allegedly negligent treatment of Daniel. Thus, again, as a matter of law, Wrenshall did not owe a duty of care to Sean during her posttransplant treatment of Daniel.

Remaining Assignments of Error

The plaintiffs have three remaining assignments of error, regarding (1) whether Sean suffered legally cognizable damages, (2) whether competing experts on the standard of care make summary judgment inappropriate, and (3) whether the court erred in denying the motion to continue the summary judgment hearing. Because Wrenshall did not owe a duty of care to Sean during her posttransplant treatment of Daniel, we conclude that the remaining assignments of error are without merit.

CONCLUSION

Wrenshall did not owe a duty of care to Sean, the donor, during the posttransplant treatment of Daniel, the donee. Therefore, we hold that the district court did not err in granting summary judgment in favor of Wrenshall and UNMCP.

Affirmed.

Stephan, Miller-Lerman, and Cassel, JJ., not participating.

Bryan S. Behrens, an individual, et al., appellants, v. Christian R. Blunk, an individual, et al., appellees.

822 N.W.2d 344

Filed October 5, 2012. No. S-12-093.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
2. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.
3. **Limitations of Actions: Negligence.** If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within an exception to

Neb. Rev. Stat. § 25-222 (Reissue 2008). The language of § 25-222 provides for a discovery exception to the statute of limitations; additionally, under certain circumstances, a continuous relationship can toll the running of § 25-222.

4. **Limitations of Actions.** The 1-year discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 2008) is a tolling provision, but it applies only in those cases in which the plaintiff did not discover and could not have reasonably discovered the existence of the cause of action within the applicable statute of limitations.
5. ____. Under the discovery principle, a cause of action accrues and the discovery provision begins to run when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.
6. **Limitations of Actions: Malpractice.** In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. Continuity does not mean the mere continuity of the general professional relationship.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellants.

Mark C. Laughlin and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellees Christian R. Blunk and Berkshire & Blunk.

William R. Johnson and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellees Christian R. Blunk and Abrahams, Kaslow & Cassman, L.L.P.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

The district court granted summary judgment in favor of Christian R. Blunk, Berkshire and Blunk, and Abrahams Kaslow & Cassman LLP (collectively defendants) and dismissed the complaint filed by Bryan S. Behrens; Bryan Behrens Co., Inc.; National Investments, Inc.; and Thomas Stalnaker (collectively

plaintiffs), who filed this appeal. We conclude that plaintiffs' suit is barred by the applicable statute of limitations and accordingly affirm the decision of the district court.

BACKGROUND

This is the second appearance of this case before this court.[1] In January 2008, the U.S. Securities and Exchange Commission filed a civil enforcement action against all plaintiffs except Stalnaker. On July 28, Stalnaker was appointed receiver of all funds and assets of Behrens, National Investments, and other Behrens-related companies.

In April 2009, the federal government indicted Behrens on charges of securities fraud, mail fraud, wire fraud, and money laundering. We explained the criminal allegations in our prior opinion:

> The criminal allegations give context to the civil action. The indictment alleged a Ponzi scheme. Behrens owned a company that provided financial planning advice and offered insurance products to clients. He was registered to sell securities. In 2002, he purchased [National Investments], which was a Nevada real estate investment company. Behrens defrauded 25 [National Investments] investors out of $8.2 million. He induced some of his insurance and securities clients to cash out their annuities or investment accounts and invest in [National Investments]. He told investors that (1) they were investing in [National Investments]; (2) their investments would produce a 7- to 9-percent rate of return, with little to no risk; and (3) they would receive back their principal in 5 to 10 years. Behrens would normally issue a promissory note to investors with these promises. Instead of investing their money in real estate, he used it to support an extravagant personal lifestyle and other businesses that he acquired. He deposited the investors' money into bank accounts that he controlled and then transferred the money to other bank accounts to conceal its source. He

[1] See *Behrens v. Blunk*, 280 Neb. 984, 792 N.W.2d 159 (2010), *modified* 281 Neb. 228, 796 N.W.2d 579 (2011).

> used the investment money from later investors to make monthly payments to earlier investors.[2]

Prior to the filing of the indictment, in December 2008, plaintiffs originally filed their complaint alleging that Blunk had committed legal malpractice. In addition to Blunk, plaintiffs sued Blunk's former partnership, Berkshire and Blunk, and the firm that later employed Blunk, Abrahams Kaslow & Cassman, contending that Blunk's negligent acts occurred when he was employed at both firms.

As we discussed in our prior opinion, both the civil and criminal cases were proceeding at roughly the same time. During the course of the civil case, certain discovery requests were made of Behrens by the various defendants. Behrens declined to respond to those requests, citing his Fifth Amendment right against compulsory self-incrimination. As a result of Behrens' claim, the district court dismissed the legal malpractice action. This court reversed the dismissal, concluding that the district court erred in applying a rule of automatic dismissal when a plaintiff invoked his or her right against self-incrimination during discovery. We remanded the cause to the district court with instructions to "balance the parties' interests and consider whether a less drastic remedy would suffice."[3]

In April 2010, Behrens pled guilty to securities fraud in federal court and was later sentenced to 60 months' imprisonment and ordered to pay restitution of $6,841,921.90. In September 2010, plaintiffs filed an amended complaint. In that complaint, plaintiffs alleged that if they had been

> properly, correctly and responsibly advised about the promissory notes, their status as securities, registration requirements, issuance requirements, and requirements necessarily complied with to promote the promissory notes under state and federal securities law, the business model recommended, supported, and maintained as proper by Blunk from 1996 until recent months, could not have come into existence, grown, expanded, eventually borrowed approximately $7.5 million, and, when it failed,

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[2] *Id.* at 986-87, 792 N.W.2d at 162.

[3] *Id.* at 997, 792 N.W.2d at 168.

> incur debt it could not pay, which debt was deemed by investigative authorities to be the joint and several debt of all Plaintiffs.

Discovery was then conducted. A motion for summary judgment was filed by defendants, arguing that the action was barred by the statute of limitations, the doctrine of in pari delicto, and by defendants' lack of negligence. Blunk additionally filed a motion for judgment on the pleadings, arguing that he was not a proper party to the action because plaintiffs' claims against him had been discharged in bankruptcy. The district court granted the motions and dismissed the complaint as to all defendants. The district court found that the action was barred by both the applicable statute of limitations and by the doctrine of in pari delicto and found for defendants.

ASSIGNMENTS OF ERROR

On appeal, plaintiffs assign, restated and consolidated, that the district court erred in finding their claims were barred by (1) the statute of limitations and (2) the doctrine of in pari delicto.

STANDARD OF REVIEW

[1] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.[4]

ANALYSIS

[2] In plaintiffs' first assignment of error, they argue the district court erred in finding that its legal malpractice claim was barred by the applicable statute of limitations. This action is one for professional negligence and is therefore governed by the statute of limitations set forth in Neb. Rev. Stat. § 25-222 (Reissue 2008):

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services

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[4] *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

> shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.[5]

[3] If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within an exception to § 25-222. The language of § 25-222 provides for a discovery exception to the statute of limitations; we have additionally recognized that under certain circumstances, a continuous relationship can toll the running of § 25-222.[6]

Plaintiffs contend first that they could not and did not discover Blunk's malpractice until December 7, 2007, and that this suit, brought on December 4, 2008, was timely under the discovery exception to § 25-222. But defendants argue that Behrens should have discovered any alleged malpractice years earlier, in October 2001.

Alternatively, plaintiffs assert that Behrens' and Blunk's relationship was continuous from 1996 until 2008 and that the statute of limitations was tolled until the end of that relationship. As such, their suit, brought within 2 years of the end of that relationship, was timely. Defendants, however, contend that under the facts presented, the continuous relationship rule is inapplicable.

Generally, a receiver is held to stand in the shoes of the entity in receivership and holds the property by the same legal right and title as the person for whose property he or she is

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[5] *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

[6] See, e.g., *Bellino v. McGrath North, supra* note 4.

receiver.[7] Thus Stalknaker, as receiver, stands in Behrens' shoes and is subject to the same defenses to which Behrens is subject.

Discovery Exception to § 25-222.

[4] This court has said that the 1-year discovery exception of § 25-222 is a tolling provision, but that it applies only in those cases in which the plaintiff did not discover and could not have reasonably discovered the existence of the cause of action within the applicable statute of limitations.[8] The district court assumed that the initial 2-year statute of limitations set forth in § 25-222 had expired in 1998 and that Behrens did not and could not have discovered the malpractice within that period. As such, the discovery exception was triggered. On appeal, neither party takes issue with these assumptions. And for the purposes of our analysis, we likewise assume that the discovery exception was triggered.

[5] Under the discovery principle,

> a cause of action accrues and the . . . discovery provision . . . begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. . . . It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.[9]

Before the district court, and now on appeal, plaintiffs contend that Behrens could not have discovered the malpractice until December 7, 2007, when Behrens sought other counsel after learning that the Securities and Exchange Commission had opened an investigation into his business

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[7] 65 Am. Jur. 2d *Receivers* § 116 (2011). Cf., *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007); *State, ex rel. Spillman, v. Security State Bank*, 116 Neb. 521, 218 N.W. 405 (1928); *State, ex. rel. Davis, v. American State Bank*, 114 Neb. 740, 209 N.W. 621 (1926).

[8] See *Egan v. Stoler, supra* note 5.

[9] *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 684, 433 N.W.2d 478, 484 (1988).

dealings. But defendants argue, and the district court agreed, that Behrens should have discovered the alleged malpractice years earlier, in October 2001. In October 2001, both Behrens and Blunk were notified by the Nebraska Department of Banking that the department was investigating Behrens' use of promissory notes and was questioning whether that use might qualify as a security and constitute a violation of the Securities Act of Nebraska. At that time, Behrens was informed that a violation of the act could subject Behrens to criminal and civil liability.

This investigation was ongoing until at least April 2003. During that investigation, the department was in contact with Blunk, who was acting on Behrens' behalf. The record contains evidence that Behrens not only received notice of the investigation, but that Behrens participated in responding to requests from the department in the course of the investigation and was copied on most, if not all, of Blunk's responses to the department's requests for information. Behrens appears to concede that he was aware of the investigation beginning in 2001, but contends that he thought Blunk had dealt with the matter and that it was no longer an issue.

This case is factually similar to *Sass v. Hanson*.[10] In *Sass*, a client was informed by the Internal Revenue Service that an investigation had begun regarding whether the client's use of a particular tax election was permissible. The Court of Appeals concluded that for statute of limitations purposes, the client's "knowledge was very complete" based upon the letter received by the Internal Revenue Service and other correspondence that he had received on the topic.[11] The Court of Appeals rejected the argument that the client was not on notice because he was expressly told that he was not entitled to the election in question, concluding that he "had knowledge which, if not actual knowledge of his potential claim, was certainly sufficient, if pursued, to lead to the discovery of the alleged malpractice."[12]

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[10] *Sass v. Hanson*, 5 Neb. App. 28, 554 N.W.2d 642 (1996).

[11] *Id.* at 36, 554 N.W.2d at 647.

[12] *Id.*

Plaintiffs offered at the summary judgment hearing Behrens' testimony that he did not learn of the alleged malpractice until December 2007 and that he had no idea that promissory notes could be treated as securities. But we disagree and conclude that the 2001 incident started the clock on the discovery exception to the statute of limitations. The department's investigation was sufficient under Nebraska law to put Behrens on notice that promissory notes could be securities and to provide Behrens with knowledge which, if pursued, would have led to the discovery of Blunk's alleged negligence. As such, the discovery exception to § 25-222 began running in October 2001 and had expired by October 2002, more than 6 years prior to the filing of the malpractice action in this case.

Continuous Relationship Rule.

[6] This court has also, upon occasion, considered whether a continuous relationship might operate to toll the statute of limitations set out in § 25-222. In order for such a relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.[13] Continuity does not mean the mere continuity of the general professional relationship.[14]

Behrens alleges that his professional relationship with Blunk began sometime in 1996 and ended no earlier than December 7, 2007, and might have continued until at least April 2008, and that thus, his time to file suit was tolled for 2 years beyond the end of the relationship. Blunk contests this assertion, arguing that the relationship was not continuous within the meaning of Nebraska law and that, even if it had been, under the facts of this case, Behrens' suit was still untimely.

We reject plaintiffs' contention that Behrens' and Blunk's professional relationship was continuous within the meaning of Nebraska law from 1996 until late 2007 or early 2008. A review of the record does not support the conclusion that there was a continuity of relationship for the same or related subject

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[13] *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

[14] *Id.*

matter following the malpractice. At most, the record shows that during this time Behrens and Blunk had a general professional relationship, which is not considered continuous for the purposes of this exception.

We note that Behrens' and Blunk's relationship might be considered continuous from October 2001, when Behrens was notified of the department's investigation, until April 2003, when that investigation was complete, because the relationship dealt with that specific investigation. But assuming without deciding that this relationship was continuous for that period of time, and also assuming without deciding that this continuous relationship could toll not the statute of limitations but the running of Behrens' discovery period under the statute, we nevertheless conclude that Behrens' suit, brought more than 5 years after the termination of this relationship, was untimely.

Because we conclude that Behrens' suit was untimely, we need not decide whether it was also barred by the doctrine of in pari delicto.

CONCLUSION

Behrens' suit is barred by the 2-year statute of limitations set forth in § 25-222. The decision of the district court in favor of Blunk and his codefendants is affirmed.

AFFIRMED.

WRIGHT, J., not participating.