 are conclusory (FAC ¶¶1, 65, 74), occurred no later than 2008 (FAC ¶31, 50-52),[33] or do not refer to Avellino (FAC ¶50, 52, 66).[34] [R. 1370,1377-1378, 1383, 1387-1388. 1389].

[33] Paragraph 51 does not include a date of when Avellino allegedly concealed that Madoff operated BLMIS as a Ponzi scheme. [R. 1383]. However, it was publically revealed on December 11, 2008, a fact of which the Court can take judicial notice. *See e.g. Mills v. Ball*, 372 So.2d 497, 498 (Fla. 1st DCA 1979).

[34] In the Statement of Facts, Brief at 9-10, Von Kahle only cites to one "act" after 2008 in paragraph 65 of the FAC, which refers to unspecified directions by Avellino to Sullivan's activities seeking recovery from Picard, which is not an element in the causes of action brought, nor did such "act" cause any damages to the Partnerships. [R. 1387].

Based on the allegations in the FAC, the alleged last tortious act by Avellino which caused damages was in 2008, and thus, the continuing tort doctrine cannot resuscitate Von Kahle's claims. *Woodward*, 107 So.3d at 544; *Black Diamond Properties*, 69 So.3d at 1094.[35]

The statute of limitations for fraud begins to run when the plaintiff should have discovered, exercising any diligence, that the allegedly fraudulent transaction was suspect. *West Brook Isles Partner's LLC v. Commonwealth Land Title Insurance Company*, 163 So.3d 635, 639 (Fla. 2d DCA 2015).[36] When a plaintiff is put on notice of the possible invasion of his legal rights, the running of the statute of limitations period begins, even if he does not know all of the elements of his cause of action; all of the elements must exist before an action may be

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[35] The cases cited by Von Kahle, Brief at 23-24, are not applicable. In *City of Quincy v. Womack*, 60 So.3d 1076, 1078 (Fla. 1st DCA 2011), the statute of limitations had not expired when the lawsuit was filed which encompassed the alleged continuing breach of contract. Here, the statute of limitations had expired when the FAC was filed. *Laney v. Am. Equity Inv. Life Ins. Co.*, 243 F.Supp.2d 1347, 1357 (M.D. Fla. 2003), involved a churning case, which requires a hindsight analysis of the entire history of the broker's management of an account and of his pattern of trading in that portfolio, and thus, there was a question of fact of whether the broker's actions constituted a continuing tort. Here there are no actions identified by Avellino which could constitute a continuing tort. *Millender v. State DOT*, 774 So.2d 767, 768-769 (Fla. 1st DCA 2000) involved an inverse condemnation, in which after the DOT rerouted the river, it continued to divert the drainage, and thus, it was a continuing tort. Again, there are no allegations of continued actions by Avellino after 2008 which caused damages or were an element of the causes of action.

[36] Delayed discovery doctrine is not applicable to the fiduciary cause of action. *Davis v. Monahan*, 832 So.2d 708, 710-711 (Fla. 2002).

maintained. *Breitz v. Lykes-Pasco Packing Co.,* 561 So.2d 1204, 1205 (Fla. 2d DCA 1990); *Hynd v. Ireland,* 582 So.2d 772, 773 (Fla. 4th DCA 1991).

The Partnerships were put on notice of a possible fraud cause of action against Avellino by December 12, 2008, when Madoff was arrested and BLMIS was exposed to the world that it was a Ponzi scheme. By December 12, 2008, according to the allegations in the FAC, the Partnership and partners had knowledge of: Avellino's alleged control of the Partnerships (FAC ¶¶27, 41, 42, 44); that the investments of the Partnerships were in BLMIS (FAC ¶¶21, 23, 49); that the investments in BLMIS were made in reliance of advice given by Avellino and Bienes (FAC ¶27, 31, 49); and that Avellino and Bienes had knowledge of the operations of BLMIS and the trades BLMIS allegedly made on behalf of the Partnerships (FAC ¶42).[37] [R. 1375, 1376, 1380, 1381, 1382].

Von Kahle argues that the FAC specifically pleads that Avellino and Bienes concealed their conduct and involvement with the Partnerships through 2012, and thus, there are issues of fact as to when Avellino and Bienes' fraudulent conduct should have been discovered. Brief at 22-23. However, Von Kahle's argument is without merit.

[37] In *Goodwin v. Sphatt*, 114 So.3d 1092, 1094 (Fla. 2nd DCA 2013), cited in Brief at 24, there were no specific dates in the complaint from which it could be determined when the statute of limitations ran. In *Pearson v. Ford Motor Co.,* 694 So.2d 61, 68 (Fla. 1st DCA 1997), cited in Brief at 24, there were allegations in the complaint of misrepresentations made by the Defendant after the statute of limitations which created a fact of whether the continuing tort doctrine applied.

Fraudulent concealment, relied on by Von Kahle, is distinct from fraud, and focuses on the subsequent actions taken by the defendant to keep the improper conduct from being exposed. *West Brook Isles Partners,* 163 So.3d at 639. Two elements are required to be shown: successful concealment of the cause of action, and fraudulent means to achieve that concealment. *Id.* The concealment must be by the party alleged to have perpetrated the fraud, and the party seeking to avail itself of the fraudulent concealment, must have exercised reasonable care and diligence in seeking to learn the facts which would disclose the fraud. *Berisford v. Jack Eckerd Corp.*, 667 So.2d 809, 811-812 (Fla. 4th DCA 1995).

The paragraphs in the FAC cited by Von Kahle in the Brief at 22-23 to establish fraudulent concealment of the fraud by Avellino do not do so. Paragraphs 1 and 65 do not contain any facts; they are merely conclusory statements.[38] [R. 1370, 1387]. Paragraphs 50 through 52 refer to conduct prior to 2008.[39] [R. 1383]. Paragraph 66 refers to conduct by Sullivan, not Avellino. [R. 1388]. There are simply no allegations in the FAC which show concealment by Avellino of the fraud, or that Avellino used fraudulent means to conceal the fraud.

[38] Paragraph 65 does allege in a conclusory fashion that Avellino assisted in the concealment of the "Kickbacks" until 2012. [R. 1387]. However, the fraud causes of action in the FAC are based on Avellino's alleged knowledge of BLMIS as a Ponzi scheme; not the receipt of "Kickbacks".

[39] Paragraph 52 refers to Bienes concealing his commissions without providing a date. However, this is an action taken by Bienes, not Avellino. [R. 1383].

Furthermore, even assuming *arguendo* that all the concealment actions alleged to have been taken by Avellino, Bienes and Sullivan in the FAC could be contributed to Avellino solely, they do not constitute a basis to delay the accrual of the statute of limitations for the fraud causes of action in the FAC. The fraud causes of action in the FAC are premised on Avellino's alleged knowledge of BLMIS being a Ponzi scheme and not revealing this knowledge to the Partnerships. Avellino's alleged knowledge of BLMIS as a Ponzi scheme was not revealed in the Partnerships' books and records, nor was it revealed in the management and control of the Partnerships.

The allegations in the FAC regarding Avellino's alleged knowledge of BLMIS as a Ponzi scheme were in fact almost verbatim from the allegations in a complaint Picard filed against Avellino in December 2010, almost four years before the FAC was filed. (*Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities, LLC v. Frank J. Avellino, et al.*, Adv. Pro. No 10-05421 (SMB), United States Bankruptcy Court, Southern District of New York). [R. 7115-7116, 7085-7086, 1376].[40] Von Kahle's argument that he was delayed in discovering the facts, or that Avellino concealed his conduct are simply not supported by the factual allegations in the FAC, and the trial court

[40] Paragraph 28 of the FAC refers to an interview by Bienes with PBS Frontline in which he is alleged to have publically disclosed that it must have been Avellino who facilitated Sullivan's ability to invest the Partnership monies in BLMIS. [R. 1377]. Based on public records this interview was on May 6, 2009.

correctly found that the fraud and fiduciary duty claims were barred by the statute of limitations.

CONCLUSION

Since December 2012, Avellino has been subjected to six complaints (and years of extensive discovery) including constantly changing claims and facts due to Von Kahle's repeated failed attempts to plead non time-barred claims. Multiple rulings below confirmed that all such claims are time-barred. Von Kahle's last gasp relation back argument seeking yet again to resurrect time barred claims is meritless. The trial court's order dismissing Counts I, II, III and IV of the FAC should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10tth day of May, 2019, a true and correct copy of the foregoing was electronically filed with the clerk of court using the Florida Court E-Filing Portal. I further certify that the foregoing document was served via electronic mail through the Florida Court E-Filing Portal upon Zachary P. Hyman, Esq., zhyman@bergersingerman.com; Leonard K. Samuels, Esq., lsamuels@bergersingerman.com; and Thomas M. Messana, tmessana@messana-law.com.

/s/ Gary A. Woodfield
Gary A. Woodfield

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this answer brief is written in 14 point Times New Roman font.

/s/ Gary A. Woodfield
Gary A. Woodfield