

NO. A04-1367

---

State of Minnesota  
**In Supreme Court**

---

RICHARD ANTONE,

*Respondent,*

v.

ISRAEL MIRVISS,

*Appellant.*

---

**APPELLANT'S BRIEF AND APPENDIX**

---

JEFFREY A. OLSON, PLLC  
Jeffrey A. Olson (#230832)  
7831 Glenroy Road, Suite 185  
Edina, MN 55439  
(952) 835-4709

LIND, JENSEN, SULLIVAN &  
PETERSON, P.A.  
Paul C. Peterson (#151543)  
William L. Davidson (#201777)  
150 South Fifth Street, Suite 1700  
Minneapolis, MN 55402  
(612) 333-3637

*Attorneys for Respondent*  
*Richard Antone*

*Attorneys for Appellant*  
*Israel Mirviss*

Mr. David F. Herr (#44441)  
MASLON EDELMAN BORMAN &  
BRAND, LLP  
3300 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-4140  
(612) 672-8350

Mr. Thomas J. Shroyer (#100638)  
Mr. Peter A. Koller (#150459)  
MOSS & BARNETT, P.A.  
4900 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 347-0300

*Attorney for Minnesota Lawyers Mutual*  
*Insurance Company*

*Attorneys for Minnesota Society of Certified*  
*Public Accountants*

*(Additional Counsel Listed on following page)*

Ms. Mary C. Lauhead (#68016)  
LAUHEAD LAW OFFICES  
3985 Clover Avenue  
St. Paul, MN 55127-7015  
(651) 426-0870

and

Mr. Michael Dittberner (#158288)  
CLUGG, LINDER & DITTBERNER, LTD.  
3205 West 76<sup>th</sup> Street  
Edina, MN 55435-5244  
(952) 896-1099

*Attorneys for Family Law Section,  
Minnesota State Bar Association*

## Table of Contents

	<u>Page</u>
Table of Contents .....	i
Table of Authorities.....	ii
Statement of Legal Issues.....	1
Statement of the Case .....	2
Statement of the Facts .....	3
Introduction and Standard of Review.....	7
Argument and Authorities .....	8
I.    The district court properly granted judgment to Mirviss when it concluded that Antone brought his legal malpractice action more than six years after it accrued.....	8
II.   The Court of Appeals erred in concluding that “the” damage sought in Antone’s complaint controls the accrual date for statute of limitations purposes; Minnesota law is clear that only “some” damage is needed to start the running of a limitations period.....	13
III.  Antone sustained “some” damage more than six years before he commenced his malpractice suit against Mirviss.....	21
A.   Antone sustained “some” damage in 1986 when he married in reliance upon the alleged negligent antenuptial agreement.....	22
B.   Antone sustained “some” damage more than six years before he brought suit because of the appreciation in value that took place as to the non-marital property.....	28
Conclusion.....	30

## Table of Authorities

<u>Cases</u>	<u>Page</u>
<i>Antone v. Antone</i> , 645 N.W.2d 96 (Minn. 2002).....	3-4, 6, 23-25, 32
<i>Antone v. Antone</i> , C8-01-679, 2001 WL 1356377 (Minn. App. Nov. 6, 2001) .....	6, 28, 32
<i>Antone v. Mirviss</i> , 694 N.W.2d 564 (Minn. App. 2005) .....	3, 14, 22, 32
<i>Bachertz v. Hayes-Lucas Lumber Co.</i> , 201 Minn. 171, 275 N.W. 694 (1937).....	9
<i>Binstock v. Tschider</i> , 374 N.W.2d 81 (N.D. 1985).....	26
<i>Bonhiver v. Graff</i> , 311 Minn. 111, 248 N.W.2d 291 (1976) .....	12
<i>Brenner v. Nordby</i> , 306 N.W.2d 126 (Minn. 1981).....	9
<i>Chapman v. Alexander</i> , 307 Ark. 87, 817 S.W.2d 425 (1991).....	9
<i>Ciardelli v. Rindal</i> , 582 N.W.2d 910 (Minn. 1998).....	12
<i>Commonwealth Land Title Insurance Co. v. Kurnos</i> , 340 N.J.Super. 25, 773 A.2d 726 (2001).....	27
<i>Dalton v. Dow Chemical Co.</i> , 280 Minn. 147, 158 N.W.2d 580 (1968).....	8, 10,12-13, 29
<i>Ekern v. Westmoreland</i> , 181 Ga. App. 741, 353 S.E.2d 571 (1987).....	17
<i>Elzie v. Commissioner of Public Safety</i> , 298 N.W.2d 29 (Minn. 1980).....	11
<i>Grimm v. O'Connor</i> , 392 N.W.2d 40 (Minn. App. 1986) .....	20, 29
<i>Gunufson v. Swanson</i> , 1995 WL 711138 (Minn. App. Dec. 5, 1995)....	17, 32
<i>Gunufson v. Swanson</i> , C4-95-1446, 1996 WL 686121 (Minn. Nov. 20, 1996) .....	1, 16-18, 32

<i>Harmeyer v. Gustafson</i> , 2001 WL 122141 (Minn. App. Feb. 5, 2001).....	19
<i>Henning v. Krahrmer and Bishop, P.A.</i> , 1993 WL 140869 (Minn. App. May 4, 1993).....	21, 32
<i>Henslevy v. Caietti</i> , 13 Cal.App.4th 1165 (1993).....	27
<i>Hermann v. McMenemy &amp; Severson</i> , 590 N.W.2d 641 (Minn. 1999) .....	1, 7, 10-12, 28
<i>Hoffman v. Guzinski</i> , 1994 WL 396328 (Minn. App. Aug. 2, 1994).....	21, 32
<i>Johnson v. Soo Line R.R. Co.</i> , 463 N.W.2d 894 (Minn. 1990).....	8
<i>Leisure Dynamics v. Falstaff Brewing Corp.</i> , 298 N.W.2d 33 (Minn. 1980) .....	9
<i>May v. First National Bank of Grand Forks, North Dakota</i> , 427 N.W.2d 285 (Minn. App. 1988).....	20, 29
<i>McClain v. Johnson</i> , 160 Ga.App. 548, 288 S.E.2d 9 (1981) .....	17
<i>Northern States Power Co. v. Franklin</i> , 265 Minn. 391, 122 N.W.2d 26 (1963).....	11
<i>Noske v. Friedberg</i> , 670 N.W.2d 740 (Minn. 2003).....	11-13, 18, 21
<i>Pearson v. Pearson</i> , 363 N.W.2d 337 (Minn. App. 1985).....	28
<i>Royal Realty Co. v. Levin</i> , 244 Minn. 288, 69 N.W.2d 667 (1955) .....	11
<i>Sabes &amp; Richman, Inc. v. Muenzer</i> , 431 N.W.2d 916 (Minn. App. 1989) .....	20
<i>Travelers Ins. Co. v. Thompson</i> , 281 Minn. 547, 555, 163 N.W.2d 289, 294 (1968).....	18
<i>Weston v. Jones</i> , 160 Minn. 32, 199 N.W. 431 (1924).....	11

**Statutes**

Minn. Stat. § 507.02..... 24

Minn. Stat. § 517.01..... 22

Minn. Stat. § 518.055..... 23

Minn. Stat. § 518.06, subd. 1 ..... 23

Minn. Stat. § 518.54, subd. 5 ..... 23, 25

Minn. Stat. § 518.58, subd. 1 ..... 23, 24

Minn. Stat. § 519.11..... 22, 24-25,

Minn. Stat. § 541.05, subd. 1 ..... 1, 8, 17

Minn. Stat. § 541.15..... 9

**Other Authority**

Mallen & Smith, *Legal Malpractice*, § 22.12 at 427  
(2005 ed.) ..... 19, 29

## Statement of Legal Issues

Whether a legal malpractice claim brought in 2003 for alleged negligent advice and preparation of an antenuptial agreement in 1986 is time-barred under Minnesota's six-year statute of limitations when the plaintiff claims he married based upon the antenuptial agreement and the plaintiff's non-marital property appreciated in value at least six years before he brought his malpractice suit?

### Decisions of the lower courts:

The district court concluded that the claim was time-barred because the six-year statute of limitations for malpractice claims had expired.

A divided panel of the Court of Appeals reversed, concluding that the claim was timely because it did not accrue until 2003 when the underlying dissolution was final, and thus the six-year limitations period had not expired.

### Apposite authority:

Minn. Stat. § 541.05, subd. 1

*Hermann v. McMenemy & Severson*, 590 N.W.2d 641 (Minn. 1999)

*Gunufson v. Swanson*, C4-95-1446, 1996 WL 686121 (Minn. Nov. 20, 1996)

## Statement of the Case

This appeal arises out of the dismissal of Respondent Richard Antone's ("Antone") legal malpractice suit against the attorney who represented him in 1986, Appellant Israel Mirviss ("Mirviss"). A.23. Antone sued Mirviss in September 2003 asserting claims of legal malpractice, breach of contract, and breach of fiduciary duty. A.8. All of these malpractice claims arise out of an antenuptial agreement that Mirviss prepared and advised Antone upon in 1986. Antone and his fiancée agreed upon and signed the antenuptial agreement the day before their marriage. Antone claims that Mirviss negligently drafted and provided improper advice about the antenuptial agreement.

Following some limited discovery, the Hennepin County District Court, the Honorable Robert Lynn, dismissed Antone's malpractice claim because it was untimely. The district court concluded that the limitations period for the malpractice claim began to run on the date action was taken based on the legal advice, *i.e.* Antone's marriage, given that Antone claimed he would not have wed but for the antenuptial agreement. A.27. Alternatively, the district court concluded that some damage resulted at some point more than six years before the malpractice action was brought because of an increase in value that occurred for the non-marital property that Antone claims was not properly protected under the terms of the antenuptial agreement. A.28.

Antone appealed, arguing that the malpractice action either did not accrue until June 2002, when this Court issued its decision in *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002) (A.73), or not until the final judgment was entered in January 2003 following remand in the dissolution proceeding and when a portion of his premarital property was awarded to his former spouse.

A divided Court of Appeals panel reversed, *Antone v. Mirviss*, 694 N.W.2d 564 (Minn. App. 2005) (A.1), concluding that the malpractice claim was timely because it did not accrue until the amended judgment in Antone's marital dissolution matter was entered. *See id.*, 694 N.W.2d at 569, 571-72.<sup>1</sup> This Court granted Mirviss' petition for review.

### **Statement of the Facts**

Israel Mirviss practiced law for 45 years until his retirement in 2001. A.165, 170, 186 (Mirviss depo. pp. 8, 26, 91). He graduated from law school and began practicing in Minnesota in 1956. A.165 (Mirviss depo. p. 8). He initially worked in various small firms, but primarily was a sole practitioner often involved in

---

<sup>1</sup> The majority decision also stated that "the statute of limitations did not begin to run until the time of the award [upon entry of the amended dissolution judgment], and [Antone's] lawsuit three years later was timely." *Antone*, 694 N.W.2d at 572. This statement is somewhat confusing given that the malpractice suit was not brought "three years" after entry of the underlying amended dissolution judgment, instead it was brought 9 months after entry of that judgment. The reference to three years may inadvertently have been to the original dissolution judgment that was entered in 2000, some three years before the malpractice claim was brought. *See id.* at 567.

office-sharing arrangements with other attorneys. A.166 (Mirviss depo. pp. 9-12). He is now 77 years old. He was never sued until this malpractice suit, and he has never been the subject of any ethics complaint. A.170 (Mirviss depo. p. 26). He had a general practice when he represented Richard Antone. A.170 (Mirviss depo. pp. 27-28).

### Antenuptial agreement

In 1986 Mirviss represented Richard Antone, who contacted Mirviss shortly before Antone's scheduled wedding to discuss protecting Antone's pre-marital property. Antone wanted to protect his interests in twenty rental properties, his homestead, and a 50% interest in a business, and prevent distribution of these assets to his fiancée, Debra Schmidt ("Schmidt"), in the event of a divorce. A.82-83 (Antone Aff., ¶ 3). Antone wanted protection so that his "fiancée would not benefit from any appreciation that occurred relative to Antone's premarital assets/properties." *Antone*, 694 N.W.2d at 566 (citation omitted).

Mirviss prepared a proposed antenuptial agreement for Antone that sought to protect Antone's non-marital property, including any increase in value of that property. A.83 (Antone Aff., ¶ 5); A.90; A.98; A.177 (Mirviss depo. pp. 55-56).

Antone presented the proposed antenuptial agreement to Schmidt on Friday, December 19, 1986 -- two days before their scheduled wedding. A.83 (Antone Aff., ¶ 6); A.280 (Debra Antone Aff., ¶ 3). Schmidt refused to sign the agreement.

A.281 (Debra Antone Aff., ¶ 4). Instead, she quickly found an attorney to represent her, Russell Ingebritson. *Id.* (Debra Antone Aff., ¶ 5).

Schmidt, Ingebritson, Antone, and Mirviss all met on Saturday, December 20. A.281 (Debra Antone Aff., ¶ 6). Schmidt refused to sign the antenuptial agreement as originally drafted and stated she did not intend to marry Antone.

A.282 (Debra Antone Aff., ¶ 7). Instead, the parties negotiated and made revisions to the antenuptial agreement. The antenuptial agreement that Antone and Schmidt agreed upon deleted the property division section, *i.e.* it no longer addressed how the property would be divided, leaving property division to be governed by Minnesota law. A.123; *Antone*, 694 N.W.2d at 566; A.178 (Mirviss depo. p. 57). Additionally, the antenuptial agreement the parties agreed upon and signed now included a limitation on the amount and duration of spousal maintenance that Schmidt could receive if the marriage was dissolved within 24 months of the wedding. A.124; *Antone*, 694 N.W.2d at 566.

After agreeing upon and signing the antenuptial agreement on Saturday, Antone and Schmidt married the next day, Sunday the 21st, as planned. Antone claims that he went through with the planned marriage in reliance upon Mirviss' advice regarding the antenuptial agreement. A.8-9; A.85 (Complaint, ¶¶ 3, 5-6; Antone Aff., ¶¶ 2, 10). Mirviss did no other work for Antone thereafter concerning the antenuptial agreement. A.24.

Antone v. Antone dissolution

In 1998, Antone sued Schmidt for divorce. A.9 (Complaint, ¶ 11). Mirviss did not represent Antone in the dissolution. During the dissolution litigation, the issue of nonmarital assets and the increase in their value was litigated.

The Antones' dissolution was tried and a judgment of dissolution was entered in November 2000. The district court concluded that the antenuptial agreement did not affect its authority to order a property division that would include assets that Antone now claims should have been covered and protected under a properly drafted antenuptial agreement. Nonetheless, the district court awarded all of the appreciated value of those assets to Antone. A.29.

Schmidt appealed the dissolution judgment. The Court of Appeals affirmed. *Antone v. Antone*, C8-01-679, 2001 WL 1356377 (Minn. App. Nov. 6, 2001) (A.68). This Court accepted review.

In a 4-3 decision, this Court reversed the decisions below. *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002) (A.73). This Court held "as a matter of law that a portion of the market-related appreciation during the marriage is marital property." *Id.* at 103. This Court remanded the dissolution matter for further consideration and directed the district court to determine the portion of the appreciated value that Schmidt should receive. Following remand, the district court entered its amended

dissolution judgment in January 2003. That amended judgment included an award of a portion of the appreciated value of the property.

Antone then sued Mirviss in September 2003. He alleged that Mirviss committed legal malpractice almost seventeen years earlier when Mirviss drafted the antenuptial agreement and advised him about it in 1986.

### **Introduction and Standard of Review**

This Court should conclude that Antone's malpractice claim was time-barred. The Court of Appeals' decision should be reversed because it incorrectly focused upon "the" damages a claimant identifies in a complaint, rather than the "some" damages required for a claim to accrue. This incorrect focus changes the law in Minnesota and will permit parties to manipulate and extend the statute of limitations in this and future cases. The adoption and application of such a narrow view of when a claim accrues will permit potential claims to linger indefinitely and thereby undercut the very purpose of a statute of limitations.

Because the material facts are undisputed, the issue is whether the district court erred in its application of the law in determining that Antone's malpractice claims against Mirviss are time-barred. *See Hermann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). This Court's review of this legal question is *de novo*. *Id.*

## Argument and Authorities

### **I. The district court properly granted judgment to Mirviss when it concluded that Antone brought his legal malpractice action more than six years after it accrued.**

The district court properly determined that Antone's malpractice claim was untimely. Antone complains that Mirviss committed malpractice in 1986 and that as a result, Antone married in reliance upon what Antone now contends was Mirviss' poor advice and drafting of the antenuptial agreement almost seventeen years before Antone brought suit. A.8-9; A.85 (Complaint, ¶¶ 3, 5-6; Antone Aff., ¶¶ 2, 10). Under Minnesota's six-year statute of limitations for legal malpractice claims, Minn. Stat. § 541.05, subd. 1, Antone's claim is time-barred.

The purpose of a statute of limitations is to grant repose to defendants, to eliminate stale claims, to permit the fair and effective administration of justice, and to allow the judiciary to husband its limited resources. *Johnson v. Soo Line R.R. Co.*, 463 N.W.2d 894, 896 (Minn. 1990); *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 158 N.W.2d 580, 584 n.2. (1968). A statute of limitations exists specifically to prevent the potential for liability to linger indefinitely and because there must be a definite time after which claims are barred. *Johnson*, 463 N.W.2d at 896.

A statute of limitations is one of repose that grants a period in which a right may be enforced, but withholding a remedy after that period expires for reasons of private justice (to the party sued) and public policy (to society generally). *See*

*Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 176, 275 N.W. 694, 697 (1937). Statutes of limitations recognize that parties must be permitted a certain measure of certainty and stability so that they can plan for the future. Courts should not be burdened with adjudicating disputes that arose decades before, when memories have faded, documents are lost, and witnesses may be unavailable.

Antone's suit some seventeen years after Mirviss' work on the antenuptial agreement and representation ended undercuts the purposes of a statute of limitations. The public interest in ensuring that cases are litigated while memories are fresh, evidence is accessible, and witnesses are available will not be served if Antone's suit is considered timely. *See Leisure Dynamics v. Falstaff Brewing Corp.*, 298 N.W.2d 33, 39 (Minn. 1980) (answering certified question that actions for the payment of sales taxes accrue at the time of sale and noting that 12-15 year period to bring a claim under a different theory would be inappropriate given the purposes of limitations periods); *see also Chapman v. Alexander*, 307 Ark. 87, 817 S.W.2d 425 (1991) (rejecting discovery rule and expressing concern that attorney could be forced to defend the validity of an agreement 25 to 30 years after preparing it, long after the attorney's records and witnesses are available).<sup>2</sup>

---

<sup>2</sup> The sole focus of this appeal is on when Antone's claim accrued, given that Antone does not contend that the limitations period was tolled, or that Mirviss should in some way be equitably estopped from asserting a statute of limitations defense. *See, e.g.*, Minn. Stat. § 541.15; *Brenner v. Nordby*, 306 N.W.2d 126, 127

The need for repose is evident in this case, involving conduct almost twenty years ago. Several examples of faded memories already are apparent in this case regarding the meeting or meetings to discuss an antenuptial agreement and the drafts and changes to the agreement before Antone and Schmidt ultimately signed the antenuptial agreement. *See generally* A.179-184 (Mirviss depo. pp. 63-84); A.239-279 (Debra Antone depo.). Schmidt's attorney, Russell Ingebritson, has little memory of the negotiations and changes to drafts of the agreement, and could no longer retrieve any file materials concerning the matter. A.204, 210 (Ingebritson depo. pp. 5-6, 29-32).

The general rule in Minnesota is that a cause of action accrues when an accident or alleged tortious act takes place. *E.g., Dalton*, 280 Minn. at 150-51, 158 N.W.2d at 583. Notwithstanding concern about possible injustice that might arise should a claim accrue and the limitations period run before a party even discovers that he has sustained injury, this Court has repeatedly rejected the discovery rule. *See id.*, 280 Minn. at 151, 158 N.W.2d at 583; *see also Herrmann*, 590 N.W.2d at 643 (“[w]e have declined to adopt the discovery rule in the past and neither [the parties] nor the court of appeals decision provide any justification for doing so now”).

---

(Minn. 1981) (defendant equitably estopped from asserting statute of limitations defense).

The running of a statute of limitations is not tolled by ignorance of a cause of action. *Hermann*, 590 N.W.2d at 643; *Weston v. Jones*, 160 Minn. 32, 36-37, 199 N.W. 431, 433 (1924). A cause of action accrues when it will survive a motion to dismiss for failure to state a claim upon which relief can be granted. *Hermann*, 590 N.W.2d at 643. “The showing a plaintiff must make in order to survive a motion to dismiss under Minn. R. Civ. P. 12.02(e) is minimal.” *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003). A plaintiff need only allege sufficient facts to state a claim, they do not need to prove their claim at that stage. *See id.*

The appropriate standard under Rule 12 is one this Court has repeatedly expressed: is it possible, on any facts alleged, to succeed with a claim. *See Elzie v. Commissioner of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980); *Royal Realty Co. v. Levin*, 244 Minn. 288, 290, 69 N.W.2d 667, 670 (1955).

In other words, could Antone have stated a malpractice claim against Mirviss at any time before 1997 (six years before he finally commenced suit in 2003)? It is immaterial whether Antone could prove the facts alleged. *See Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). Because Antone could have stated all of the elements of his legal malpractice claim after his marriage, and certainly more than six years before he

finally commenced this malpractice action in 2003, he could have survived a motion to dismiss and his claim was ripe years ago.

To state a claim for legal malpractice, a party must allege four elements:

1. the existence of an attorney-client relationship;
2. acts constituting negligence or breach of contract;
3. that such acts proximately caused the plaintiffs' damages; and,
4. that but for the attorney's conduct the plaintiff would have obtained a better result.

*See Noske*, 670 N.W.2d at 742.

“[T]he gravamen in deciding the date upon which the cause of action” accrues is when the alleged negligence happened, coupled with the alleged resulting damage. *Hermann*, 590 N.W.2d at 643 n.12 (quoting *Dalton*, 280 Minn. at 154, 158 N.W.2d at 584). As long as “some” damage occurs as a result of the alleged malpractice, the cause of action accrues and the limitations period begins then. *Hermann*, 590 N.W.2d at 643. It is this joinder of the alleged negligence and resulting injury that triggers the start of the limitations period. Minnesota applies and follows this accrual rule in other professional malpractice cases, *see, e.g., Ciardelli v. Rindal*, 582 N.W.2d 910, 912 (Minn. 1998) (medical malpractice claim; “statute of limitations began to run on the date a plaintiff sustained damage”); *Bonhiver v. Graff*, 311 Minn. 111, 117, 248 N.W.2d 291, 296 (1976) (accounting malpractice claim; statute of limitations begins to run when “damage is occasioned”). Here the alleged negligence happened in 1986. If “some”

resulting damage from that negligence occurred before August 1997, then Antone's claim is time-barred. As shown below, and as the district court concluded, Antone sustained some damage when he married in 1986 or at least by August 1997 because of his loss of certain rights to non-marital property.

**II. The Court of Appeals erred in concluding that “the” damage sought in Antone’s complaint controls the accrual date for statute of limitations purposes; Minnesota law is clear that only “some” damage is needed to start the running of a limitations period.**

In reversing the district court, the divided panel of the Court of Appeals determined that because “the” specific monetary damages Antone sought in his malpractice suit did not exist until January 2003, that his malpractice cause of action did not accrue before then. In narrowly focusing on just “the” damages pled, the divided panel ignored the long-standing rule that if “some” damage exists, a cause of action has accrued. This Court should reverse and make clear that the focus for purposes of analyzing accrual is not on the particular damages included in a complaint, but instead is upon whether any damage exists. To hold otherwise will permit claimants to manipulate the statute of limitations by artificially controlling when a claim accrues through artful pleas for relief.

In reiterating its continued rejection of the discovery rule, this Court in *Hermann* repeated that “some” damage was the appropriate rule. 590 N.W.2d at 643 & nn. 11 and 17 (citing *Dalton*, 280 Minn. at 154, 158 N.W.2d at 585); *see also Noske*, 670 N.W.2d at 743 n.1. Notwithstanding this clear pronouncement,

the Court of Appeals' decision improperly focused on "the" money damages that Antone pled in his complaint. As Judge Dietzen recognized, this focus was improper and contrary to Minnesota law. *Antone*, 694 N.W.2d at 572-73 (Dietzen, J. dissenting). The Court of Appeals' construction of the accrual rule creates the very real risk that malpractice claims will not be brought for many years after both the alleged wrongful conduct and some harm.

The Court of Appeals recognized that various possible dates might trigger the start of the limitations period: the signing of the antenuptial agreement, the marriage, commencement of the dissolution, entry of the original dissolution judgment, the appellate court decisions, or entry of the final dissolution judgment following remand. *Antone*, 694 N.W.2d at 568. The Court of Appeals concluded that no actionable claim existed until January 2003, when Antone sustained money damages due to three events: (1) appreciation in value of the property; (2) dissolution of the marriage; and, (3) an award of a portion of the appreciated value upon the dissolution. *Id.* at 571. It was error to condition accrual or the trigger of the limitations period on these three events and the specific money damages Antone alleges was not known or fixed in place until the amended dissolution judgment was entered in January 2003.

To adopt Antone's reasoning would mean that a legal malpractice claim does not and cannot accrue until all possible appellate avenues are exhausted and a

final judgment is entered that fixes the amount of claimed monetary damages. This would mean that in every malpractice case where some underlying litigation exists, a new and different accrual rule will apply that will extend, as a practical matter, Minnesota's existing six-year limitations period. Minnesota has never adopted such a rule, nor should it now. Significantly, the judicial determination (here the entry of the final amended dissolution judgment in 2003) did not create the injury. For statute of limitations purposes and analyzing when a cause of action accrues, the focus is on when damage occurs, not when the full extent of the damages is reasonably ascertainable or measured.

A cause of action accrues when alleged negligence results in some damage. "Some" damage is all that is needed; not "some" damage that exists or may finally be determined to occur only after appeals and further proceedings are concluded. The time, money, and effort spent to draft the antenuptial agreement itself is "some" damage because the agreement ultimately signed did not reflect the intent that Antone claims he desired, and for which he paid Mirviss. As well, "some" damage exists because of the need to remedy, or attempt to remedy, Mirviss' alleged failure to draft the antenuptial agreement so as to reflect the intent that Antone now claims it should have reflected.

This Court should reject any attempt to extend an already long statute of limitations by manipulating accrual rules to require any underlying litigation to

wind its way through the court system over a number of years. If the Court of Appeals' reasoning in *Antone* is accepted – either that “the” damage claimed instead of “some” damage is the trigger, or that damages can trigger the accrual of a claim only upon completion of underlying litigation – this would change long-standing Minnesota precedent. With no legislative change to the statute of limitations, this new accrual rule will suddenly expose every attorney who drafts contracts, estate plans, or other transactional papers to significantly longer exposure for alleged malpractice, either because a claimant might be able to plead certain damage (“the” specific damage sought) to avoid a limitations period, or because damages may not become fixed and certain for many years.

Significantly, the Court of Appeals' new (and erroneous) accrual rule either ignored or would overturn numerous appellate decisions regarding the statute of limitations in legal malpractice cases. Notably, the Court of Appeals utterly disregarded the holding in *Gunufson v. Swanson*, 1996 WL 686121 (Minn. Nov. 20, 1996) (A.291), a factually comparable case where this Court rejected a similar analysis from another divided Court of Appeals panel. *See id.*

*Gunufson v. Swanson*

In *Gunufson* the defendant lawyer was sued in 1994 for an alleged drafting error in 1984 regarding a stipulation to settle a divorce dispute. The stipulation was intended to foreclose any future claims from the client's ex-wife, but it did

not. In 1992 the ex-wife successfully moved for relief extending the duration of her maintenance payments. The client then sued his lawyer for malpractice, but the trial court granted summary judgment and ruled that the statute of limitations had run. A divided panel reversed, concluding that the claim did not accrue until the ex-wife obtained additional relief in 1992 based upon the alleged 1984 drafting error. *Gunufson*, 1995 WL 711138 (Minn. App. Dec. 5, 1995) (A.292).

This Court granted review, summarily reversed the Court of Appeals, and reinstated the trial court's summary judgment decision, concluding:

Our review of the record leads to the conclusion that the applicable statute of limitations, Minn. Stat. § 541.05, subd. 1(5), began to run on August 22, 1984, the date the allegedly deficient stipulation drafted by [the lawyer] was incorporated into the judgment and decree of marital dissolution as entered. Accordingly, this legal malpractice action commenced on December 2, 1994 was time barred.

*Gunufson*, 1996 WL 686121. (A.291).<sup>3</sup> This Court concluded that the malpractice cause of action accrued in 1984 even though the wife might never have sought to change the maintenance payments and no ascertainable or fixed amount of money damages could be determined then. This reasoning undercuts the Court of

---

<sup>3</sup> See also *Ekern v. Westmoreland*, 181 Ga. App. 741, 353 S.E.2d 571 (1987) (date alleged unfavorable property separation agreement was signed as a binding obligation triggered accrual of malpractice claim, not when property separation agreement was later incorporated into divorce decree); *McClain v. Johnson*, 160 Ga. App. 548, 288 S.E.2d 9 (1981) (claim for negligent drafting of property settlement agreement that was later incorporated into divorce decree; statute of limitations on malpractice claim started to run at time of alleged unskillful drafting, not when child reached 18 and full extent of damage discovered due to alleged negligence).

Appeals' focus on "the" money damages claimed and a requirement that a final judgment be entered so that a known, fixed amount of damages can be determined.

Unlike *Noske*, where this Court was guided by and reiterated its prior holding that a person convicted of a crime could not attack a valid criminal conviction in a subsequent criminal proceeding, *Noske*, 670 N.W.2d at 744-45 & n.4 (citing *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 555, 163 N.W.2d 289, 294 (1968)), this Court has previously held and should be guided by its earlier decision that a legal malpractice cause of action accrues upon some damage resulting from an attorney's alleged negligence in drafting an agreement that addresses marital rights. *See Gunufson*, 1996 WL 686131.

Moreover, *Noske* recognized that because the alleged malpractice occurred during litigation, the potential dangers associated with stale claims and lingering liability were lessened because a record will have been made of the actions that form the substance of the malpractice action. 670 N.W.2d at 746. Here, however, the alleged malpractice did not occur during litigation; the claim is one for transactional malpractice. Thus, the dangers of stale claims and indefinite liability exposure remain, and exist here given the poor memories of events from 1986.

In weighing competing public policy factors, this Court should recall that:

[u]ltimately, any consideration of public policy must start with a recognition that a statute of limitation is itself a public policy statement imposing a somewhat arbitrary deadline for the pursuit of claims. The statute balances the interests of the claimant, the lawyer,

the judicial system and the public. The claimant's interest is to be able to pursue a remedy. The lawyer's interest is to be able to defend when recollections are fresh and evidence is not stale or unavailable, and being able to avoid open-ended concerns of liability in planning his or her life. The judicial system and the public are best served by efficient and prompt resolution of disputes.

Mallen & Smith, *Legal Malpractice*, § 22.12 at 427 (2005 ed.).

### Contrary Court of Appeals decisions

Accepting the Court of Appeals' rationale and Antone's arguments also will undermine numerous Court of Appeals decisions. *See, e.g., Harmeyer v.*

*Gustafson*, 2001 WL 122141 (Minn. App. Feb. 5, 2001) (A.295). In *Harmeyer* a

lawyer drafted irrevocable trust documents in 1990 as part of an estate plan for a

married couple. Following the husband's death almost six years later, the wife

sued the lawyer for malpractice in 1999 claiming that the trust documents were

improperly drafted. The district court and Court of Appeals concluded that the

malpractice claim was time-barred. The *Harmeyer* court specifically rejected the

wife's argument that the limitations period did not begin to commence until her

husband's death because it was not possible to ascertain damages until then.

Instead, "some" damage occurred when the trust documents were signed because

the couple did not receive the expected benefits of the trusts. The limitations

period started running then, even though the couple may have been ignorant of the

cause of action or may not have been able to determine the damage that would be

incurred from the alleged negligent drafting. The court concluded that a

malpractice action would have survived a motion to dismiss for failure to state a claim after the signing of the trust documents because the documents contain language that the plaintiff claims adversely affected her.

Similarly, the decision and reasoning in *May v. First National Bank of Grand Forks, North Dakota*, 427 N.W.2d 285 (Minn. App. 1988), would be undercut if the Court of Appeals' *Antone* reasoning is accepted. In 1987 the beneficiaries of a farm property trust sued the lawyer who advised a personal representative, claiming negligence occurred that ultimately led to an IRS tax assessment. The plaintiffs claimed that no actual harm occurred until the IRS assessed an actual tax deficiency in 1986. The *May* court disagreed, noting that damage happened in 1981 when the IRS placed a lien on the property and notified the heirs of a "potential deficiency." *Id.* at 287-88. The *May* court concluded that the tax lien created at least a cloud on the title to the property that was damage sufficient to trigger the limitations period. *Id.* at 289. As the court noted, "[t]ime, money and energy [would] have to be expended, either to pay [the lien] off or to prove that it should not exist . . . ." *Id.* Even though a final resolution fixing any specific dollar amount was not yet determined, the malpractice cause of action accrued earlier upon "some" damage being incurred as a result of the attorneys' alleged negligence.

Other decisions recognize that a malpractice claim accrues when “some” damage occurs, and that the ultimate damage sustained need not be known or ascertainable. *See Sabes & Richman, Inc. v. Muenzer*, 431 N.W.2d 916 (Minn. App. 1989) (malpractice claim for alleged negligence in not advising to copyright brochure; claim accrued when competing brochure published (and not when money spent in attempt to enforce infringement claim) because harm due to lawyer’s alleged erroneous advice became irremediable); *Grimm v. O’Connor*, 392 N.W.2d 40, 43 (Minn. App. 1986) (omission of a clause in a contract for deed was some damage that triggered statute of limitations); *Henning v. Krahmer and Bishop, P.A.*, 1993 WL 140869 (Minn. App. May 4, 1993) (A.298) (noting rejection of discovery rule in legal malpractice actions; damage accrued when the will was signed with terms unfavorable to the claimants that the lawyer allegedly drafted negligently); *Hoffman v. Guzinski*, 1994 WL 396328 (Minn. App. Aug. 2, 1994) (A.300) (alleged negligent drafting of a contract for deed; malpractice claim accrued on date of closing). Because the Court of Appeals’ decision in *Antone* misapplied settled Minnesota law, this Court should reverse.

**III. Antone sustained “some” damage more than six years before he commenced his malpractice suit against Mirviss.**

If Antone sustained “some” damage more than six years before he commenced suit against Mirviss, his malpractice claim was untimely and must be dismissed. While damage alone is not the only focus, *see Noske*, 670 N.W.2d at

743 n.1, it is undisputed that the other elements necessary to state a legal malpractice claim existed more than six years before suit was brought.

Here, the district court correctly found that Antone sustained “some” damage more than six years before he brought suit: he was damaged as a result of marrying in reliance upon the alleged negligent antenuptial agreement, and he was damaged because his non-marital property appreciated in value. A.27-28.

**A. Antone sustained “some” damage in 1986 when he married in reliance upon the alleged negligent antenuptial agreement.**

Antone claims he married Schmidt because of Mirviss’ alleged negligent drafting and advice as to the antenuptial agreement. A.8-9; A.83 (Complaint, ¶¶ 3, 5-6; Antone Aff., ¶¶ 2, 10). The allegedly deficient antenuptial agreement that Mirviss drafted and advised upon was agreed to and signed by Antone and Schmidt. It became effective once Antone and Schmidt married. Like his marriage, the antenuptial agreement Antone signed is a civil contract. *See* Minn. Stat. § 517.01 (marriage “is a civil contract”); Minn. Stat. § 519.11.

The Court of Appeals erred in concluding that when Antone married, “there were no damages at all.” *Antone*, 694 N.W.2d at 571. This conclusion followed an overly narrow emphasis on the money damages sought in the complaint. The harm Antone sustained included his expenditure of attorney fees for a result he claims was inconsistent with his intent. This harm included the time and expense that would be incurred in correcting, or trying to remedy, the alleged error in

drafting. The harm sustained also included the fact that his non-marital property became a part of the marital estate and was subject to marital claims from Schmidt, contrary to what Antone claims the antenuptial agreement should have permitted.

Upon marrying, Antone sustained “some” damage, damage that he attributes to Mirviss’ alleged negligence. This was true even if the exact amount of damage was not yet ascertainable at that time. Thus, Antone’s allegations of malpractice against Mirviss could have been brought and would have survived a motion to dismiss for failure to state a claim once Antone married.

Antone’s unimpaired right to do whatever he wished with the non-marital property was lost upon his marriage due to what Antone claims was Mirviss’ alleged negligence regarding the antenuptial agreement. As Judge Dietzen succinctly and correctly stated below, Antone’s “non-marital property . . . became a part of the marital estate and was subject to the marital claims of” Schmidt when he married. *Antone*, 694 N.W.2d at 572 (Dietzen, J. dissenting).

As soon as Antone married, he lost the legal right to claim an unfettered ownership interest in his non-marital assets. The antenuptial agreement was operative throughout and upon Antone’s marriage. Antone’s alleged loss of an exclusive interest in controlling his assets was “some” damage that proximately flowed from Mirviss’ alleged negligence in drafting the agreement and advising Antone upon it.

The act of marrying creates the right to a “just and equitable division of the marital property of the parties without regard to marital misconduct . . .” *See* Minn. Stat. § 518.58, subd. 1; *see also* Minn. Stat. § 518.54, subd. 5 (defining “marital property” and “nonmarital property”). Marriage creates a presumption that all property acquired during the marriage is marital property, without regard to the form of ownership. *Antone v. Antone*, 645 N.W.2d 96, 100-01 (Minn. 2002).

By definition, marriage confers certain rights and responsibilities upon the spouses. *See* Minn. Stat. § 518.06, subd. 1 (legal separation determines the “rights and responsibilities of a husband and wife arising out of the marital relationship”); *see also* Minn. Stat. § 518.055 (“putative spouse acquires rights conferred upon a legal spouse, including the right to maintenance” and fair division of property acquired during relationship). Were certain rights not automatically created by marriage, there would be no need for antenuptial agreements, which permit spouses to limit rights, including rights in the other’s real property, that exist upon marriage. *See* Minn. Stat. § 519.11, subd. 3.

When they married, Antone and Schmidt each obtained certain rights by operation of law. One of the rights obtained (or lost depending on one’s perspective on marriage) was that the other spouse could not convey the homestead without the signature of both spouses. *See* Minn. Stat. § 507.02. Thus, when

Antone married Schmidt and because of what he claims was the improperly drafted antenuptial agreement, Antone lost the right to unilaterally convey the homestead.

Another right obtained upon marriage is a conclusive presumption that each spouse is entitled to the value of contributions made during the marriage. *See* Minn. Stat. § 518.58, subd. 1. Rather than retaining a presumption in his favor that protected the property described in an antenuptial agreement, *see* Minn. Stat. § 519.11, subd. 5 (party contesting an antenuptial agreement bears burden of proof as to all matters described in the agreement), Antone was harmed and saddled with the burden of proof to overcome a contrary presumption to establish that property was non-marital. This change in the burden of proof and change in presumptions is “some” damage that occurred when Antone married and triggered the start of the limitations period.

Stated differently, Antone was harmed in 1986 when he married because – contrary to what he claims the antenuptial agreement was supposed to ensure – he became obligated to ensure that certain property was treated and maintained as non-marital and to establish that the property was non-marital. *See* Minn. Stat. § 518.54, subd. 5. He was burdened with the responsibility to overcome, by a preponderance of the evidence, the presumption that certain property was not

marital property, *i.e.* to demonstrate that the property is non-marital. *See Antone*, 645 N.W.2d at 101, 103.<sup>4</sup>

The Court of Appeals erroneously accepted Antone's argument that until his dissolution was final, he could not state a malpractice claim against Mirviss because Antone sustained no damage. Antone's argument is that because the supposed effect of the antenuptial agreement does not take place until the dissolution was final, no damage occurs until then. This argument, however, ignores Minnesota's "some" damage rule.

Notably, other courts have determined that a legal malpractice claim accrues even though some future event has not yet occurred and, like a marriage dissolution, might not ever occur. For example, a North Dakota court concluded a malpractice claim was time-barred in *Binstock v. Tschider*, 374 N.W.2d 81 (N.D. 1985). *Binstock* involved a claim that the lawyer improperly drafted documents for the sale of property, which included an option to buy additional acreage. Even though the option to buy the property might never be exercised, the malpractice cause of action accrued when the option was included in the sales documents – not

---

<sup>4</sup> Antone also lost the right to make any changes to the antenuptial agreement itself. In 1986 when Antone married, Minnesota recognized antenuptial agreements as valid only if they were entered "prior to solemnization of marriage." Minn. Stat. § 519.11, subd. 1 (1986). In 1994 the statute was amended to permit postnuptial agreements. Minn. Stat. § 519.11, subd. 1(a); Laws 1994, c. 545, § 1. Thus, antenuptial agreements can be amended or revoked after a marriage by a valid post-nuptial agreement. Minn. Stat. § 519.11, subd. 2a.

when the option ultimately was exercised years later. *Id.* at 85. In reaching this conclusion, the court rejected the plaintiff's argument that the claim did not accrue until either the option actually was exercised or the underlying judgment was entered that enforced the option. *Id.* at 84.

Likewise, a New Jersey court concluded that a legal malpractice cause of action accrued even in a situation where the potential risk the lawyer's alleged malpractice created might not ever occur. *See Commonwealth Land Title Ins. Co. v. Kurnos*, 340 N.J.Super. 25, 773 A.2d 726 (2001). In *Kurnos* the alleged negligence was the lawyer's handling of a refinancing transaction. A lender and a title insurance company sued for malpractice, but claimed that the lawyer's negligence did not result in harm until 1996, when the borrowers defaulted. The court rejected this argument, noting that the plaintiffs were aware of the alleged malpractice in 1991. The exposure and potential detriment to the priority rights of the lender and title insurer, was sufficient harm that triggered the limitations period, even though the borrowers had not yet defaulted and might not ever default.

Antone's signing of the antenuptial agreement and subsequent marriage are jural acts that altered his legal relationship with Schmidt and created new obligations that injured him, harm that he claims is due to Mirviss' alleged fault. *See Henslevy v. Caietti*, 13 Cal.App. 4<sup>th</sup> 1165 (1993) (lawyer's alleged negligence

in drafting marital termination agreement affected parties' rights and was injury that triggered limitations period even before judgment on the agreement was entered). Upon marrying Schmidt, the alleged poor antenuptial agreement was essentially a "cloud" on Antone's marriage and his unrestricted rights to the non-marital property, no different than the "cloud" on the title in *May*. Just as the purchase option in *Binstock* might never be exercised or the borrowers in *Kurnos* might never default, the possibility that Antone might never divorce and that the antenuptial agreement might never be enforced, does not preclude the accrual of Antone's malpractice claim against Mirviss.

**B. Antone sustained "some" damage more than six years before he brought suit because of the appreciation in value that took place as to the non-marital property.**

Though the Court of Appeals failed to address it, the district court also concluded that Antone sustained "some" damage no later than August 1997, more than six years before Antone brought suit against Mirviss. A.27-28. Specifically, the district court concluded that "some" damage happened during Antone's marriage because there was appreciation of the marital property during that time and Antone lost rights to a portion of that increase in value. *Id.* Notably, funds earned during a marriage, including those earned by nonmarital assets, are marital funds. *Pearson v. Pearson*, 363 N.W.2d 337, 339 (Minn. App. 1985).

Antone's theory is that had Mirviss not negligently drafted the antenuptial agreement, all of the appreciation that occurred during the marriage to what should have been non-marital property would not have been marital property. It is uncontested, however, that "market forces caused the fair market value of the rental properties to increase during the marriage . . . ." *Antone v. Antone*, 2001 WL 1356377 (Minn. App. Nov. 6, 2001) (A.68); *see also* A.284. Because the property appreciated in value and because of the presumption that the property was marital, Antone sustained harm more than six years before he sued Mirviss for malpractice.

Antone's expected arguments that the amount of these damages could not be determined and that he was unaware of these damages fail because Minnesota has long made clear that ignorance or discovery of a cause of action is irrelevant. *Hermann*, 590 N.W.2d at 643. Likewise, Minnesota has long-recognized that a cause of action accrues upon the fact of an injury, rather than upon any specific quantity or type of damage that might arise, or even the ability to ascertain the exact amount of damage. *See id.*; *Dalton*, 280 Minn. at 154, 158 N.W.2d at 585. Thus, even if significant or specific damages may not occur until well into the future, or never at all, "some" damage is enough to trigger the commencement of a limitations period. *See id.*; *see also* Mallen & Smith, *Legal Malpractice*, § 22.11 at p. 1391 ("the prevailing rule is that there only need be the fact of an injury, rather than a specific quantity of damage, even if significant damages may not occur until

the future, if at all”). Upon the appreciation in value of the property that the antenuptial agreement allegedly failed to protect, Antone sustained harm. *See May*, 427 N.W.2d at 288-89; *Grimm*, 392 N.W.2d at 43. Accordingly, the district court did not err in concluding that Antone’s malpractice claim was time-barred.

### CONCLUSION

The Court of Appeals’ decision should be reversed and the judgment granted to Mirviss in the district court should be reinstated. Lawyers who draft antenuptial agreements should not face decades of exposure for alleged malpractice. The district court did not err in concluding that Antone’s claim was time-barred when he sued Mirviss in 2003 for his allegedly wrongful conduct in 1986.

Minnesota’s relatively lengthy six-year statute of limitations for legal malpractice claims already permits a significant number of malpractice claims. The Court of Appeals’ new accrual rule and its narrow interpretation of when a claim accrues will effectively extend this limitations period and permit delay in the bringing of malpractice claims. This extension for bringing such claims may very well serve to increase the number of claims. At a minimum, however, the delayed commencement of such claims will certainly burden the courts and litigants alike given the recognized and appropriate concern over stale claims, faded memories, missing witnesses, and destroyed files.

Mirviss is not seeking absolution or a barrier to all malpractice claims against family law attorneys, or to claims generally against attorneys who draft transactional documents. He is contending that a malpractice claim must be brought in a timely fashion so that merits of such a claim can be fairly decided, rather than burdening the court and handicapping a defendant and forcing him to respond to a stale claim years after the fact. For all these reasons, he asks this Court to reverse the Court of Appeals and conclude that Antone's claim is time-barred.

Dated: July 28, 2005

Respectfully submitted,

Lind, Jensen, Sullivan & Peterson  
A Professional Association



---

Paul C. Peterson, # 151543  
William L. Davidson, # 201777  
Attorneys for Appellant  
150 South Fifth Street, Suite 1700  
Minneapolis, Minnesota 55402  
(612) 333-3637

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).