

STATE OF MICHIGAN
COURT OF APPEALS

MUNICIPAL HIGH INCOME FUND, INC.,
SMITH BARNEY MANAGED MUNICIPAL
FUND, INC., MANAGED MUNICIPALS
PORTFOLIO II, INC., SMITH BARNEY
INCOME FUNDS – SMITH BARNEY
MUNICIPAL HIGH INCOME FUND, and
SMITH BARNEY MUNI FUNDS – NATIONAL
PORTFOLIO,

Plaintiffs-Appellants/Cross
Appellees,

v

GOLDMAN, SACHS & COMPANY,

Defendant-Appellee,

and

R. W. BECK, INC.,

Defendant-Appellee/Cross
Appellant.

UNPUBLISHED
February 16, 2006

No. 264224
Wayne Circuit Court
LC No. 04-425735-CZ

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right, and defendant R. W. Beck, Inc. (Beck) cross appeals, from the trial court's order dismissing plaintiffs' third amended complaint, without prejudice, pursuant to the doctrine of forum non conveniens. We affirm.

I

In May 1998, the Michigan Strategic Fund (MSF)¹ issued revenue bonds with a face value of \$80 million in order to finance the conversion of a municipal waste incineration facility

¹ The MSF is a public corporation established pursuant to § 5 of the Michigan Strategic Fund
(continued...)

in Dearborn Heights, Michigan, into a modern waste-to-energy facility. The bond proceeds were to be loaned to Central Wayne Energy Recovery Limited Partnership (Central Partnership), the operators of the facility. Goldman, Sachs & Company (Goldman), the underwriter of the bond issue, agreed to purchase the revenue bonds from MSF. Plaintiffs are various municipal funds that, like Goldman, maintain their principal place of business in New York. Goldman sold revenue bonds with a face value of \$50,500,000 to plaintiffs.

In August 2004, plaintiffs filed this action against Goldman and also Beck, the engineering firm that prepared a feasibility study of the project underlying the bond issue (hereafter referred to as the “Independent Engineer’s Report”), which was included in Goldman’s prospectus (hereafter referred to as the “Official Statement”).² Plaintiffs alleged that the Official Statement and Independent Engineer’s Report contained false and misleading statements regarding the project’s ability to generate enough revenue to repay the bonds and, in particular, the amount of revenue that would be generated by charging “tipping fees” for municipal solid waste (MSW). Plaintiffs alleged that the project shut down in 2003, and that its operator, Central Partnership, sought bankruptcy protection. Plaintiffs alleged that Goldman was liable for losses to their bond funds based on theories of innocent and negligent misrepresentation. Plaintiffs alleged only a claim of negligent misrepresentation against defendant Beck.

Plaintiffs twice amended their complaint before defendants moved for dismissal in November 2004, based on the doctrine of forum non conveniens. Defendants alternatively moved for summary disposition under MCR 2.116(C)(7) (statute of limitations) and MCR 2.116(C)(8) (failure to state a claim). Defendants argued that the trial court should apply New York law to plaintiffs’ substantive claims and hold, under New York’s Martin Act, NY Gen Bus. Law, art 23-A, §§ 352-359, that plaintiffs had no private right of action for innocent and negligent misrepresentation claims. The trial court granted summary disposition in favor of defendants under MCR 2.116(C)(8) based on its determination that New York law applied to plaintiffs’ substantive claims, but gave plaintiffs an opportunity to file a third amended complaint alleging fraud against defendants. The trial court denied plaintiffs’ subsequent motion for reconsideration of its decision.

Plaintiffs filed a third amended complaint alleging fraudulent misrepresentation against both defendants, which again was based on alleged misrepresentations regarding the project’s ability to generate sufficient revenue to repay the bonds. Goldman moved for dismissal of the fraud claim, without prejudice, based on the doctrine of forum non conveniens or, alternatively, dismissal with prejudice on the ground that the fraud claim was untimely under Michigan’s statute of limitations. Beck also moved for dismissal of the fraud claim, with prejudice, based on Michigan’s statute of limitations. The trial court granted Goldman’s motion for dismissal based on the doctrine of forum non conveniens and sua sponte determined that its decision should

Act, MCL 125.2005.

² The prospectus actually has the title, “Limited Offering Memorandum.” But for purposes of consistency with the allegations in plaintiffs’ complaint, we shall refer to this document as the Official Statement.

apply to plaintiffs' claim against Beck as well. It declined to address defendants' arguments regarding the statute of limitations.

II

On appeal, plaintiffs argue that the trial court erred in determining that New York law governed their misrepresentation claims against defendants. We disagree. We review conflict of law questions de novo. *Frydrych v Wentland*, 252 Mich App 360, 363; 652 NW2d 483 (2002). Because the trial court ruled on this issue when determining that plaintiffs' innocent and negligent misrepresentation claims should be dismissed, we shall consider its decision in this context. Plaintiffs have not challenged the trial court's determination that New York's Martin Act precludes these common-law claims as to each defendant. Any challenge in this regard is therefore abandoned. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

We note, however, that New York, like Michigan, recognizes some form of innocent and negligent misrepresentation claims. See *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998) (innocent misrepresentation); *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 502; 686 NW2d 770 (2004) (negligent misrepresentation); *Dygert v Leonard*, 138 AD2d 793, 794; 525 NYS2d 436 (1988) (innocent misrepresentation); *Ossining Union Free School Dist v Anderson LaRocca Anderson*, 73 NY2d 417, 424; 539 NE2d 91; 541 NYS2d 335 (1989) (negligent misrepresentation).

Although there is some contrary view, the rationale for precluding the claims in New York, when the alleged misdeeds fall within the purview of its Martin Act, is that recognizing a private cause of action would be inconsistent with the broad regulatory and remedial powers granted to New York's attorney general under the act. See *Louros v Kreicas*, 367 F Supp 2d 572, 595 (SD NY, 2005), and *CPC Int'l Inc v McKesson Corp*, 70 NY2d 268, 277; 514 NE2d 116 (1987). The act provides a consistent enforcement mechanism. *Id.* A common-law negligent misrepresentation claim fails because, in essence, it would be a private action under the Martin Act. *Rego Park Gardens Owners, Inc v Rego Park Gardens Assocs*, 191 AD2d 621; 595 NYS2d 492 (1993). Similarly, a claim of innocent misrepresentation fails because a plaintiff is not required to prove intentional deceit. *Granite Partners, LP v Bear, Stearns & Co, Inc*, 17 F Supp 2d 275, 291 (SD NY, 1998). Although a common-law fraud claim is not precluded, "private plaintiffs will not be permitted through artful pleadings to press any claim based on the sort of wrong given over to the Attorney-General under the Martin Act." *Whitehall Tenants Corp v Estate of Olnick*, 213 AD2d 200; 623 NYS2d 585 (1995).

Turning to the appropriate choice of law to apply with respect to plaintiffs' claim against Goldman, our first task is to examine New York's interest in having its law applied. *Frydrych, supra*. The trial court found, and we agree, that New York has a significant interest in having its law applied because the alleged injury occurred in New York, the alleged misrepresentations occurred in New York, and plaintiffs and Goldman have their principal places of business in New York. Indeed, plaintiffs concede in their brief on appeal that New York, "legally speaking," was the place of their injury. Thus, the operative transaction upon which plaintiffs based their misrepresentation claims occurred in New York.

We reject plaintiffs' position that the operative transaction should be treated as having occurred in Michigan, rather than New York, because the MSF issued the revenue bonds. Plaintiffs' reliance on *Ackerberg v Johnson*, 892 F2d 1328 (CA 8, 1989), in support of this position is misplaced. At issue in *Ackerberg* was whether a person engaged in security transactions was exempt under federal securities law from the registration requirements under 15 USC 77d. Here, neither federal registration requirements, nor any statutory definitions applied in making this determination, are material to plaintiffs' common-law claims against Goldman. Further, neither the MSF nor any other Michigan entity is a party to this litigation. One might argue that plaintiffs would not have suffered injury but for the bond issue and the failure of the Michigan project that it funded. In general, revenue bonds do not have this state's pledge for payment, but rather "are retired from the proceeds of the operation of the public structure or enterprise supporting their issuance." *Schureman v State Hwy Comm*, 377 Mich 609, 611-612; 141 NW2d 62 (1966).

But the operative transaction upon which plaintiffs' action against Goldman is based was their purchase of the revenue bonds from Goldman based on alleged misrepresentations in Goldman's Official Statement. The operative transaction, therefore, occurred in New York, where the injury also occurred. An injury state always has an interest in the conduct within its borders. *Olmstead v Anderson*, 428 Mich 1, 30 n 13; 400 NW2d 292 (1987). Further, the fact that plaintiffs and Goldman are based in New York is particularly relevant in this case because New York would plainly have an interest in furthering the intent of the Martin Act by precluding certain common-law actions for those entities conducting their security transactions in New York. New York's intent to provide a uniform system of enforcement is primarily a matter of local concern. Cf. *Olmstead, supra* at 28-29 (a state's limitation of damages is largely a matter of local concern). Neither plaintiffs nor Goldman could reasonably complain that their transaction was subject to the Martin Act.

With respect to Michigan's interest in having its law applied, we agree with the trial court's determination that Michigan's interest is minimal. As we have already indicated, plaintiffs' claim is not based on the MSF's issuance of the bonds, but rather on information supplied by Goldman. To the extent that plaintiffs rely on the Michigan Uniform Securities Act (MUSA), MCL 451.501 *et seq.*, as establishing Michigan's interest, we note that plaintiffs first raised this argument in the trial court in their motion for reconsideration of the trial court's decision to grant summary disposition in favor of defendants with respect to the innocent and negligent misrepresentation claims. Because plaintiffs have not briefed the merits of their claim that the trial court erred in denying that motion, we deem this issue abandoned. *Prince, supra*.

But even if we were to overlook preservation requirements to consider plaintiffs' legal argument, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), we would not conclude that the MUSA establishes a significant Michigan interest in having its common law applied to plaintiffs' misrepresentation claims. Even assuming that plaintiffs could have stated a claim against Goldman under the MUSA, as plaintiffs concede, the claim is barred by the statute of repose, MCL 451.810(e). The cost of any limitation period is that conduct will go unredressed. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 282 n 8; 696 NW2d 646 (2005). It is nonetheless a legislative choice. *Id.* The Legislature's decision here to limit the time for a MUSA claim therefore weighs against any finding that Michigan has an interest in applying its law to plaintiffs' common-law claims grounded on the same alleged

conduct. Michigan's lack of interest is heightened by the fact that plaintiffs and Goldman have their principal places of business in New York. As was observed in *Frydrych, supra* at 364, "Michigan has little or no interest in affording greater rights of tort recovery to a foreign state resident than those afforded by the foreign state."

Additionally, this case presents forum-shopping concerns, inasmuch as plaintiffs appear to be seeking to apply Michigan law to avoid the preclusive effect of New York's Martin Act. Because a rational basis exists for applying New York law to plaintiffs' claims against Goldman, we uphold the trial court's decision to grant Goldman's motion for summary disposition under MCR 2.116(C)(8) based on the preclusive effect of New York's Martin Act and plaintiffs' consequential failure to state a cognizable claim under New York law.

We reach this same result with respect to plaintiffs' negligent misrepresentation claim against Beck. We note that, unlike Goldman, Beck's principal place of business is not in either New York or Michigan. But because plaintiffs' claim against Beck arises from the inclusion of Beck's Independent Engineer's Report in Goldman's Official Statement, a rational basis exists for applying New York law. Indeed, under the circumstances of this case, it would be unreasonable to subject plaintiffs' tort claims against Goldman and Beck to the law of two different states. Hence, we also uphold the trial court's grant of summary disposition under MCR 2.116(C)(8) in favor of Beck. In light of this decision, it is unnecessary to address Beck's argument that an alternative ground exists for upholding the trial court's decision.

Plaintiffs next argue that the trial court erred by dismissing their fraudulent misrepresentation claim against defendants based on the doctrine of forum non conveniens. We disagree. We review the trial court's decision to grant Goldman's motion for dismissal based on this doctrine, and to sua sponte order dismissal with respect to Beck, for an abuse of discretion. *Miller v Allied Signal, Inc*, 235 Mich App 710, 713; 599 NW2d 110 (1999). We assume for purposes of our review that both Michigan and New York provide possible forums for plaintiffs' claim because the doctrine of forum non conveniens presupposes at least two possible forums. *Cray v Gen Motors Corp*, 389 Mich 382, 395; 207 NW2d 393 (1973); *Miller, supra*.

Under *Cray, supra* at 395-396, a trial court should consider three factors in determining whether to accept or reject jurisdiction: (1) the litigant's private interests, (2) matters of public interest, and (3) the defendant's reasonable promptness in raising the plea of forum non conveniens. "[I]t is within the discretion of the trial court to decline jurisdiction in such cases as the convenience of the parties and the ends of justice dictate." *Id.* at 396.³

Here, the trial court's decision reflects that it gave careful consideration to each of these factors. It found that Goldman's motion was timely, and that the private and public interest factors weigh in favor of having plaintiffs bring their action in New York. Plaintiffs have not established that the trial court abused its discretion.

³ Although we are applying the test set forth in *Cray, supra*, we note that our Supreme Court has granted leave to appeal in *Radeljak v DaimlerChrysler Corp*, 472 Mich 924; 697 NW2d 524 (2005), to consider whether the public interest factor should be revised or modified.

To the extent that plaintiffs assert that they have many third-party fact witnesses in Michigan who would be unwilling to travel to New York to testify regarding the true state of the market conditions for the disposal of MSW in Michigan, we conclude that this argument is not properly before us because it is not factually supported with appropriate citations to the record. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.” *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). This Court will not search the record for factual support for a plaintiff’s claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004); see, also, MCR 7.212(C)(7).

Assuming that plaintiffs’ argument is based on attorney Bruce Rohde’s affidavit, no basis for disturbing the trial court’s analysis of the private-interest factor is apparent. The affidavit indicates that plaintiffs retained James Frey, the CEO of Resource Recycling Systems, Inc., as a consultant and that Frey confirmed information about the market conditions provided by various other sources. The historical facts provided to Frey through representatives of various entities appear to be based on documentary information, consistent with allegations in plaintiffs’ third amended complaint that defendants had access to material information in public and private records. Assuming that plaintiffs intended to use Frey as an expert witness, his location in Michigan is of little concern. “While the convenience of counsel and of expert witnesses may be of some importance in conjunction with other factors, it is entitled to little weight when it alone is advanced as favoring the chosen forum.” *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619, 629-630; 309 NW2d 539 (1981). To the extent that plaintiffs proposed having Michigan witnesses explain or identify what information was available in records for Goldman and Beck, no prejudice is apparent. As the court observed in *Saminsky v Occidental Petroleum Corp*, 373 F Supp 257, 260 (SD NY, 1974), when deciding a choice-of-forum issue under 28 USC 1404(a), the demeanor of witnesses may well be a crucial issue when a defendant is charged with fraud. But when a plaintiff proposes calling disinterested witnesses, whose credibility is apt not to be at issue, it is unlikely that the plaintiffs will be prejudiced by resort to offering their testimony by deposition.

With respect to the public-interest factor, we have already upheld the trial court’s decision to apply New York law to plaintiffs’ innocent and negligent misrepresentation claims. There is nothing about plaintiffs’ fraudulent misrepresentation claim that compels a different conclusion. The administrative difficulties that might arise in this case weigh in favor of New York because witnesses outside of Michigan would not be subject to Michigan process. See MCR 2.506(G)(1); *Manfredi v Johnson Controls, Inc*, 194 Mich App 519, 525; 487 NW2d 475 (1992). Further, those people concerned about this litigation are not based in Michigan. The operative transaction occurred in New York between plaintiffs and Goldman. The MSF may have a concern that a fraudulent misrepresentation was allegedly made in connection with the revenue bonds, but plaintiffs are neither litigating a wrong committed against the MSF, nor seeking a remedy from the MSF for their lost investment in the revenue bonds. Although a court should afford a plaintiff’s choice of forum appropriate weight, *Anderson, supra* at 631, we conclude that the trial court here did not abuse its discretion by declining to exercise jurisdiction over plaintiffs’ fraud claim against both Goldman and Beck. *Cray, supra* at 396; *Miller, supra*.

III

In its cross appeal, Beck argues that the trial court should have addressed the sufficiency and timeliness of plaintiffs' third amended complaint under MCR 2.112(B)(1) and MCL 600.5813, and dismissed it, with prejudice, as time-barred, rather than to dismiss it without prejudice based on the doctrine of forum non conveniens. Beck's argument merely assumes that the trial court should have addressed their motion for summary disposition under MCR 2.116(C)(7) based on the statute of limitations, before applying the doctrine of forum non conveniens. Having failed to brief this argument with citation to appropriate authority, we deem this issue abandoned. See *Peterson Novelties, Inc, supra*.

In any event, while this Court may overlook preservation requirements to consider issues necessary to a proper determination of the case, *Steward, supra* at 554, we are not persuaded that Beck has established that dismissal, with prejudice, was warranted.

We will uphold a trial court's determination regarding whether to dismiss a claim with or without prejudice unless the record indicates that the trial court abused its discretion. See generally *North v Dep't of Mental Health*, 427 Mich 659, 661; 397 NW2d 793 (1986). Under the involuntary dismissal rule, MCR 2.504(B)(3), "[u]nless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits."

Here, dismissal with prejudice would have been an appropriate remedy if plaintiffs' fraud claim was time barred. Cf. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). The doctrine of forum non conveniens did not preclude consideration of this issue because the doctrine presupposes at least two possible forums. Indeed, a non-Michigan forum is unavailable where its limitation period for the claim expired and the defendant fails to waive the statute of limitations defense. See *Miller, supra* at 713-714.

Nonetheless, we note that Beck's argument regarding New York's statute of limitations in its motion for summary disposition, like its argument in its brief on cross appeal, is limited to a brief discussion in a footnote. Such cursory treatment of an issue is insufficient to properly present the issue for judicial review. *Peterson Novelties, supra*. We further decline to address this issue because it is not set forth in the statement of the questions involved in Beck's cross appeal. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). We will assume, therefore, as the trial court appropriately did, that New York was an available forum for plaintiffs' fraud claim.

Whether Michigan provides an available forum is not entirely unrelated to New York's statute of limitations because plaintiffs are not residents of this state and Michigan's borrowing statute provides:

An action based upon a cause of action accruing without this state shall not be commenced after the expiration of the statute of limitations of either this state or the place without this state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of this state the statute of limitations of this state shall apply. [MCL 600.5861.]

Where a claim accrued for purposes of this provision is determined under Michigan law because this issue does not present a conflict of laws question, but rather a matter of legislative intent. See, generally, *In re Master Mortgage Investment Fund, Inc.*, 151 BR 513, 516 (WD Mo, 1993). In any event, Michigan generally looks to the state of injury under its borrowing statute to determine where the claim accrued. *Parish v B F Goodrich Co.*, 395 Mich 271, 284; 235 NW2d 570 (1975) (products liability action). As we have already indicated, the trial court correctly found that plaintiffs' injury occurred in New York. This is so because the economic impact on a plaintiff from a misrepresentation of mutual funds is felt at the plaintiff's principal place of business. See *Maiden v Biehl*, 582 F Supp 1209, 1214 (SD NY, 1984) (applying New York's borrowing statute to a fraudulent misrepresentation claim).

Because plaintiffs' claim accrued outside of Michigan, it is barred if either Michigan or New York's statute of limitations bars the claim. We look to the entire framework of the statute of limitations, including any tolling provisions, in applying them under the borrowing statute. *Buettgen v Volkswagenwerk, AG*, 505 F Supp 84, 86 (WD Mich, 1980), *aff'd* 701 F2d 174 (CA 6, 1982), see, also, *Hover v Chrysler Corp.*, 209 Mich App 314, 318; 530 NW2d 96 (1994).

As previously indicated, Beck has abandoned any argument regarding New York's statute of limitations by failing to properly address this issue. Thus, we limit our consideration to whether Beck has established that plaintiffs' fraud claim was barred under the applicable Michigan statute of limitations. Because Beck did not offer evidence that contradicted the allegations in plaintiffs' third amended complaint, we must accept those allegations as true for purposes of considering whether Beck would have been entitled to summary disposition on this issue under MCR 2.116(C)(7). *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes, supra* at 706.

We find it unnecessary to address Beck's argument regarding the tolling provision in the fraudulent concealment statute, MCL 600.5855, because Beck has not established that plaintiffs' fraud claim was time-barred under the six-year statute of limitations in MCL 600.5813. The date of accrual, for purposes of applying this provision, is "the time the wrong upon which the claim is based was done." MCL 600.5827. We reject Beck's claim that the date on which plaintiffs purchased the revenue bonds from Goldman in May 1998, is the appropriate accrual date under this statute.

Under Michigan law, "[t]he wrong is done when the plaintiff is harmed, rather than when the defendant acted." *Boyle v Gen Motors Corp.*, 468 Mich 226, 231; 661 NW2d 557 (2003), citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995). "Stated another way, a plaintiff's cause of action for tortious injury accrues when all the elements of the cause of action have occurred and can be alleged in a proper complaint." *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 640; 692 NW2d 398 (2004). To hold otherwise would permit a plaintiff's cause of action to be barred before an injury took place. *Stephens, supra* at 535.

The Third Circuit Court of Appeals decision in *Mathews v Kidder, Peabody & Co, Inc.*, 260 F3d 239, 247 (CA 3, 2001), does not support a determination that an injury in a securities case must be treated as occurring on the date of the purchase. At issue in *Mathews* was the

appropriate accrual rule to apply to a civil RICO (Racketeer Influenced and Corrupt Organizations Act) claim. In the course of its analysis, the Third Circuit distinguished between securities that could be characterized as debt instruments, which have a contractual right to future payments of interest and principal, and those that could be characterized as establishing equity ownership in property. *Id.* at 247-249. In the latter situation, the court indicated that an injury is sustained when a person purchases overpriced securities based on misrepresentations as to the securities' value. In the former situation, the injury occurs when the debtor defaults on the payment obligation. *Id.* The court further recognized that "modern financial markets, and the widespread use of complicated derivative instruments, have blurred the once-sharp distinction between debt and equity," but determined that the case before it involved a clear equity interest in real property. *Id.* at 248 n 12.

The decision in *Mathews* regarding the RICO claim is not controlling in this case, but we find the discussion of the distinction between equity and debt instruments persuasive for concluding that plaintiffs' claim here did not accrue in May 1998. *Garg, supra* at 283. There is no bright-line rule under the applicable Michigan accrual statute, MCL 600.5827, for determining when a defrauded person was harmed, but this Court has recognized that fraud victims are injured when they do not receive what they expected to receive. *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 185; 341 NW2d 268 (1983).

Accepting the allegations in plaintiffs' complaint as true, the alleged harm to plaintiffs arose from their failure to receive the principal and interest payments that they expected under the revenue bonds. It is the date of this occurrence, rather than the date when plaintiffs purchased the revenue bonds from Goldman, that is material in determining the accrual date. Because the fraud claim did not begin accruing in May 1998, and Beck has not established any other basis for concluding that plaintiffs' claim was time-barred under MCL 600.5813, we find no basis for disturbing the trial court's decision to dismiss the fraud claim, without prejudice. Even assuming that the trial court should have addressed this statute of limitations issue before deciding to dismiss the fraud claim, without prejudice, it reached the right result.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Henry William Saad