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CASE NO. A04-1367

STATE OF MINNESOTA
IN SUPREME COURT

RICHARD ANTONE,

Respondent,

v.

ISRAEL MIRVISS,

Appellant.

AMICUS CURIAE BRIEF OF MINNESOTA SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

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INTEREST OF *AMICUS CURIAE* MINNESOTA SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

The Minnesota Society of Certified Public Accountants ("the Society") is a non-profit Minnesota corporation whose members are certified public accountants.[1] The Society was founded in 1904. Over the past 100 years, it has grown to include representatives from over 1,100 accounting firms located throughout Minnesota, with over 9,000 members.

The mission of the Society is to help its members succeed professionally, while being mindful of serving the public interest through the promotion of ethics and excellence in the rendering of certified public accounting services, innovation, life-long learning, community service and inclusiveness. The Society's strategic plan can be viewed at www.mncpa.org. The Society believes that its role as an *amicus* in this matter is to inform the Court of the impact this case may have on the civil justice system and, in particular, to explain how all professionals rendering complex professional services with "long-tail" liability exposure will be negatively affected if this Court does not reverse the erroneous ruling of the court of appeals.

The Society's interest in this matter is primarily public in nature. The Society has no interest whatsoever in the particular dispute between these litigants. Rather, the Society is only concerned with the orderly development of the law in Minnesota. Since

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1 This brief was written entirely by the Society's counsel. No party or counsel to a party authored any portion of the brief and no person or entity other than the Society or its counsel made any monetatry contribution to the preparation or submission of this brief.

the Society's members are professionals who may themselves be sued for malpractice, a decision regarding this issue by this Court could be said to raise a private interest, as well. Nonetheless, the Society's primary concern is that the law of Minnesota on this issue be clear, precise and consistent with the well-recognized and long-standing principles of law and policy behind the statute of limitations. Because the ruling of the court of appeals majority below failed to achieve these goals, the Society urges this Court to overturn that ruling and reaffirm the well-established rules of accrual for all professional malpractice cases.

Of particular concern to Minnesota accountants, however, is the fact that accountants' professional liability insurance is generally limited to "claims made" coverage. Paul Demery, *Make Sure You're Covered for an Acquired Firm's Liability*, Practical Accountant, Apr. 1997, at 42. That is, certified public accountants are only capable of insuring against claims that are made while their liability insurance policy is in effect. *Id.* If they suffer a policy cancellation or retire from public accounting, certified public accountants are uninsured unless they have purchased an "extended reporting endorsement" (commonly referred to as a "tail policy"). *Id.* "Tail policies" are only offered for limited duration, often for no more than three years and rarely – if ever – for intervals longer than five years. *Id.* Thus, under the new rule for the accrual of malpractice claims created by the court below, Minnesota certified public accountants face the prospect of virtually unending exposure for malpractice claims without the ability to insure against such exposure.

One likely consequence of such a rule is further consolidation of the accounting profession into increasingly fewer and ever-larger accounting firms. This consequence, in turn, will quite likely lead to the limited availability of certified public accountants for individuals and small businesses, who are presently well-served by accountants who are sole practitioners or members of small groups. At present in Minnesota, the Society estimates that 882 certified public accountants either practice alone or in a firm of five or fewer CPAs. Conversely, Minnesota is now the home of several "super regional" CPA firms, with large staffs rendering national services within the state. A rule creating such open ended exposure will surely encourage those firms to export jobs to states with more favorable statutes of repose – thus impairing the job base in Minnesota.

To avoid these consequences and to uphold the strong public policies underlying the statute of limitations, the Society urges this Court to reverse the decision below.

ARGUMENT

In reaching its decision, the majority below ignored or misinterpreted the controlling principles established by this Court. Specifically, the majority opinion of the court of appeals stretches this Court's long-standing rule that a cause of action accrues when there is *some* resulting damage – into a rule that accrual does not occur until *"the"* damage has become known.

The Society, as *amicus curiae*, urges this Court to reject the flawed reasoning and necessary consequences of the decision of the court of appeals and to retain the analytical framework established by this Court over decades of careful deliberation. A cause of action for professional negligence should accrue when professional negligence is coupled with *some* damage, even if *the ultimate* damage is unknown, unpredictable or partially contingent. That rule comports with such fundamental principles behind statutes of limitations as the avoidance of stale claims and the desire to provide potential defendants a date of repose. Adopting the rule imposed by the court of appeals would unfairly expose certified public accountants and other professionals to liability for stale, unplanned for, and potentially uninsurable claims.

I. A CAUSE OF ACTION FOR PROFESSIONAL NEGLIGENCE SHOULD ACCRUE WHEN THE ALLEGED MALPRACTICE IS COUPLED WITH *SOME* RESULTING DAMAGE.

The court of appeals majority held that "[t]he money damages that constitute the relief Antone demanded in his malpractice action remained solely and entirely potential until the district court entered its amended judgment." (A.A. 4.) The majority further reasoned that if Antone had brought his action "at any time before" that judgment, then ". . . his suit would have been dismissed for failure to state a claim upon which the relief he sought could have been granted." *Id.* As pointed out in the dissent, however, Antone suffered at least "some damage" when he entered into his marriage in reliance upon the allegedly improperly drafted antenuptial agreement. (A.A. 6.) Specifically – and at a minimum – Antone could have maintained an action against his lawyer for the return of his professional fees incurred in the negligent drafting of the already defective antenuptial agreement. To suggest that Antone had no damage (and thus no legally cognizable remedy) until the deficient agreement was applied in the parties' divorce decades later would mean that Antone would have had no legal recourse against his attorney if his marriage had not been dissolved – an absurd result.

This Court has never held that the statute of limitations does not accrue until "the damages" claimed by a plaintiff have become entirely liquidated. On the contrary, prior decisions of this Court have all followed the rule that only *some* resulting damage is required for a cause of action for professional negligence to accrue. *Dalton v. Dow Chem. Co.*, 280 Minn. 147, 158 N.W.2d 580, 584 (1968).

For example, in an action for the failure to pay sales tax, this Court held that the cause of action accrued at the time when the omission occurred – even though a successful tax court appeal might have entirely obviated all tax liability. *Leisure Dynamics v. Falstaff Brewing Corp.*, 298 N.W.2d 33, 36-38 (1980). Thus, this Court has previously rejected the notion adopted by the court of appeals in the present case (*i.e.*, that a cause of action does not accrue while some damage remains contingent and unliquidated).

Similarly, in *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641 (Minn. 1999), a case cited by the court of appeals majority, this Court held that a cause of action accrued when no more than theoretical financial injury attached to the transaction resulting from the alleged malpractice. The record in *Herrmann* is clear: A law firm established a qualified employee trust under the Internal Revenue Code in 1986, but put together a joint venture involving the plan in 1987 that began engaging in "prohibited transactions" under ERISA. 590 N.W.2d at 642. As a result, the plaintiff became "subject to significant federal excise taxes and interest." *Id.* Importantly, however, the plaintiff incurred *zero* financial damage at that time – in fact it was unaware of the illegality until 1993. *Id.* at 643. It was not until then that the plaintiff began spending some money (and incurred some damage) to correct the problem, but it was not until 1996 (when the IRS actually imposed excise taxes and interest) that *the* damage was sustained (at least under the logic of the court of appeals in the present case). *Id.* at 642-43. Despite the fact that the plaintiff's damage was contingent (on future adverse action that might never be taken by the IRS) and unliquidated (the amount of excise tax and interest was not known until the IRS acted in 1996), this Court ruled that the plaintiff's cause of action accrued at the moment when the pension plan became burdened by potential exposure for *some* excise tax and interest assessments, at the precise moment when the first prohibited transactions were consummated in 1987. *Id.* at 643-44.

In deciding the present case, the majority opinion of the court of appeals appears to be based upon a misreading of *Herrmann*. Discussing *Herrmann*, the majority opinion states:

> [A]s the Supreme Court held, the statute *ran only from the time Herrmann incurred an actual liability for the payment of money, irrespective of the irrefutable fact that the malpractice that occasioned the loss occurred 9 1/2 years earlier.*

(A.A. 5; emphasis added). In point of fact, as noted above, the Supreme Court held in *Herrmann* that the cause of action accrued in 1987 because "the loss occurred" when the prohibited transaction was consummated – rather than nine and one-half years later when the amount of that liability became fixed and liquidated.[2] The court of appeals majority, therefore, appears to have based its decision upon an inadvertently mistaken reading of this Court's decision in *Herrmann.*

This Court should recognize and correct the court of appeals majority's erroneous reading of *Herrmann* and should reaffirm the "some damage" accrual rule that the Court has previously applied in *Dalton, Leisure Dynamics* and *Herrmann.*

II. ELIMINATING THE "*SOME* DAMAGES" TRIGGER FOR THE STATUTE OF LIMITATIONS EXPOSES CERTIFIED PUBLIC ACCOUNTANTS AND OTHER PROFESSIONALS TO LIABILITY FOR STALE AND POTENTIALLY UNISURABLE CLAIMS.

Many professionals, including certified public accountants, will face unfair exposure to stale claims, which may be brought years after they lose the ability to purchase any malpractice insurance. As noted above, a sole practitioner CPA who retires or whose firm dissolves presently has no ability – at any cost – to buy "tail coverage" to ensure against claims brought more than a small number of years into the future. Moreover, an accountant who has already left the profession and purchased "tail coverage" that he or she thought would provide sufficient liability protection under the long-standing statute of limitations rules observed by this Court will not be able to

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2 A fiduciary who causes a qualified pension plan to enter into a prohibited transaction may obtain a complete waiver of the civil penalty for the violation, under ERISA § 502(1)(3). Moreover, the U.S. Department of Labor has primary enforcement authority over prohibited transactions. Marcia Beth Stairman Wagner & Alden J. Bianchi, *EPCRS – Plan Correction and Disqualification*, 375 Tax Management Portfolios A-67 (BNA 2005).

purchase additional coverage to insure against stale claims that may now be resurrected under the new rule adopted by the court of appeals majority and will be left uninsured.

Accountants (like lawyers and many other professionals) provide services that are (a) inherently complex, (b) subject to the exercise of much discretion and professional judgment, and (c) frequently adversely affected by unforeseeable subsequent events. It is manifestly unfair to subject accountants to liability exposure for claims commenced more than six years after their alleged negligence combines to produce some legally cognizable damage. For example, a tax return preparer who negligently advises a client to pay an incorrect amount of tax faces virtually unending exposure to being sued on a stale claim under the court of appeals' decision. In the case of a tax underpayment, the plaintiff would contend that no damage was suffered until the client was actually forced to pay interest imposed by the IRS at the time the deficiency was made up – and then only if prevailing commercial interest rates while the deficiency was outstanding were less than the statutory interest rate imposed by the taxing authority.[3]

Even if the tax is overpaid, numerous circumstances render the amount of ultimate liability contingent and unliquidated. These include the possibility of filing a retroactive amended return, intervening changes in the taxpayer's overall tax posture, or even subsequent changes in tax law. Remarkably, the overpayment of taxes proves to be a "good" investment for the taxpayer when interest paid by the IRS on a subsequent refund

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3 After all, the taxpayer can hardly complain about having the use of money that would have been paid as tax if the return had been correctly prepared.

is higher than prevailing commercial rates during the interim, especially when there has been a concurrent decline in the performance of other investment modalities (*e.g.*, the stock market).

The presentation of stale claims arising out of negligently prepared tax returns (or for negligent tax planning) invariably present defendant professionals with major problems in terms of gathering documents and marshalling testimonial evidence from faded memories. These types of claims almost invariably involve the recreation of oral communications that have long since vanished from the accountant's memory.

Claims arising out of allegedly "failed audits" are even more difficult to litigate with the passage of time. Audits of financial statements are often stunningly complex and entail the unraveling of audit trails and the translation of workpapers, including myriad spreadsheets containing a blizzard of financial data, difficult tasks at best that are rendered virtually impossible after the passage of extended intervals.

Nor are certified public accountants the only professionals affected in this fashion. For example, a land surveyor who mistakenly marks a boundary could face liability exposure for decades after completing an engagement, under the decision rendered below by the court of appeals. In that event, the surveyor would face a Herculean task in recreating the historical record of her engagement, while damages might have soared out of all proportion to the original undertaking if the land became unexpectedly more valuable due to changing land use patterns – while at the same time the surveyor might well have retired and run through all available "tail insurance."

The disproportionately unfair impact of the decision of the court of appeals below is manifest, unfair, and unwise as a matter of public policy and is contrary to the clear and long-standing precedent established by this Court.

CONCLUSION

For all of the foregoing reasons, the Minnesota Society of Certified Public Accountants urges reversal of the court below.

Respectfully submitted,

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Dated: August 8, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 2,445 words, exclusive of the cover page, table of contents, table of authorities, signature block and this certification, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: August 8, 2005.

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