[Cite as *Clemens v. Nelson Fin. Group, Inc.*, 2015-Ohio-1232.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Richard A. Clemens, Trustee et al.,	:	
Plaintiffs-Appellants,	:	No. 14AP-537
v.	:	(C.P.C. No. 10CVA-01-1221)
Nelson Financial Group, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 31, 2015

Law Offices of James P. Connors, and *James P. Connors*, for appellants.

Zeiger, Tigges & Little LLP, *Marion H. Little, Jr.*, and *Kris Banvard*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiffs-appellants, Richard A. Clemens (in his capacity as trustee of the Richard Clemens Trust dated March 15, 2000 and the Clemens Irrevocable Trust dated March 15, 2000) and the Estate of Richard P. Clemens, appeal from a judgment in favor of defendants-appellees, Nelson Financial Group, Inc., William J. Nelson, Richard Wayne Severt, ING ReliaStar Life Insurance Company ("ReliaStar"), ING, and ING Financial Partners, Inc.[1] For the following reasons, we affirm that judgment.

{¶ 2} In 1997, Richard P. Clemens ("Clemens") attended a personal finance and investment seminar presented by Nelson Financial Group. During the seminar, attendees

[1] ING Financial Partners, Inc., a subsidiary of ING, is the broker-dealer of Nelson Financial Group. Nelson and Severt, who are both affiliated with Nelson Financial Group, are registered representatives of ING Financial Partners, Inc. ReliaStar is an insurance subsidiary of ING.

were invited to complete a "Personal Financial Data Form" and meet one-on-one with a Nelson Financial Group employee to discuss investment objectives. Clemens took advantage of this offer. Based on the information Clemens supplied, Nelson Financial Group developed a "Financial Analysis" for Clemens. This analysis showed that Clemens' projected post-retirement income would probably not support his desired lifestyle unless he reduced his standard of living and restructured his financial investments.

{¶ 3} Nelson Financial Group suggested that Clemens consider purchasing a variable universal life insurance policy. Such policies function as both an insurance policy and an investment vehicle. A policyholder invests the cash value of the policy in sub-accounts, which operate in a manner similar to mutual funds. The policyholder choses which sub-accounts to invest in and assumes the investment risk. To maintain the death benefit provided under the policy, the policyholder must make timely premium payments. However, no premium payment is necessary if the cash value is sufficient to pay the cost of the insurance.

{¶ 4} Through Nelson Financial Group, Clemens applied for a variable universal life insurance policy with ReliaStar. On December 9, 1997, ReliaStar issued a policy to Clemens with a face value of $427,000 ("Policy I"). Clemens made three annual premium payments under this policy, for a total amount of $150,000. Thereafter, the cash value in Policy I was enough that Clemens did not need to make further premium payments.

{¶ 5} In 2000, Clemens decided to purchase a second variable universal life insurance policy from ReliaStar ("Policy II"). This second policy, with a face value of $263,000, was issued to the Clemens Irrevocable Trust on June 28, 2000.[2] Although Clemens' son was trustee of the Clemens Irrevocable Trust, Clemens determined how to allocate the cash value to the sub-accounts and received all policy-related communications from ReliaStar. Additionally, Clemens assumed responsibility for funding the policy.

{¶ 6} Under Policy II, Clemens owed an annual premium of $22,650. Clemens paid that amount the first year of the policy. On the first anniversary of Policy II, the cash value in the policy was insufficient to cover the premium due, so, in order to prevent the

[2] Nelson Financial Group suggested that Clemens establish the Clemens Irrevocable Trust for the purpose of holding Policy II. The trust agreement names Nelson Financial Group as the trust's financial advisor.

death benefit from lapsing, Clemens had to make a second annual premium payment. At that point, Clemens changed the mode of payment from annual to quarterly. From June 2001 to through April 2004, ReliaStar sent Clemens notices when the quarterly premium payments were due. ReliaStar received the quarterly premium payments until the spring of 2004.

{¶ 7} On March 22, 2004, ReliaStar sent Clemens a letter marked "First Notice; Request for Premium Payment; Policy is in Danger." (R. 52, at Exhibit F.) The letter informed Clemens that his death benefit guarantee under Policy II would terminate unless ReliaStar received a premium payment of $3,226.83 by May 22, 2004. ReliaStar sent a second notice to Clemens on April 21, 2004. The second notice repeated the warning regarding policy termination if Clemens did not pay. ReliaStar did not receive the required payment. Therefore, on May 24, 2004, it sent Clemens a letter informing him that Policy II had lapsed.

{¶ 8} Clemens requested that ReliaStar reinstate his policy. ReliaStar refused.

{¶ 9} Clemens died on April 6, 2005. ReliaStar paid the face value of Policy I to Clemens' beneficiaries. As Policy II had lapsed, ReliaStar paid nothing under that policy.

{¶ 10} On January 26, 2010, plaintiffs filed an action against defendants, alleging claims for negligence, breach of fiduciary duty, breach of contract, misrepresentation, fraud, unjust enrichment, and civil conspiracy. In their complaint, plaintiffs alleged that "defendants grossly mismanaged and handled the plaintiffs' accounts and financial affairs." (R. 3, at ¶ 7.) Citing the purchase of Policy II and the creation of the Clemens Irrevocable Trust, plaintiffs asserted that defendants rendered questionable advice to Clemens. Plaintiffs also asserted that defendants pursued investment strategies that were not in accordance with Clemens' wishes or best interests. With regard to the lapse of Policy II, plaintiffs contended that Nelson and Severt, who both oversaw Clemens' account with Nelson Financial Group, misled Clemens by telling him that he did not need to make the May 2004 premium payment on Policy II.[3] Plaintiffs alleged that ReliaStar then breached Policy II by refusing to pay the death benefit when Clemens died.

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[3] Severt succeeded Nelson as the manager of Clemens' account with Nelson Financial Group. At the time Policy II lapsed, Severt was managing the account.

{¶ 11} Defendants simultaneously answered the complaint and moved for summary judgment. In their motion for summary judgment, defendants distinguished plaintiffs' claims for negligence, breach of fiduciary duty, and unjust enrichment from the claims for breach of contract, misrepresentation, fraud, and civil conspiracy. Defendants represented that the first group of claims were based on the purchase of Policy II, and the second group of claims were based on the lapse of that policy. Defendants attacked the second group of claims on their merits. With regard to the claim for breach of contract, defendants argued that Clemens breached Policy II by not making the necessary premium payments, which excused ReliaStar from paying the death benefit. With regard to the claims for misrepresentation and fraud, defendants contended that they did not mislead Clemens. To support this contention, defendants relied on the affidavits of Nelson and Severt. Both Nelson and Severt testified that neither they nor anyone else at Nelson Financial Group ever told Clemens that he did not need to make premium payments.

{¶ 12} In response, plaintiffs argued that defendants were estopped from asserting the nonpayment of the May 2004 premium as a basis for summary judgment. Plaintiffs based this estoppel argument on their contention that, when Clemens received the March and April premium notices, he asked Nelson Financial Group what to do and Nelson Financial Group advised him to do nothing. According to plaintiffs, Clemens relied on this advice, which explained why Clemens did not pay the May 2004 premium. Plaintiffs asserted they should not suffer a penalty for Clemens' good-faith reliance on Nelson Financial Group's faulty advice.

{¶ 13} In reply, defendants pointed out that plaintiffs' evidence to support their estoppel argument did not actually state what plaintiffs represented. The evidence at issue was a March 25, 2005 letter from Nelson and Severt that responded to Clemens' complaint to ReliaStar regarding the lapse of Policy II. In relevant part, that letter stated:

> [On] June 7, 2004[,] Richard [P. Clemens] called in and talked to Mary [Shumaker, an employee of Nelson Financial Group]. He said that he had received a death benefit guarantee notice. Mary explained what it meant and that he didn't have to do anything.

(R. 58, at Exhibit C.) This communication occurred two weeks *after* the lapse of Policy II on May 24, 2004. Thus, defendants asserted Shumaker's comment could not have influenced Clemens' failure to submit the premium payment.

{¶ 14} On April 25, 2012, the trial court issued a judgment granting defendants summary judgment on plaintiffs' claims for breach of contract, misrepresentation, fraud, and civil conspiracy. In its summary judgment decision, the trial court agreed with defendants' arguments and concluded that the evidence presented failed to establish that defendants were liable for the lapse of Policy II. The trial court, however, disagreed with defendants' characterization of plaintiffs' claims for negligence, breach of fiduciary duty, and unjust enrichment. The trial court found that those claims were not based on the purchase of Policy II, but instead, on the ongoing relationship that Clemens had with defendants as financial advisors. Those claims survived summary judgment.

{¶ 15} Defendants then filed a second motion for summary judgment. This motion attacked the remaining claims on statute-of-limitations grounds. It also argued that the economic loss rule barred plaintiffs' claim for negligence. The trial court, again, granted defendants summary judgment. In its October 26, 2012 decision, the trial court found that the negligence claim was barred, and it limited the scope of the claims for breach of fiduciary duty and unjust enrichment. Plaintiffs could not pursue breaches of fiduciary duty predicated on events that occurred prior to April 6, 2003. Moreover, plaintiffs could not claim unjust enrichment regarding any payments received prior to April 6, 2001 or any payments made thereafter pursuant to the terms of a contract.

{¶ 16} On January 29, 2013, the parties' attorneys attended a status conference with the trial judge. Apparently, at that conference, plaintiffs' attorney argued that the trial court should revisit the summary judgment decisions. The trial court declined. In an order dated February 1, 2013, the trial court stated, "As the dispositive motion deadline has passed and all pending motions have been ruled upon, the Court will not consider any additional motions, except those made in limine." (R. 193.)

{¶ 17} Despite the February 1, 2013 order, plaintiffs simultaneously filed a motion seeking leave to move for reconsideration and their motion for reconsideration. The trial court summarily denied both motions, citing its previous order.

{¶ 18} As the trial date approached, defendants filed a series of motions in limine. Of importance on appeal, defendants sought to preclude plaintiffs from introducing evidence or argument regarding defendants' supposed liability for the lapse of Policy II. The trial court granted that motion in limine.

{¶ 19} Rather than proceed with trial, the trial court terminated the case with a judgment dated June 13, 2014. The judgment summarized the court's earlier summary judgment rulings and reiterated the court's ruling on the motion in limine. It then granted plaintiffs' motion to dismiss the two remaining claims (for breach of fiduciary duty and unjust enrichment).

{¶ 20} Plaintiffs now appeal from the June 13, 2014 judgment, and they assign the following errors:

> 1. The trial court erred by partially granting summary judgment to appellees on March 5, 2012.
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> 2. The trial court erred by again partially granting summary judgment to appellees on October 26, 2012.
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> 3. The trial court erred by ruling *in limine* that the plaintiffs could not assert the Relia[S]tar #2 life insurance policy death benefit as damages on their breach of fiduciary duty claims.
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> 4. The trial court erred in its final judgment entry on June 13, 2014 by ruling that the plaintiffs could not assert the Relia[S]tar #2 life insurance policy death benefit as damages on their breach of fiduciary duty claims.

{¶ 21} Plaintiffs' first and second assignments of error challenge the trial court's summary judgment rulings. A trial court will grant summary judgment under Civ.R. 56 when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 22} By their first assignment of error, plaintiffs argue that the trial court erred in granting defendants summary judgment on the claims for breach of contract, misrepresentation, fraud, and civil conspiracy. We disagree.

{¶ 23} Initially, plaintiffs attack the trial court's conclusion that, based on the evidence before the court, Clemens did not contact Nelson Financial Group until after he received notice that Policy II had lapsed. Plaintiffs claim that they presented evidence that demonstrates that Clemens spoke to a Nelson Financial Group employee prior to that. According to plaintiffs, Clemens contacted Nelson Financial Group after receiving the March and April notices, and both times, Clemens was told not to pay the premium. Plaintiffs argue that, based on this evidence, they established a question of fact that precluded summary judgment. We do not find this argument persuasive because the evidence that plaintiffs refer to was not before the trial court when it decided the summary judgment motion.

{¶ 24} "Appellate review is limited to the record as it existed at the time the trial court rendered judgment." *Fifth Third Mtge. Co. v. Salahuddin*, 10th Dist. No. 13AP-945, 2014-Ohio-3304, ¶ 13; *accord Guernsey Bank v. Milano Sports Ents., L.L.C.*, 117 Ohio App.3d 314, 2008-Ohio-2420, ¶ 30 (10th Dist.) ("When reviewing a ruling on summary judgment, an appellate court restricts its consideration to 'the same evidentiary materials that were properly before the trial court at the time it ruled on the summary judgment motion.' "). An appellate court cannot consider evidence that a party adds to the trial court record after judgment and then decide an appeal of that judgment based on the new evidence. *Salahuddin* at ¶ 13; *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. No. 11AP-64, 2011-Ohio-5616, ¶ 13. This prohibition arises from the maxim that " 'in an appeal on questions of law the reviewing court may consider only that which was considered by the trial court and nothing more.' " *State v. Ishmail*, 54 Ohio St.2d 402, 405 (1978), quoting *Bennett v. Dayton Mem. Park & Cemetery Assn.*, 88 Ohio App. 98, 101 (2d Dist.1950).

{¶ 25} Here, plaintiffs' appellate argument primarily depends on two letters that Clemens wrote regarding the lapse of Policy II. Those letters were not part of the record when the trial court decided the first summary judgment motion. Plaintiffs adduced the letters approximately four months later in connection with their motion to deny defendants' second summary judgment motion.[4] Plaintiffs subsequently relied on the letters when moving for reconsideration of the summary judgment rulings. The trial court denied the motion for reconsideration on procedural grounds, i.e., it was not filed before the dispositive motion deadline. The trial court, consequently, did not consider the evidence that plaintiffs now reference when determining whether the claims for breach of contract, misrepresentation, fraud, and civil conspiracy survived summary judgment. Since the trial court never considered the evidence, we, too, cannot consider the evidence.

{¶ 26} Restricting our review to the same evidence the trial court considered, we conclude that the trial court did not err in finding that Clemens first contacted Nelson Financial Group about the premium notices in June 2004. Nothing in the record establishes that Clemens discussed the notices with Nelson Financial Group in March and April 2004, as plaintiffs claim. To the contrary, Nelson testified that "Clemens did not contact Nelson Financial Group for assistance in forwarding payment to ReliaStar with regard to the" premium payment due in May 2004. (R. 52, at Exhibit C, ¶ 26.)

{¶ 27} Plaintiffs next argue that Nelson Financial Group assumed the obligation to arrange and make all premium payments on Policy II, thus waiving the contractual requirement that the policyholder render payment. Plaintiffs, however, did not present this argument to the trial court. Generally, a party waives the right to raise on appeal an argument it could have raised, but did not, in earlier proceedings. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶ 34. Moreover, a party cannot shift its theory of the case and present new arguments for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992).

{¶ 28} In response to the first summary judgment motion, plaintiffs argued equitable estoppel due to misrepresentation, not waiver based on course of conduct. Below, plaintiffs maintained that the misrepresentation regarding payment of the May 2004 premium estopped defendants from asserting nonpayment as a defense to plaintiffs'

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[4] Instead of filing a memorandum contra to defendants' second summary judgment motion, plaintiffs moved for a denial of the second summary judgment motion or, alternatively, for an extension of time to respond to the motion under Civ.R. 56(F). This motion was filed on August 20, 2012—approximately four months after the trial court had issued the judgment granting defendants' first summary judgment motion. The trial court denied this motion.

claim for breach of contract. Now, on appeal, plaintiffs supplement their estoppel argument with the argument that defendants waived the payment requirement in Policy II when, through its course of conduct, Nelson Financial Group accepted full responsibility to pay the premium itself. Plaintiffs' failure to raise this argument before the trial court precludes them from asserting it on appeal.

{¶ 29} Moreover, even upon a consideration of its merits, the course-of-conduct argument fails. The record simply does not support plaintiffs' contention that Nelson Financial Group undertook the responsibility to pay Policy II's premiums.

{¶ 30} At the time it decided the first motion for summary judgment, the trial court had before it the testimony of Robert Clemens ("Robert"), Clemens' son and the trustee of the Clemens Irrevocable Trust from 2000 to 2006. Robert explained how the trust made the premium payments for Policy II. According to Robert, when his father received a premium notice, "he would come to [Robert] and ask for a deposit slip and a signed check, and he would get the assets" to pay the premium. (Robert Clemens deposition, at 51.) To "get the assets," Clemens contacted Nelson Financial Group, who would advise him regarding which assets to liquidate in order to acquire the funds to pay the premium.[5] Once he received the funds from the liquidated assets, Clemens would deposit them into the checking account that the trust maintained. He would then complete the signed (but otherwise blank) check with date, payee, and amount information. Clemens would give the check to Nelson Financial Group, who would forward it to ReliaStar. (R. 52, Exhibit T.)

{¶ 31} Based on the above evidence, any reasonable factfinder would conclude that Clemens managed the payment process, while Nelson Financial Group merely facilitated it. Nelson Financial Group directed the liquidation of assets to acquire funds and mailed the payment check, but their role was contingent upon Clemens seeking their assistance when he received a premium notice. Consequently, Nelson Financial Group did not appropriate Clemens' obligation to pay the premiums for Policy II. Defendants, therefore, did not waive the requirement that Clemens make timely premium payments in order to retain the death benefits under Policy II.

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[5] According to Nelson, the assets liquidated were equities held in other investment accounts, including a Fidelity account that Clemens maintained with Nelson Financial Group.

{¶ 32} In sum, we conclude that plaintiffs cannot prevail on their arguments under the first assignment of error. The record, as it existed when the trial court rendered judgment on the first motion for summary judgment, does not substantiate plaintiffs' factual contentions. Accordingly, we overrule plaintiffs' first assignment of error.

{¶ 33} By their second assignment of error, plaintiffs argue that the trial court erred in finding their negligence claim barred by the economic-loss rule and limiting the scope of their claim for breach of fiduciary duty. We find these arguments unavailing.

{¶ 34} We will first address plaintiffs' argument that the economic-loss rule does not apply to their negligence claim. Absent tangible physical harm to persons or tangible things, there is generally no duty to exercise reasonable care to avoid economic losses to others. *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.*, 54 Ohio St.3d 1, 3 (1990). The economic-loss rule, therefore, "generally prevents recovery in tort of damages for purely economic loss." *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶ 6. That is, "a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." (Citation omitted.) *Id.*; *accord Reengineering Consultants, Ltd. v. EMC Corp.*, S.D.Ohio No. 2:08-cv-47 (Jan. 14, 2009) ("The prohibition on the recovery in negligence of purely economic loss arises from the inevitable absence of a duty on the defendant to protect purely economic loss suffered by the plaintiff."); *Caruso v. Natl. City Mtge. Co.*, 187 Ohio App.3d 329, 2010-Ohio-1878, ¶ 13 (1st Dist.) ("Under the economic-loss rule, a plaintiff who has suffered only economic loss due to another's negligence cannot recover damages.").

{¶ 35} Here, plaintiffs seek to recover economic losses through a negligence claim. Such claims do not survive the economic loss rule. *J.F. Meskill Ents., LLC v. Acuity*, N.D.Ohio No. 05-CV-2955 (Apr. 7, 2006); *accord Long v. Time Ins. Co.*, 572 F.Supp.2d 907, 912 (S.D.Ohio 2008) (quoting *J.F. Meskill*); *In re Natl. Century Fin. Ents.*, Inc., 504 F.Supp.2d 287, 325 (S.D.Ohio 2007) (holding that the economic-loss rule "applies squarely to negligence claims").

{¶ 36} Plaintiffs, however, contend that their claim is exempt from the economic-loss rule. Although the economic-loss rule sweeps widely, it does not preclude all tort claims for economic damages. A plaintiff may pursue such a tort claim if it is "based exclusively upon [a] discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity." *Corporex* at ¶ 9; *accord Campbell v. Krupp*, 195 Ohio App.3d 573, 2011-Ohio-2694, ¶ 25 (6th Dist.) (in determining whether the economic-loss rule applies to tort claims, courts must examine whether the defendant owes any duties to the plaintiff "that [are] imposed by law instead of by contract"). These types of exempt claims may include claims for negligent misrepresentation. *Potts v. Safeco Ins. Co.*, 5th Dist. No. 2009CA0083, 2010-Ohio-2042, ¶ 21; *Universal Contracting Corp. v. Aug*, 1st Dist. No. C-030719, 2004-Ohio-7133, ¶ 11. Other examples are claims for breach of fiduciary duty, fraud, and conversion. *Morgan v. Mikhail*, 10th Dist. No. 08AP-87, 2008-Ohio-4598, ¶ 69.

{¶ 37} To support their argument that their negligence claim is exempt, plaintiffs rely on *Alton v. Wyland*, 72 Ohio App.3d 685 (10th Dist.1991). In *Alton*, this court held that "one who holds himself out to be an investment advisor and for a fee gives investment advice to another is liable to such other person if he negligently gives inaccurate advice causing damage to the other person as a result of relying upon such investment advice." *Id.* at 689. Plaintiffs contend that *Alton* recognized a discrete, preexisting duty in tort. According to plaintiffs, this recognition excludes their claim, which is based on that duty, from the ambit of the economic-loss rule. We disagree.

{¶ 38} We interpret our holding in *Alton* as addressing negligent misrepresentation, which is different from a negligence claim. A person is liable for negligent misrepresentation if he or she, in the course of business, negligently supplies false information, knowing that the recipient intends to rely on it in business. *Corporex* at ¶ 9. In *Alton*, we articulated one way in which an investment advisor could be liable for negligent misrepresentation. *Alton* is inapplicable here because the claim at issue is for negligence, not negligent misrepresentation.

{¶ 39} Perhaps realizing the difference between the two claims, plaintiffs seem to argue that their negligence claim is really a claim for negligent misrepresentation. Plaintiffs ignore that they raised a claim for "misrepresentation" along with a claim for fraud in "Count Three" of their complaint. Plaintiffs alleged in "Count Three" that "defendants negligently * * * misrepresented the need to make premium payments under" Policy II. (R. 3, at ¶ 24.) The trial court dealt with this claim during the first round of summary judgment. In its April 25, 2012 judgment, the trial court granted summary judgment on "Count Three" and dismissed that count. Therefore, no claim for negligent misrepresentation remained in the case when the trial court considered whether to grant summary judgment based on the economic-loss rule.

{¶ 40} In the end, we conclude that plaintiffs cannot escape the economic-loss rule. The trial court, therefore, did not err in granting defendants summary judgment on plaintiffs' negligence claim.

{¶ 41} Plaintiffs next argue that the trial court erred in temporally limiting their claim for breach of fiduciary duty to comply with the four-year statute of limitations.[6] Plaintiffs first argue that defendants are estopped from asserting the statute-of-limitations defense. Second, plaintiffs argue that the statute of limitations for claims for breach of fiduciary duty is subject to the discovery and termination rules. We reject both arguments.

{¶ 42} Although plaintiffs claim that estoppel precludes defendants from raising the statute of limitations as a defense, they do not specify what kind of estoppel applies. Plaintiffs, like many parties, use the term "estoppel" loosely, which hinders a court's ability to analyze the estoppel argument. *Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶ 33. Having reviewed the pleadings below and the various types of estoppel, we conclude that plaintiffs' estoppel argument is based on equitable estoppel.

{¶ 43} " 'The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice.' " *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 43 ("*Doe I*"), quoting *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145 (1990). A plaintiff may employ the doctrine of equitable estoppel to prevent the inequitable use of statutes of limitations. *JRC Holdings, Inc. v. Samsel Servs. Co.*, 166 Ohio App.3d 328, 2006-Ohio-2148, ¶ 28 (11th Dist.); *Luft v. Perry Cty. Lumber & Supply Co.*, 10th Dist. No. 02AP-559, 2003-Ohio-2305, ¶ 74. To do so, the plaintiff must establish that specific misleading or fraudulent actions by the defendant

[6] Plaintiffs only challenge the portion of the trial court's decision that restricted plaintiffs' claims to those that arose after April 6, 2003. The trial court set that limitation for the claim for breach of fiduciary duty; it set April 6, 2001 as the date governing the claim for unjust enrichment. As plaintiffs do not attack the temporal bar applying to the claim for unjust enrichment, we do not address it.

somehow kept it from timely bringing suit. *Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, ¶ 9; *Doe I* at ¶ 45; *Aronhalt v. Castle*, 10th Dist. No. 12AP-196, 2012-Ohio-5666, ¶ 32.

{¶ 44} In the case at bar, plaintiffs premise their case for equitable estoppel on defendants' delay in disclosing records detailing their dealings with and on behalf of Clemens. According to plaintiffs, defendants withheld those records for over a year after Clemens' April 5, 2005 death. Plaintiffs, however, fail to explain why they needed those records to know of their potential causes of action against defendants. Clemens wrote letters in February 2005 complaining about the lapse of Policy II and the alleged mishandling of his investments. Clemens discussed both matters with his son Richard, who is one of the plaintiffs, in March 2005. This evidence establishes that plaintiffs had sufficient knowledge of defendants' alleged wrongdoing to file suit before they received defendants' records. Thus, we conclude that the delay in the disclosure of the records did not equitably estop defendants from raising the statute-of-limitations defense.

{¶ 45} Plaintiffs next argue that the trial court erred in not finding that their claim for breach of fiduciary duty accrued either when Clemens discovered his damages or when Clemens died, thus terminating his relationship with Nelson Financial Group. We do not agree.

{¶ 46} A party must file a claim for breach of fiduciary duty within four years after the claim accrues. R.C. 2305.09(D); *Wells v. C.J. Mahan Constr. Co.*, 10th Dist. No. 05AP-180, 2006-Ohio-1831, ¶ 26. Generally, a cause of action accrues at the time the wrongful act is committed. *State ex rel. E. Cleveland Fire Fighters' Assn., Local 500, Internatl. Assn. of Fire Fighters v. Jenkins*, 96 Ohio St.3d 68, 2002-Ohio-3527, ¶ 13. There are exceptions to this general rule. Some causes of action do not accrue until the plaintiff knows, or by an exercise of reasonable diligence should know, that he or she has been injured by the conduct of the defendant. *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, ¶ 14. This exception is known as the discovery rule. *Id.*

{¶ 47} R.C. 2305.09 contains a discovery rule for certain torts, including fraud and conversion. The General Assembly's failure to extend this discovery rule to all torts covered by R.C. 2305.09 indicates that the General Assembly did not intend the discovery rule to apply to those claims. *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 181 (1989). R.C. 2305.09(D) determines the statute of limitations for claims for breach of fiduciary duty. *Wells* at ¶ 26. Because R.C. 2305.09 does not name claims for breach of fiduciary duty as claims that accrue only upon discovery, the discovery rule does not toll the statute of limitations for those claims. *Marks v. Reliable Title Agency*, 7th Dist. No. 11 MA 22, 2012-Ohio-3006, ¶ 14; *Dodd v. KeyBank*, 8th Dist. No. 85949, 2006-Ohio-93, ¶ 25; *Holloway v. Holloway Sportswear, Inc.*, 3d Dist. No. 17-98-20 (June 7, 2001); *Jim Brown Chevrolet, Inc. v. S.R. Snodgrass, A.C.*, 141 Ohio App.3d 583, 587 (11th Dist.2001); *Binsack v. Hipp*, 6th Dist. No. H-97-029 (June 5, 1998); *Herbert v. Banc One Brokerage Corp.*, 93 Ohio App.3d 271, 273-75 (1st. Dist.1994). "A claim for breach of fiduciary duty accrues when the claimant's interest is impaired by such a breach, rather than when the breach is discovered." *Wells* at ¶ 29; *accord Union Savings Bank v. Lawyers Title Ins. Corp.*, 191 Ohio App.3d 540, 2010-Ohio-6396, ¶ 28 ("[A] claim for breach of fiduciary duty accrues when the act or omission constituting the breach actually occurs and [ ] the discovery rule does not apply to such claims.").

{¶ 48} Like the discovery rule, the termination rule is also an exception to the general rule that a claim accrues when the wrongful act occurs. In determining the accrual date of claims for medical and legal malpractice, courts apply the discovery rule in combination with the termination rule. Under the termination rule, accrual occurs when a physician-patient relationship for a particular condition, or an attorney-client relationship for a particular transaction or undertaking, terminates. *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385 (1988), paragraph one of the syllabus; *Frysinger v. Leech*, 32 Ohio St.3d 38 (1987), paragraph one of the syllabus. As with the discovery rule, the termination rule does not apply to claims that are subject to the four-year statute of limitations set forth in R.C. 2305.09(D). *Jim Brown Chevrolet*; *Beechler v. Touche Ross & Co.*, 81 Ohio App.3d 354, 359 (8th Dist.1992); *Bagley v. Hall*, 10th Dist. No. 92AP-18 (June 11, 1992). Such claims include claims for breach of fiduciary duty.

{¶ 49} Given the settled law in this area, we conclude that the trial court did not err in refusing to adopt the discovery and/or termination rules with regard to claims for breach of fiduciary duty. Plaintiffs originally asserted their claim for breach of fiduciary duty in a complaint filed April 6, 2007.[7] Thus, the statute of limitations bars liability for any breaches that occurred before April 6, 2003, or four years before the original complaint was filed.

{¶ 50} In sum, we are not persuaded by any of the arguments that plaintiffs assert under their second assignment of error. We thus overrule that assignment of error.

{¶ 51} By plaintiffs' third and fourth assignments of error, they argue that the trial court erred in disallowing any evidence or argument regarding defendants' liability for the lapse of Policy II at a trial on the claims for breach of fiduciary duty and unjust enrichment. We find that this issue is not ripe for review.

{¶ 52} A motion in limine is a tentative, precautionary request to limit inquiry into a specific area until admissibility is determined during trial. *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶ 35; *accord Morgan v. Ohio State Univ.*, 10th Dist. No. 13AP-287, 2014-Ohio-1846, ¶ 34 (holding that an in limine order is " 'a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of an evidentiary issue' "). An in limine ruling has no effect until is acted upon at trial. *Morgan* at ¶ 34. Therefore, an appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection, proffer, or ruling when the issue is actually reached during the trial. *Gable* at ¶ 35; *Cranford v. Buehrer*, 2d Dist. No. 26266, 2015-Ohio-192, ¶ 13; *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶ 61.

{¶ 53} Here, in its order granting defendants' motion in limine and its final judgment, the trial court indicated how it intended to rule at trial regarding the admissibility of evidence and argument about defendants' liability for the lapse of Policy II. That trial, however, never occurred. Consequently, we do not know how the trial court would have treated the issue, had it arisen, during trial. The trial court's ruling regarding the issue remains merely a tentative, preliminary ruling, which we cannot review. *Carlo v. Nayman*, 8th Dist. No. 84542, 2005-Ohio-3130, ¶ 25 (if a plaintiff declines to go forward with trial after an unfavorable ruling on a motion in limine, an appellate court has no basis on which to review or reverse the ruling). Accordingly, the arguments raised

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[7] Plaintiffs voluntarily dismissed their original complaint. This appeal stems from their re-filed complaint.

in plaintiffs' third and fourth assignments of error are not properly before us and we decline to address them.

{¶ 54} For the foregoing reasons, we overrule plaintiffs' first and second assignments of error, and we decline to address plaintiffs' third and fourth assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.