

No. A04-1367

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**STATE OF MINNESOTA**  
**IN SUPREME COURT**

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RICHARD ANTONE,

Respondent,

v

ISRAEL MIRVISS,

Appellant,

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**RESPONDENT'S BRIEF AND APPENDIX**

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## STATEMENT OF LEGAL ISSUE

**Issue:** What event triggers the legal malpractice statute of limitations when the allegation is that the attorney prepared an ineffective antenuptial agreement? Antone, 694 N.W.2d at 568.

### Decisions of the lower courts:

The District Court, misreading Herrmann v. McMenemy & Severson, 590 N.W.2d 641 (Minn. 1999), determined that a malpractice claim “begins to run when action is taken based on legal advice,” and dismissed Antone’s malpractice lawsuit as untimely. RA-65<sup>1</sup>

The Court of Appeals reversed, applying the rule of law recently set forth by this Court in Herrmann, to determine that Antone’s malpractice claim did not accrue until Antone incurred liability to his ex-wife when she was awarded property, during their divorce, that should have been protected by the antenuptial. The statute of limitations on Antone’s malpractice claim accrued at that point, when Antone incurred actual liability as a result of Mirviss’ malpractice. The Court of Appeals noted that “contingent, potential, or even probable” damages, that may have existed before the adverse award in the dissolution proceeding, were not sufficient to commence the statute of limitation. “[B]y its very terms, the antenuptial agreement would not operate until a marriage dissolution. Damages could not occur until the faulty instrument actually became operative.” Id.

Apposite Authority:

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

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<sup>1</sup> “RA” refers to Respondent’s Appendix.

## STATEMENT OF THE CASE

This legal malpractice claim relates to Mirviss' improper advice relating to and drafting of a December 1986 antenuptial agreement. Respondent Antone retained Appellant Mirviss to ensure that his nonmarital assets would remain his in the event of a divorce. RA-22. As he encouraged Antone to sign the agreement, Mirviss assured Antone that all of his nonmarital property would be protected in the event of a divorce. RA-23. Marital dissolution proceedings began on September 25, 1998. After a 2003 ruling that distributed a significant portion of his nonmarital property to his ex-wife, Antone initiated this action on September 11, 2003. On June 25, 2004, Judge Robert Lynn dismissed the case as untimely. On April 12, 2005, the Court of Appeals reversed.

## STATEMENT OF THE FACTS

The following is a brief summary of the attorney client relationship, including Mirviss' refusal to speak to or cooperate with Antone during Antone's divorce proceeding when it became evident that the antenuptial agreement failed to accomplish any of the objectives that Mr. Mirviss had promised. RA-45. Importantly, for purposes of his motion to dismiss, Mirviss admitted malpractice - both liability and causation of damages. RA-134.

Antone's first marriage ended in divorce in 1977 and Mirviss had represented him during that dissolution. RA-43. In 1986, Antone was preparing to marry his girlfriend of six years Debra Schmidt. Id. They had been living together for approximately 4 years. RA-46. Several weeks before his wedding, Antone called Mirviss seeking advice

regarding the law and actions necessary to protect the personal wealth and assets that he had accumulated up to the time of this second marriage. RA-43, ¶¶ 2, 10. At the time of his second marriage, Richard had accumulated assets valued at approximately \$3 million. A.129. At the time of the marriage Debra Schmidt had assets valued at approximately \$60,000. A-162.

During a number of phone conversations with Mirviss, Antone reviewed his assets which included 20 rental properties, his homestead, and a 50% ownership interest in a business. RA-43 and A.129. Antone requested advice from Mirviss regarding what actions Antone should take so that his assets and any increase in value of those assets would remain his and not be subject to a court division of property if there was a subsequent divorce. RA-44. Antone also explained that if he and Debra had children, he wanted those assets to be available to benefit his children in the event of his death. Id.

The agreement that Mr. Mirviss advised Antone to present to Debra is found at A.98. Mirviss advised Antone that the agreement would protect the assets that he had worked for and accumulated up to the point of his marriage, including any increase in value that might occur in the value of those assets. RA-44. Debra reviewed that version of the antenuptial, but initially refused to sign it. At Antone's urging, Debra retained an attorney acquaintance of hers, Russell Ingebritson. After Debra met with Ingebritson, he and Mirviss discussed the antenuptial. A.181, 183.

The day before the Antone's wedding, Debra and Richard went to Mirviss' office and met with Ingebritson and Mirviss. After about twenty minutes of discussions, Mirviss presented a "signature page" for what was to become the final, revised version of

the antenuptial agreement to Antone for his signature. Antone asked whether the same protections were in place for his nonmarital property and its increase in value, as in Mirviss' initial version of the Agreement. RA 45-46. Mirviss advised Antone that the Agreement had been revised but still offered the same protections to Antone's property as they had discussed in earlier conversations. Id. Mirviss confidently advised Mr. Antone that, "[e]verything you have before the marriage will be yours after the marriage." RA-45. When Antone asked again about the effectiveness of the antenuptial agreement before signing the document, Mirviss self-assuredly stated words to the effect: "I am the attorney, you are the client. Sign the agreement." RA-45. Antone signed the "signature page" that was presented to him without the rest of the antenuptial agreement, and all parties left the meeting without receiving copies of the agreement. RA-44, 45.

Relying on the effectiveness of the antenuptial agreement and the advice of counsel, Antone was married on December 21, 1986. RA-2 and 46. Antone understood, and rightly so, that the antenuptial agreement would not become operative unless a divorce occurred. RA-46.

Nothing in the record suggests or supports the finding of: 1) any damage to Antone's interests in his nonmarital property while he was married or 2) that damage occurred simply as a result of his marriage. To the contrary, Antone set forth evidence, in the form of an Affidavit from Martin Swaden, that

*The antenuptial agreement between Richard Antone and Debra Schmidt did not convey to Debra a legally cognizable property interest. During the Antone's marriage, Debra Antone did not acquire a transferable or marketable interest in Mr. Antone's pre-marital properties. Nor did she possess a joint tenancy interest. There was no legal requirement that Richard Antone provide Debra with any benefit that*

*inured to him as a result of his ownership of those pre-marital properties.* As a result, Richard Antone was free to dispose of his pre-marital properties or otherwise affect the property value without Debra Antone's knowledge or consent. He also could have mortgaged or sold any of the pre-marital properties during the marriage and retained the proceeds.

RA-37. (Italics supplied).

Proceedings to dissolve the marriage began on September 25, 1998. RA-2. During the dissolution proceedings, Antone learned that the antenuptial agreement drafted by Mirviss simply did not address disposition (or protection of) Antone's nonmarital assets and therefore put his nonmarital assets and any increase in their value at risk. RA-47 and 75. Mirviss had advised Antone to sign an antenuptial agreement that did not protect Antone's nonmarital property or any increase in the properties' values. The final antenuptial provided for nothing beyond a set amount of maintenance if the marriage be dissolved within two years. RA-14-15.

When the Antone's dissolution proceeding was commenced in 1998, Antone made several calls to Mirviss seeking his assistance. Mirviss did not return Antone's phone calls or respond to Antone's fax that sought assistance with respect to the antenuptial agreement. RA-45 and 46. During his deposition, Mirviss admitted that he kept Antone's file open until 1997 because it "made an impression on [his] mind." A.171, pp. 31 and 32. Mirviss, however, refused to elaborate on this statement or why he finally closed the Antone file in 1997. A.171 and 172, pp. 32, 33, 60.

Had Mirviss honestly and accurately advised Mr. Antone that the antenuptial did not protect his nonmarital assets and the increases in value thereof, he never would have

signed the antenuptial agreement and would not have gotten married. At that time, the couple had already been in a relationship for 6 years, lived together for 4 years, and could have continued their relationship as such. RA-46, ¶¶ 10, 11.

### SUMMARY OF ARGUMENT

Contrary to Mirviss' exaggerated warnings, Antone v. Mirviss, 694 N.W.2d 564 (Minn.Ct.App. 2005), did not set forth a new rule of law to create "open-ended exposure", "undermine prior decisions," "significantly expand the time" to bring a malpractice claim, or create a "new rule far more expansive than the 'discovery' rule." Even so, Mirviss adopts this level of hyperbole early and uses it often. To the contrary, the Court of Appeals applied an existing rule of law that was set forth in Herrmann v. McMenemy & Severson, 590 N.W.2d 641 (Minn. 1999), a recent decision of this Court. Relying upon Herrmann, the Court of Appeals determined that Antone's legal malpractice claim accrued when he suffered actual damage (incurred liability), not when he received negligent advice.

Also, contrary to Mirviss' assertion, the Court of Appeals did not require that "all possible appellate avenues are exhausted" or that a "final judgment is entered that fixes the amount of claimed monetary damages"; this simply appears to be additional rhetoric and embellishment by Mirviss. Mirviss Brief, pp. 14, 15. Rather, the Court of Appeals recognized that to start the statute of limitations running, there must be actual damage caused by Mirviss' negligence. It could not be, as Mirviss suggests, Antone's *potential risk* or even *contingent exposure to potential loss* of some property should the couple

ever decide to get divorced.<sup>2</sup> Moreover, under Minnesota law, as long as the parties to the agreement remain married, a spouse does not automatically obtain an interest in the other spouse's non-homestead, non-marital property. See Affiliated Banc Group, Ltd, v. Zehringer, 527 N.W.2d 585, 587 (Minn.Ct.App. 1995).

The Antone decision expressly limits its holding to malpractice claims involving antenuptial agreements. These agreements are unique, as they may never become operative and can be challenged in a marital dissolution no matter how many years after the agreement was signed. See McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989). Mirviss' malpractice did not have to cause and indeed, might never have caused, any damage to Antone. That is a result of the unique characteristics of an antenuptial.

Mirviss contends that the statute of limitations should have commenced running the day after the Antone's marriage. Using this logic, a lawsuit against Mirviss on *the day after Respondent's marriage* would have to be sustained---such a result is not only unwarranted by existing law, but is fraught with numerous practical barriers. The absurdity of Mirviss' proposition is obvious. A malpractice action brought the day after the wedding, or at any time during the marriage, would have been dismissed post haste by a trial court. While Antone and his wife were married, there was no indication that the

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<sup>2</sup> In the same manner, Judge Dietzen's dissenting opinion assumes that Antone automatically suffered damage, as a result of Mirviss' malpractice, simply because of Antone's marriage, when Antone's "non-marital property thus became a part of the marital estate." Judge Dietzen does not support this contention with legal precedent or authority. Antone, 694 N.W.2d at 572. The dissent also claims that Antone, "lost the legal right to claim ownership in his non-marital assets unfettered by his former spouse's inchoate interests," but does not cite legal authority that actually supports this pronouncement. *Id.*, at 573.

prenuptial would ever become operative...thus resulting in actual damage and consequently, a justiciable claim that was ripe for adjudication. This Court must recognize the unmistakable reality that until Antone suffered actual damage, there was no claim against Mirviss. That damage did not occur until there was an unfavorable disposition of property during the dissolution proceeding.

Further, practical difficulties exist, both marital and otherwise, if Antone were required to attack the prenuptial agreement (and pursue his malpractice claim) while still happily married. First, while the couple was happily married and no damage had been suffered, the Court would be limited to rendering an advisory decision as to malpractice damages which would be based on what might happen in a subsequent divorce, if and when one occurred. That is not the role of a trial court, nor should it be.

Second, public policy in Minnesota supports and encourages marriage and the harmonies and benefits that generally accompany that relationship. It would be entirely inappropriate to require Antone not only to raise the issue of the prenuptial but to litigate its meaning and potential monetary impact while still happily married. Such action would undoubtedly cause doubts and stress between otherwise happily married spouses and, as explained *infra*, would be an unnecessary and premature tax upon an already crowded judiciary system.

Until he suffered damage in the form of a property award to his ex-spouse in 2003, Antone had no justiciable claim against Mirviss based upon the poorly drafted antenuptial agreement. Wisely, the Court of Appeals recognized that if Antone had presented his claim the day after his marriage, the Court would be limited to rendering an advisory

decision as to damage that might result in a possible, subsequent divorce. *Antone*, 694 N.W.2d at 571. That is not the role of a trial court, nor should it be.

## **LEGAL ARGUMENT**

### **I. Standard of Review**

Determining whether a statute of limitations applies is a matter of law subject to de novo review by this court. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn.1989).

### **II. The Trial Court Went Outside the Pleadings on a Rule 12 Motion to Dismiss.**

Although, Mirviss has acknowledged that the trial court treated his dismissal motion as a Rule 12 motion (Mirviss Trial Court. Brief, p. 12.), he had admitted that the trial court went outside the pleadings and based its decision, in part, on “undisputed facts” as set forth in Appellant’s supporting Affidavit of Robert Lear. (Mirviss Trial Court Brief, pp. 33 and 35. This was improper for a Rule 12 motion. See Minn.R.Civ.P. 12.02(e). This court should ignore the factual assertions and evidence in Appellant’s Brief and Appendix and consider the sole issue on appeal, the Statute of Limitations. Review should be limited to the parameters of Rule 12 of the Minnesota Rules of Civil Procedures.

### **III. A Malpractice Claim Accrues When The Cause of Action Will Survive a Motion to Dismiss.**

A cause of action accrues and the statute of limitations begins to run when the claim will survive a motion to dismiss for failure to state a claim upon which relief can be granted. *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 152-53, 158 N.W.2d 580 (1968).

To state a claim for legal malpractice, Antone must, at a minimum, demonstrate: (1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; and (3) that such acts *proximately caused damage to plaintiff*. Noske v. Friedberg, 670 N.W.2d 740, 743 (Minn. 2003). (Italics supplied). “Failure to establish any one of these elements defeats the entire claim.” Id. A cause of action survives a motion to dismiss when “some” damage has occurred as a result of the alleged malpractice. Hermann v. McMenemy & Severson, 590 N.W.2d 641, 643 (Minn. 1999).

The Court of Appeals was correct in holding that Antone’s cause of action for legal malpractice, based on improper advice and negligent representation in connection with an antenuptial agreement, accrued when Antone first became liable to his ex-wife for a portion of his nonmarital property and thus suffered damage that was caused by Mirviss’ malpractice.

**IV. THE ANTONE DECISION DOES NOT “IGNORE OR OVERTURN” ANY DECISIONS, PUBLISHED OR UNPUBLISHED.**

The specific issue presented in this case is one of first impression for this Court. None of the cases cited by Mirviss involve a legal malpractice claim based on advice relating to and preparation of an ineffective antenuptial agreement.

**A. As A Practical Matter, According to Herrmann, Antone Could Not Have Stated A Malpractice Claim While He Was Married. Noske v. Friedberg recognizes the Futility of Bringing a Claim When the Litigant’s Legal Status Prevents Proof of Causation and Thus, Bars the Claim.**

It would be error to adopt Mirviss’ position that damage occurred by reason of Antone’s marriage. That finding would certainly ignore the doctrine of justiciability and

would mean that the statute of limitations expired while Antone was married and several years before he incurred a liability to his ex-wife as a result of Mirviss' malpractice. The Court of Appeals recognized that Antone's claim was not justiciable the day after he married, as Antone simply could not have stated a cause of action based on Mirviss' faulty antenuptial agreement while he was married and while the antenuptial was still inoperative. Antone v. Mirviss, 694 N.W.2d at 571 (finding that Antone could not establish even some money damages on the day after he was married and stating that the jury could not have awarded any amount).

This Court's reasoning and decision in Herrmann v. McMenemy & Severson, 590 N.W.2d 641 (Minn. 1999), is helpful and dispositive. There, the law firm charged with malpractice established a qualified employee trust ("the Plan") under section 4975 of the Internal Revenue Code for its client. Thereafter, the client entered into a transaction with the Plan even though, under the Internal Revenue Code, it was a "disqualified person." The Court determined that "damage" occurred for the client, when the subsequent event (prohibited transaction) occurred and resulted in the client becoming "immediately liable for the excise tax and interest required by section 4975 as a result of McMenemy & Severson's alleged failure to advise." Herrmann, 590 N.W.2d at 644-45. At that point and as a result of the subsequent event that created actual liability, the client's cause of action would have survived a motion to dismiss and the statute of limitations began to run. Id. When Antone signed the antenuptial agreement he did not become "immediately liable" to his spouse. He suffered no damage until the dissolution of his marriage and the Court's distribution of a portion of his nonmarital property to his

spouse. Thus, Antone's claim did not accrue until September 1998, at the earliest, and his claim against Mirviss was timely.

The recent decision, Noske v. Friedberg, 670 N.W.2d 740, 743 (Minn. 2003) is also instructive as it recognizes that a litigant cannot actually experience damage if their legal status belies the existence of that damage. See Noske, 670 N.W.2d at 744 (litigant's cause of action for legal malpractice cannot accrue until litigant is able to prove attorney's conduct resulted in actual damage).

In Noske, this Court determined that a legal malpractice claim did not accrue against a criminal defense attorney until almost eleven years after the plaintiff was convicted at trial. Refuting the defendant's assertion that the claim was stale and a prime example of the need for statute of repose, the Supreme Court instead focused the inquiry on when the claim could withstand a motion to dismiss. This Court allowed the case to move forward even though it was commenced eleven years after the representation had ended. Until the plaintiff received post conviction relief (habeas), he could not really show damages or survive a motion to dismiss. *Id.* at 743. Obviously, that standard is not new. It is significant, though, that obvious damage – in the form of a criminal conviction – did not start the statute of limitations running when the potential malpractice litigant's was prevented from articulating actual damage caused by the malpractice.<sup>3</sup>

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<sup>3</sup> Although the Court could have taken an easier path, determining that the malpractice litigant had suffered damage when he was convicted and that the conviction was caused by his attorney's ineffective representation at trial, the Court instead chose practicality, and focused on when the malpractice plaintiff could actually prove the elements of his claim, thus, having the ability to survive a motion for dismissal. Noske at 743.

The Court in Noske also stated a desire to uphold the presumption of regularity associated with a criminal conviction that has yet to be reversed. If a civil malpractice claim were permitted, the Court noted the potential for inconsistent results that would embarrass or bring disrepute to the judicial process and potentially undermine the integrity of the judicial system. A similar concern is raised herein since Antone would be required to litigate a hypothetical divorce and property distribution, while still married, to assert a malpractice claim relating to an antenuptial agreement and to quantify damages in the malpractice action. Here, if Antone had brought his malpractice action within six years of the marriage, the malpractice court would necessarily have had to proceed with a hypothetical divorce proceeding within the malpractice action in order to ascertain possible damages and issue what would be an advisory opinion. After expending the time and expense, a divorce might never occur and judicial resources would have been wasted.

In the present case, neither the dissent, Mirviss or the district court cite to controlling authority to demonstrate that liability to Mrs. Antone was created immediately upon marriage. Instead, the trial court referred to “a risk of loss” of part of the appreciation of Antone’s nonmarital property. RA-66. The property still belonged to Antone and was titled only in his name. There was no liability to his ex-wife until the Minnesota Supreme Court determined such on June 13, 2002. Antone v. Antone, 645 N.W.2d 96 (Minn. 2002). Prior to that time, he faced, at best, only a “risk” of loss. Risk, however, is not compensable loss, liability, or justiciable damage.

Per Herrmann, it is the event causing immediate liability that results in accrual of an action for negligent advice. The event of marriage does not cause immediate liability. At the point of his marriage Antone had no liability to his wife and thus, no damage caused by Mirviss' negligence. In fact, the "risk" or "exposure," if any, that Antone had as a result of his marriage was not realized and did not become fixed, as a matter of law, until during his divorce proceedings. Therefore, there was no damage and no justiciable claim until the divorce occurred and there was an adverse award against Antone.<sup>4</sup>

**B. The Antone Decision Does Not Create a New Rule; It Properly Focuses on The Only Damage Resulting from and Caused By Mirviss' Negligence.**

As set forth above, the Antone decision does not set forth a new point of accrual for legal malpractice. Instead, the Court of Appeals decision carefully applies this Court's rule of law as set forth in Herrmann. The Court of Appeals relied upon Herrmann, carefully exploring and implementing this Court's holding and analysis in that recent decision. Antone, 694 N.W.2d at 570.

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<sup>4</sup> A justiciable controversy must exist in order for a litigant's claim to be properly before a court. State v. Young, 294 N.W.2d 728, 730 (Minn. 1980). In the absence of a justiciable claim, a court simply does not have subject matter jurisdiction. "There must be a substantial and real controversy between the parties before a case will be considered." State v. Brown, 12 N.W.2d 180, 181 (Minn. 1943). Consistent with this fundamental principle, the courts are not in the business of handing out advisory opinions or solving "purely hypothetical" controversies. Izaak Walton League of Am. Endowment, Inc. v. State, Dep't of Natural Res., 312 Minn. 587, 589, 252 N.W.2d 852, 854 (1977). A claim is justiciable is (1) there exists a genuine or present controversy; (2) presented by persons with truly adverse interests; and (3) capable of specific rather than advisory relief by a decree or judgment. Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc., 549 N.W.2d 96, 99 (Minn.Ct.App. 1996), review denied (Minn. Aug. 20, 1996).

As set forth above, in Herrmann, the Court determined that “damage” occurred when the subsequent event (prohibited transaction) occurred and the client “became *immediately liable* for the excise tax and interest required by section 4975”. Herrmann, 590 N.W.2d at 644-45 (emphasis supplied). The client’s malpractice cause of action would then survive a motion to dismiss and the statute of limitations begin to run. Id.

Mirviss’ position, that the cause of action accrues “when action is taken based on legal advice”, is incorrect and it contradicts the rule in Herrmann. Id., 590 N.W.2d at 644. According to Herrmann, the cause of action actually accrues when some event occurs that gives rise to liability that is unavoidable. The Court of Appeals noted several points in Herrmann where the client took action based upon legal advice, yet this Court did not find malpractice damage until actual liability had accrued, which resulted in damage to the client. Antone, 694 N.W.2d at 570.

The Court of Appeals’ focus on the resulting damage and liability to Antone is also consistent with other decisions of this Court, including the decision in Bonhiver v. Graff, 311 Minn. 111, 248 N.W.2d 291 (1976). Bonhiver involved, inter alia, a malpractice claim against an accounting firm. In deciding when the cause of action accrued in Bonhiver, this Court focused its inquiry on when damage was “sustained” as a result of the accountant’s negligence. Bonhiver, 311 Minn. at 117, 248 N.W.2d at 296. It was the damage complained of – the loss of plaintiff’s funds – that the Court pinpointed as the damage sustained as a result of the malpractice and thus was the point of accrual of the malpractice claim. Similarly, in Antone, there is no reference to a particular amount of damages that must have occurred, only that the cause of action does

not accrue until there is some damage supporting the relief sought.

As further support for its decision in Antone, the Court of Appeals cited this Court's decision in Martens v. Minn. Mining & Mf. Co., 616 N.W.2d 732, 739-40 (Minn. 2000). Recall that a cause of action accrues and the statute of limitations begins to run when a claim will survive a motion to dismiss. Dalton, *supra*. To determine whether a claim could survive a motion to dismiss, this Court has long focused its inquiry on *the relief demanded*. *Id.*, (claim will survive motion to dismiss when it is "possible on any evidence which might be produced, consistent with the pleader's theory, to grant *the relief demanded*.")) (quoting N. States Power Co. v. Franklin, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963))) (emphasis added).

Antone's lawsuit seeks damages that resulted from Mirviss' malpractice. The only liability that Antone incurred as a result of Mirviss' malpractice was the liability to his ex-wife at the conclusion of the Antone's divorce proceeding. That liability was significant, approximating \$1,000,000, and resulted in the damage claimed in this lawsuit. Though he takes issue with the Court of Appeal's decision, that Antone had to incur a liability (the award of nonmarital property to his ex-wife) before being damages as a result of Mirviss' malpractice, Mirviss does not explain why he believes this finding is improper. Mirviss Brief, pp. 14, 15. Instead, and without providing any support for his "conclusions", Mirviss simply focuses on what he believes will happen if this alleged

“new rule”<sup>5</sup>, stands. Especially considering that the new “Antone Rule” is merely the application of this Court’s already existing “Herrmann Rule”, these predictions seem to be exaggerated. Rather, the decision identifies the damage caused by Mirviss’ negligence as monetary damages in the form of the property award to Antone’s ex-wife, because that is the damage Mirviss caused.

**C. Policy Concerns Are Significant and Call For Acceptance of What Can Be a Lengthy Period Between the Attorney’s Negligent Act and the Point of Accrual.**

In essence, Mirviss encourages this Court to find that “potential” damage is enough to withstand a motion to dismiss and start the statute of limitations running. If legal claims accrued with nothing more than “potential” damage, however, one could also predict that new claims will abound based upon mere predictions of harm. More importantly, Mirviss’ argument contradicts the holding of Hermann. This Court has already decided that a cause of action accrues if there exists actual damage - liability resulting from negligence.

Mirviss also reminds this Court why we have statutes of limitations<sup>6</sup> and forecasts that the Antone decision, specifically about and limited to antenuptial agreements, will

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<sup>5</sup> The Court of Appeals decision in Antone does not state that damage triggers the statute of limitations “only upon completion of underlying litigation”. Mirv. Brief, p. 16; see also p. 15 (suggesting a “new and different accrual rule” was developed “in every malpractice case where some underlying litigation exists”).

<sup>6</sup> Antone does not disagree with Mirviss’ contention that a statutes of limitation can provide a “measure of certainty and stability so that [parties] can plan for the future.” Mirv. Brief, p.9. Ironically, antenuptials (at least those that are prepared effectively) tend to serve these same purposes-----creating certainty and stability and allowing people to plan for their future.

“burden” the courts and “undercut” the statute of limitations. For the most part, statutes of limitations serve the interests of defendants, who can rest easy when a particular period has passed after tortious behavior. If Mirviss could make a “new rule”, and that is what his new counsel seeks, the new rule would insulate attorneys from liability associated with the preparation of antenuptials in every case involving a marriage that lasts longer than six years.

Further, there are beneficent and harmful policy ramifications associated with both sides of this argument. And, to be fair, the amicus brief of the Family Law Section of the Minnesota Bar may be correct in pointing out that the competing policy considerations of this case simply cannot be reconciled. Either the client or the attorney is going to receive the “short stick” in determining when a cause of action for malpractice, based on ineffective antenuptial drafting and advice, has accrued.

That point, however, may be unavoidable due to the nature of the antenuptial agreement. The law governing antenuptials is unusual in several respects. First, the agreements may never become operative and are generally contingent upon the termination of the marriage. Second, there is no period of repose for antenuptials. Not only are they contingent agreements that may never become operative, but they may be challenged and invalidated regardless of the passage of time. No matter the length of a marriage – three years or fifty years, the antenuptial is reviewed and only at that point does it become operative. There is no specific period of repose set forth in Minnesota’s statutes with respect to when an antenuptial agreement may be challenged. Even so, the judiciary has determined that these agreements can be reviewed when they become

operative, at the time of the marriage dissolution, no matter how many years have passed since their execution. In short, a party to an antenuptial is never certain that the agreement will be enforced. Given this inherent uncertainty, the public – those who contract with attorneys – have a significant interest in ensuring that the antenuptial, at least on its face, is consistent with the attorney’s representations about its content.

Mirviss’ repeated reference to stale claims and faded memories may simply be a fact of litigation when it involves the negotiation and preparation of a contract that may be challenged at any time in the future. Memories can fade quickly, in a matter of days or months, especially if the event is neither exciting nor memorable. Both sides of this lawsuit, however, must deal with faded memories and missing documents. For example, Mirviss at his deposition was unable to recall anything i.e., whether he had ever prepared an antenuptial other than the one at issue. Nor could Mirviss recall why he left Antone’s file open longer (until 1997), even though he closed other clients’ files much earlier. “Something about it stuck in his head”, but he was unable or unwilling to elaborate.

Finding damage at the point of marriage would also penalize Antone, and all other parties to antenuptial agreements, by requiring them to choose between sustaining his marriage or forfeiting his right to redress legal grievances against their attorney and relating to the antenuptial. Further, to place a value on Antone’s damages in that scenario, the court presiding over the malpractice claim would have to engage in a hypothetical marital dissolution proceeding, a hypothetical review of marital and non-marital assets, and a hypothetical division of that property as if a dissolution had occurred? Would the happily married couple testify about their standard of living and

expectations if a future divorce were to occur? What date would the Court use for valuing the categories of property or assessing those expectations? Would the findings in the hypothetical proceedings be binding in an actual dissolution proceeding that occurred in the future? If the result of the actual divorce proceeding resulted in greater damages to Antone, would he have recourse against Mirviss after the actual divorce proceeding? Obviously, a court should not undertake to divide the couple's marital and non-marital property while they are still married.

**D. The Court of Appeals Recognized That Until the Antenuptial Became Operative, There Was Only a Risk of Damage Contingent Upon a Possible Dissolution.**

The "potential" for liability or "risk" of damage is not sufficient for a cause of action to accrue. Per Hermann, actionable damage is present only when the potential or risk of damages that was created by negligent advice is actually realized (i.e., an actual tax liability exists and thus a debt is established). Unlike the facts in Hermann, when Antone signed the antenuptial agreement and married in reliance on it, he did not become "immediately liable" to his spouse. Similarly, if his nonmarital property appreciated in value (whenever that occurred, which is not evident from the record herein or from the record in Antone's divorce), Antone could have reaped and enjoyed all the benefits of that appreciation for himself by selling the properties. No portion of those proceeds would be subject to a claim by his wife as long as they remained married.

1. Damage Caused By Mirviss' Negligence Was Contingent Upon Completion of Antone's Dissolution.

The antenuptial agreement did not legally impair or in any way affect Antone's

Property interests during the marriage; its effect was contingent upon events that might never occur. “Risk” of loss that Mirviss and Judge Dietzen use to suggest that “some damage” occurred immediately when Antone got married, is not sufficient to satisfy existing legal precedent and does not result in accrual of Antone’s cause of action. Judge Dietzen and Mirviss both fail to address the fact that potential loss, that is contingent upon a dissolution that might never occur, does not equate to damage. If the parties had remained married, no damage would have resulted to Antone by reason of Mirviss’ representation, no suit would have been brought against Mirviss, and we would not be in the midst of this second appeal.

As noted, an antenuptial agreement is not operative – it has no effect on the parties’ respective property rights - until a dissolution occurs. Mirviss and his supporters, including the amicus briefs and Judge Dietzen, have not cited any dispositive authority to the contrary. The contingent nature of liability/damage associated with an antenuptial agreement, is demonstrated by the fact that Minnesota law permits a party to an antenuptial agreement to challenge the agreement without regard to a statute of limitation. See e.g., McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989) and A-36, ¶ 3. In other words, an antenuptial agreement may remain in place for decades only to be declared invalid during dissolution proceedings, and never impact the division of property.

Damage to Antone, by reason of the antenuptial agreement could not occur until the antenuptial agreement became operative, upon the dissolution of the Antone's

marriage. This is simply the nature of the function that the antenuptial performs. Prenuptial agreements, by their very terms, remain inoperative and contingent upon some future event that may never occur. “When a right is dependent on a contingency, the cause of action accrues and the statute begins to run on the date of the happening of the contingency.” Froats v. Froats, 415 N.W.2d 445 (Minn. Ct. App. 1987), quoting Grothe v. Shaffer, 305 Minn. 17, 232 N.W.2d 227 (1975).

Indeed, Mirviss cannot identify any actual damage to Antone while he was still married. The two suggested bases for damage during Antone’s marriage fall far short for lack of causation. First of all, Antone’s malpractice cause of action cannot accrue based on Antone’s “time, money and effort” to draft the antenuptial. Mirviss Brief, p. 15. The assertion that Antone suffered damage when he paid his legal bill for services that did not fulfill his goals is ridiculous and ignores the requirement of causation. (Mirviss brief, pp. 15, 22). The damage must result from the alleged negligence. Mirviss’ negligence did not cause Antone to have to pay his legal bill. That bill would have been issued despite Mirviss’ negligence. If paying your legal bill starts the malpractice statute of limitations, a client could simply manipulate the accrual period by never paying the bill. More importantly, the \$1800 that Antone might have recovered if he had sued for breach of contract or malpractice the day after his marriage would not even come close to the amount of actual damages, approximately \$1,000,000, that Antone actually suffered as a result of Mirviss’ malpractice. If Mirviss is correct in this regard, Antone would

effectively be left without a remedy for the admitted malpractice and damage caused by Mirviss.

Second, “the need to remedy” Mirviss’ failure does not represent the damage caused by the negligence. Mirviss Brief, pp. 15, 22. The omissions could not have been remedied. Short of petitioning for dissolution and obtaining another antenuptial, all in the name of suing his attorney, Antone could not take another stab at obtaining what Mirviss promised had already been accomplished. On this point, Mirviss is silent about how to “remedy” his negligence and noticeably ignores the public policy against breaking up a marriage simply to sue an attorney.

What damage did Antone suffer as a result of the negligence while he was still married? None. Yet, Mirviss would have the statute of limitations expire before the antenuptial was operative and while Antone remained happily married.

## 2. Marriage Does Not Create or Diminish Property Rights.

Mirviss and Judge Dietzen, as well as the district court, would have this Court believe that the act of marriage automatically results in lost property rights, specifically, that Antone lost rights to his *nonmarital* property on the day that he married. These pronouncements regarding spousal property rights simply are inaccurate and are not supported by any citation to dispositive legal authority. Mirviss also claims that Antone lost the “unimpaired right to do whatever he wished with the non-marital property.” Mirviss Brief, p. 23. Again, there is no authority cited for this claim. Ironically, Mirviss relies upon the marital dissolution statutes to claim that the “act of marrying creates

rights.” Yet, the event that triggers application of the marital dissolution chapter, categorization and division of property is not marriage, but dissolution. The law governing marital dissolution simply does not create a property right, least of all in the non-homestead, nonmarital property of the other spouse during marriage.

In Minnesota, it is unclear at best what interest, if any, one spouse has in the other spouse’s pre-marital real property during the marriage. See Affiliated Banc Group, Ltd. v. Zehringer, 527 N.W.2d 585, 587 (Minn.Ct.App. 1995). In Affiliated Banc Group, Ltd. v. Zehringer, 527 N.W.2d 585, 587 (Minn.Ct.App. 1995), the Court of Appeals recognizes that

Under current Minnesota law there is a question of what interest a spouse has in the separate, non-homestead property of the other spouse. Minn.Stat. § 507.02 (1994) provides that a spouse may execute a separate deed to convey non-homestead real estate owned by that spouse, ‘subject to the rights of the other spouse therein.’ This statute leaves unanswered the question of what the rights of the other spouse are. \* \* \* *It is uncertain whether a spouse continues to retain an inchoate interest in the other spouse’s non-homestead property.*

*Id.* at 587 (italics supplied). Continuing, however, the court noted 1985 changes to the Minnesota Probate Code that affected the property included in a spouse’s augmented estate when a spouse chooses to take an “elective share.” *Id.* at 587. The court noted that as a result of the 1985 changes, non-marital, non-homestead property is not part of that augmented estate unless it has been, in essence, fraudulently transferred during the marriage. *Id.* (“The augmented estate does not include all real property owned by the decedent spouse during the marriage but only the value of certain property transferred during the marriage for inadequate consideration. Minn.Stat. § 524.2-202(1).”).

Accordingly, a spouse apparently has no interest in premarital, non-homestead property since a surviving spouse has no right to add such property to the augmented estate when taking an elective share (absent proof of transfer without adequate consideration). See Minn.Stat. § 524.2-202(1); 524.2-207; 524.2-208; see also Minn.Stat. § 519.02.

Certainly, while the parties remain married, the property rights of the spouse who is the sole owner of nonmarital, non-homestead property, as Antone was, are not impinged simply because the owner chose to marry. See Minn.Stat. § 507.02; Affiliated Banc Group.

In Affiliated, this Court refers to the fact that such rights have not been clarified and recognizes that if they still exist, they are merely *inchoate* property interests. Id. Other jurisdictions have also recognized the contingent and unmatured nature of such an inchoate interest, holding that it is contingent, not operative, and simply does not come into existence until death or a dissolution. See Sinha v. Sinha, 285 A.D.2d 801, 803 (N.Y. Sup.App.Div. 2001) (stating that Equitable Distribution Law did not create any contingent or present vested interests, legal or equitable, by virtue of the parties' marital status until there was a judgment dissolving the marriage), citing, Leibowits v. Leibowits, 93 A.D.2d 535 (N.Y. Sup. App Div. 1983), J. O'Connor, concurring ("The likely view is that there is no spousal interest in the separate[ly held] property of the other party unless and until equitable distribution is made upon divorce. It does not appear, moreover, that there is an inchoate interest or "expectancy" with regard to "separate[ly held] property.")); Matter of Cole, 202 B.R. 356, 360 ("spouses' respective rights in marital property do not vest. . . until entry of judgment dissolving marriage"); Hayutin v.

Commissioner of Internal Revenue, 508 F.2d 462, 469 (10<sup>th</sup> Cir. 1975) (a spouse's property is free from any vested interest of the other spouse, inchoate rights vest only upon filing of the divorce action); Cady v. Cady, 581 P.2d 358 (Kan. 1978) (inchoate interest in property held by other spouse is of no effect during marriage and only vests, as an undetermined interest, with the filing of divorce); Goodman v. Gerstle, 109 N.E.2d 489 (Ohio 1952) (any contingent inchoate right in property of other spouse vests only upon the death of the other spouse). Inchoate property interests, even if still recognized in Minnesota, are not detrimental to Antone's position on the Statute of Limitations. Indeed, such interests are meaningless to the other spouse's ability to enter into transactions, relating to his separately owned property, during the marriage.

Importantly, and contrary to Mirviss' argument, it is not necessary for this Court to make an expansive pronouncement about the parameters or existence of spousal property rights during marriage. It is sufficient for this Court to find that these undefined, contingent inchoate property rights, (if still recognized in Minnesota) presented only a "risk" (at best) of loss until dissolution; and a "risk" of loss simply does not equate to damage. "Risk of loss" is not enough for a cause of action to accrue.

In this case, Antone did not suffer any damage, caused his attorney's negligence, while he remained married. It is undisputed that his wife held no express interest in any of the pre-marital property. She was not a joint tenant. The antenuptial agreement at issue did not convey a legally cognizable property interest to Antone's ex-wife. RA-37. Nor is there any evidence in the Record that Antone's wife acquired a transferable or marketable interest in Antone's pre-marital properties during the marriage or was added

to the title of any of Antone's premarital properties. Id. There was no legal requirement that Antone provide his spouse with any benefit that inured to him as a result of his ownership in the pre-marital properties and Antone was free to dispose of the properties or otherwise affect the property value without his wife's knowledge or consent. Id. He could have mortgaged or sold any of the pre-marital properties during the marriage and retained the proceeds. Id.

There are no new rules and there is no global expansion of malpractice liability as a result of the Court's decision in Antone v. Mirviss. In reality, the causation element of a legal malpractice claim and the unique nature of Minnesota's dissolution statutes and property law, when considered together, meant that until Antone's antenuptial became operative, was deemed ineffective, and Antone became liable to his ex-wife for a portion of his nonmarital assets, Antone simply did not suffer damage caused by his lawyer's negligence. Until Antone incurred liability as a result of Mirviss' malpractice, he had not suffered actual damage sufficient to accrue a claim against Mirviss. Mirviss should not avoid the consequences of his conduct based on the argument that too many years passed between his negligence and the resulting damage.

3. Appreciation to Antone's Nonmarital Property During His Marriage Did Not Damage Antone. He Required No Consent From His Spouse to Enter into Transactions relating to the Nonmarital Properties And He Could Retain, Use, and Enjoy All Proceeds from Any Transaction for Himself As Long As He Remained Married.

The Court of Appeals did not review this issue on its own except to find implicitly that the appreciation of nonmarital properties was not damage to Antone that was caused

by Mirviss' negligence---until a portion of the nonmarital appreciation was awarded to Antone's ex-wife and he became immediately liable to her for that amount.

This issue is complicated only because the district court took liberty with the "record", in an attempt to suggest an alternative means for Antone to have sustained damage during his marriage. The district court did not reference the nine Affidavits submitted by Antone and Mirviss, yet never excluded the Affidavits. Both Antone and Mirviss argued from the Affidavits at Oral Argument. Had the motion to dismiss been converted to a Rule 56 motion for summary judgment, the record revealed material issues of fact regarding the values of the non-marital property. See e.g., RA-51-53.

The court drew what it characterized as logical conclusions regarding property values that had no basis in the record. Instead, the district court referenced the Antone's underlying divorce case and findings at the trial court level, admitting that those trial court findings fell short of stating that values had increased by August 31, 1997. RA-66. It is improper to assume that appreciation to Antone's nonmarital properties must have occurred by a certain date, especially when the "assumption" is relied upon to extinguish Antone's claim.

**E. Other Jurisdictions Confronted With This Precise Issue, Base Their Decisions on the Realities of Attempting to Prove Hypothetical Damage and Hold That Damage Does Not Occur At the Point of Marriage.**

For example, Pope v. Zanetis, 2002 WL 425050, (S.D.Ind.), (RA-54), addresses the precise issue before the court and contains material facts that mirror those of Antone. Furthermore, the decision is also based on principles that are found in Minnesota decisions determining when a claim accrues. The plaintiff in Pope signed a prenuptial

agreement shortly before her marriage. One attorney, Mr. Zanetis, claimed to represent both Mr. Pope and his fiancé before the agreement was signed, without disclosing the conflict or obtaining a waiver. Six years later, the couple separated and attempted to reach a property settlement between themselves without counsel. When Mrs. Pope informed the attorney, in June 1998 of the proposed settlement, she learned that it was contrary to the terms of the prenuptial agreement. *Id.*, \*\* 2, 3. Soon after, divorce proceedings began and the parties eventually mediated a settlement agreement that was adopted by the court June 2000, by entry of a dissolution decree. Thereafter, Mrs. Pope filed suit against the attorney one month later.

In Indiana, the court determined that a cause of action accrues when all elements of the claim are present, and the damage element is present when the plaintiff suffers any actual, ascertainable damage. *Id.*, \*\* 3, 4. The defendant argued that damage was sustained when the prenuptial agreement was signed. The court disagreed,

[D]efendants have not identified any ascertainable injury that plaintiff suffered as a result of the alleged malpractice before the final divorce decree was issued. The decisive fact here is that plaintiff did not suffer any actual, ascertainable damage until less than two years before she filed this action. . . If plaintiff had filed a malpractice action against Zanetis the day after she signed the agreement and was married, Indiana courts would have dismissed her case as not ripe, for lack of any ascertainable injury. In fact, the result would have been the same if she had filed suit [after becoming aware of the alleged wrongdoing] or *any other time before the divorce decree was issued dividing the Popes' property.*

*Id.* (italics supplied)

The Pope court supported its decision and explained its reasoning by recounting the facts and holdings of other legal malpractice cases, and specifically noted that the cases it relied upon were decided *before* Indiana adopted the discovery rule. Pope v.

Zanetis, 2002 WL 425050, at \*\* 5 – 7, citing Anderson v. Anderson, 39 N.E.2d 391 (Ind.Ct.App. 1979) (holding damage does not exist until dissolution court enters a decree disposing of parties' property) and Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981). Significantly, the Pope court, a federal court applying Indiana law, noted that "adoption of the discovery rule did not eliminate the independent need for ascertainable injury before a malpractice claim accrues." Pope, at \* 7.

Courts in a number of other states have also held that the statute of limitations begins to run on a claim for legal malpractice arising from preparation of a prenuptial agreement *when the premarital agreement is actually invoked, declared invalid, or the judgment of dissolution entered*. Each of the following decisions recognizes that a premarital agreement does not convey property interests during the parties' marriage and that the agreement's effect, if there is to be an effect at all, is uncertain because the agreement itself may subsequently be declared unfair or invalid. See e.g., Zimmie v. Calfee, Halter & Griswold, 538 N.E.2d 398, 402 (Ohio 1989) (legal malpractice claim filed in 1985 for negligent drafting of prenuptial agreement in 1963 would have been timely under one-year limit if filed within one year of trial court decision invalidating agreement, but was untimely when filed only within one year of state supreme court decision holding agreement invalid); Robbat v. Gordon, 771 So.2d 631, 636-37 (Fla.App.2000) (stating that actual, not potential harm, is necessary; statute of limitations did not begin to run on legal malpractice claim arising from 1978 prenuptial agreement until final appellate decision in 1994 holding agreement invalid); In re Estate of Crawford, 730 P.2d 675, 680 (Wash.1986) (on claim against deceased spouse's estate to

declare prenuptial agreement void, statute of limitations is tolled until spouse asserts rights under prenuptial agreement during dissolution action).

This Court should also be guided by the practical reasoning in Pope and aforementioned cases to determine that Antone suffered no damage until the property division associated with his marriage dissolution was final. In the alternative, the Court should hold that Antone suffered no damage until the antenuptial agreement became operative when the marriage dissolution was initiated in September 1998. Thus, Antone's claim would not be time barred.

**F. Mirviss' Foreign Authority Does Not Address Antenuptial Agreements and is Not Persuasive.**

Binstock v. Tschider, 374 N.W.2d 81 (N.D. 1985), which Mirviss relies upon, does not involve a similar issue to this case. The focus of the case was not, as Mirviss claims, whether a contingent event occurred. Unlike Minnesota, North Dakota commences the statute of limitations for a legal malpractice case based upon the "discovery rule." Therefore, the issue was when and whether the plaintiff knew that the offensive option clause was included in the purchase documents he signed. Binstock, 374 N.W.2d at 84, 85. It was irrelevant whether the option at issue had been exercised. Moreover, the existence of the option clause was an immediate and unavoidable "encumbrance that reduced the value of the property, limited the right of disposition, and prevented [the plaintiff] from making further improvements to the property". *Id.* at 85. This case is in apropos.

Commonwealth Land Title Ins. Co., v. Kurnos, 773 A.2d 726 (N.J. App. 2001), also relied upon by Mirviss, involves another jurisdiction's application of the "discovery rule." It does not hinge on whether a contingent event actually occurred or resulted in damage. Instead, the critical issue was whether and when the mortgagee and title insurance company discovered the negligent conduct by the attorney. The court determined that both knew at the transaction's closing that they had a second mortgage, and not a first mortgage, that their "security was impaired." *Id.* at 30. Again, this situation cannot be compared to Antone's antenuptial which did not become operative nor impair his property rights or unfavorably affect his position until the dissolution award.

Finally, Mirviss' reliance upon Hensely v. Caietti, 13 Cal.App.4<sup>th</sup> 1165 (1993) is also misplaced. This case involves a property settlement agreement, not an antenuptial agreement. The settlement agreement was immediately binding and "allocated property and debts" upon its incorporation into a divorce judgment. *Id.* at 1168. Its effect cannot be compared to that of an antenuptial which was dormant, ineffective, inoperative, and of no legal significance until dissolution of the Antone's marriage.

**G. Other Authority suggested by Mirviss to be in Support of reversing the Court of Appeals Decision Is In Appropos.**

The present case is not on point with Gunufson v. Swanson, 1996 WL 686121 (Minn), as Mirviss suggests. In that unpublished case, the appellant claimed that his attorney prepared a stipulation that did not "reflect[ ] the agreement of the parties relating to spousal maintenance and the length of time it was to be paid." Gunufson v.

Swanson, 1995 WL 711138, \*2 (Minn.Ct.App.) (Lansing, dissent)). The stipulation set forth the obligation to pay spousal maintenance and the duration of the payments, left open the possibility that the agreement could be modified, but was incorporated into the judgment and decree of dissolution, as entered. A critical distinction between this case and Gunufson highlights and summarizes Antone's position. Mirviss' poorly prepared antenuptial agreement caused no damage, as it could not, by itself, convey funds or transfer property interests. By contrast, in Gunufson, the "allegedly deficient stipulation drafted by Swanson [that was] incorporated into the judgment and decree of marital dissolution as entered," did result in damage because the judgment and decree actually *established liability, a legal obligation* to pay spousal maintenance, i.e., it transferred property interests and awarded relief. Gunufson, 1996 WL 686121 (Minn.)

Significantly, this Court did not find that damage occurred when the poorly drafted settlement agreement was signed, but instead when it was incorporated into the binding judicial decree, and therefore created liability.

Mirviss has also cited two Georgia cases in support of his argument that execution of the antenuptial is the date on which damage occurs. These cases are not persuasive. First of all, Georgia expressly commences the statute of limitations on a legal malpractice claim "immediately upon the wrongful act having been committed, even though there are not special damages". Ekern, 353 S.E.2d at 742. In Georgia, it is necessary only to pinpoint "the attorney's breach of duty which is the date of the alleged negligent or unskillful act." Id. at 741. Minnesota has rejected this rule. Secondly, both Georgia

cases involve the preparation of property settlement agreements, not antenuptial agreements. Also, for the same reasons that Gunufson v. Swanson is not persuasive, these Georgia cases are similarly not on point. Unlike an antenuptial, a property settlement agreement is immediately operative when incorporated into a binding divorce decree. From that instant, it influences property rights by increasing and/or reducing the parties' present holdings.

Mirviss also relies upon Harmeyer v. Gustafson, 2001 WL 122141 (Minn.Ct.App.), an unpublished decision that involves an irrevocable trust document, not an antenuptial. The trust documents, which became immediately operative, were prepared improperly so that the plaintiff received a taxable annual income from the trust and corresponding tax liability. With all due respect, the court in Harmeyer did not interpret or apply Herrmann v. McMenemy & Severson, 590 N.W.2d 641 (Minn. 1999) correctly when equating damage to the "attorney's alleged failure to advise". Harmeyer, at \*2. This was not the rule of Herrmann. In Herrmann, the client was damaged and the statute of limitations began to run when an actual tax liability arose, not when the client received bad advice. Id at 644. Harmeyer has no precedential impact on this case since it was an unpublished decision and was clearly based upon an incorrect reading of Herrmann. Even so, there are also factual distinctions between Harmeyer and the Antone case. When the Harmeyers signed the irrevocable trust documents it was unavoidable that they would suffer liability and thus damage as a result of the malpractice. Unlike the antenuptial in Antone's case, which was dormant, inoperative and did not affect Antone's property rights in any respect during his marriage, the

irrevocable trust in Harmeyer provided an income that was taxable and thus created an immediate liability and resulted in damage. Id. at \*1.

May v. First Nat'l Bank of Grand Forks, 427 N.W.2d 285 (Minn. Ct. App. 1988), also relied upon by Mirviss, was decided three years before Herrmann. It is similar to Herrmann v. McMenemy in that a tax lien was the immediate, ascertainable, and unavoidable damage that meant the malpractice cause of action had accrued. A lien by the federal government, however, on property cannot be compared to Antone's marriage. Again, Mirviss is unable to identify actual liability that arose simply because of Antone's marriage. Remaining married means Antone avoids damage. In May, there was no "avoiding" a tax lien by the IRS. True, one will spend money and effort to litigate the propriety of it. In the same way, Antone could spend money and effort to litigate the disposition of his nonmarital property. But, Antone did not spend this time and effort until his dissolution began in 1998.

Sabes & Richman, Inc. v. Muenzer, 431 N.W.2d 916 (Minn.Ct.App. 1989) has been previously cited by Mirviss and the trial court in support of dismissing this lawsuit. Sabes, however, actually supports Antone's position. In Sabes, the plaintiff sought advice of counsel as to whether an advertising brochure should be copyrighted. Plaintiff sought the advice in 1979 and was told that it was not necessary to do anything at the time to protect the brochure. In April 1979, the brochure was printed and distributed. In February 1980, a competitor put forth an advertising brochure that was very similar to plaintiff's brochure. Plaintiff became aware of the infringing brochure in March 1980. Plaintiff again contacted the attorney immediately and was advised to file a copyright

registration, which they did, but not until February 1981. Plaintiff did not commence its malpractice action against the attorney until May 16, 1986, more than six years after learning of the infringing brochure. As in Herrmann, damage occurred when the subsequent event occurred---the competitor distributed its brochure. Id. at 918

Without protecting the brochure with proper copyright language and filings, plaintiff was “at risk.” But, there was no damage and/or claim until someone actually put forth the allegedly infringing brochure and caused the client’s damage. Again, despite the faulty advice of counsel, there was no claim based upon the poor advice---only a claim when compensable damage actually occurred. Here, even if, assuming arguendo, that there was “risk” of having to share his nonmarital assets and/or appreciation in value of those assets with his wife upon a divorce, that risk did not manifest, at the earliest, until the subsequent commencement of the dissolution proceeding and, at the latest, the 2002 Supreme Court decision.

In Grimm v. O’Connor, 392 N.W. 2d 40 (Minn.Ct.App.1986), a malpractice claim was brought against an attorney whose failure to include an interest escalator clause in a contract for deed meant that the plaintiff was not protected from increasing interest costs. The appellate court determined that damages existed and were ascertainable as soon as the contract for deed was signed in 1973 because: 1) contracts for deed have an established market and 2) a contract with an interest escalator clause has a higher value than one without such a clause. In the case at bar, there is no evidence that an established

market exists for antenuptial agreements, whether drafted and executed in reliance upon good or bad legal advice.<sup>7</sup>

Nor is Henning, 1993 WL 140869 (Minn.Ct.App.) on point. The Henning plaintiffs were three beneficiaries of a will who brought a malpractice action against the attorney that drafted the will. The court determined, however, that there was no legal deficiency in the will when drafted and that the will carried out the testamentary intent of the now deceased client. More importantly, the court determined that the attorney's actions were simply not the cause of damages to the benefactors. *Id.* At, \*2. Instead, damage was caused by the personal representative, when he stole funds from the estate. Further, there was no attorney client relationship between the attorney that drafted the will and the three will beneficiaries, thus they had no standing to sue. The case does not turn on when the will becomes operative and is not instructive to determining when the Statute of Limitations accrued in this matter.

Finally, Mirviss relies upon Hoffman v. Guzinski, 1994 WL 396328 (Minn. Ct. App.), and claims that the statute of limitations accrued in that case when the clients

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<sup>7</sup> Importantly, several additional and significant reasons required dismissal of the malpractice claim in Grimm. First, the Court stated that the plaintiff had actual knowledge that the contract did not contain the interest escalator clause when it was executed. *Id.*, at 42. Second, the Court noted plaintiff's deceptiveness. For example, plaintiff falsely claimed not to have been present at a hearing when a stipulation was signed and read into the record, even though the plaintiff was present and had signed the agreement in the court's presence. *Id.* Third, plaintiff had sent two letters to the attorney in 1973 and 1974 complaining about the interest issue, thus more evidence of actual knowledge of the damage. *Id.*

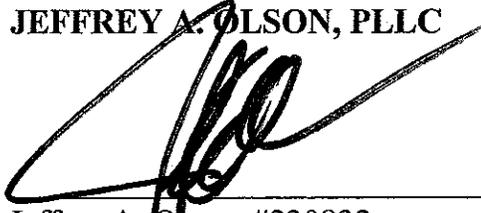
signed a defective contract for deed. Once again, there is more to the Court's decision, all of it unfavorable to Mirviss' position. The Hoffman plaintiffs were contract vendees who lost their interest in land when the vendor's interest was foreclosed upon. The contract did not contain any provision to protect the vendees (plaintiffs) from a foreclosure of the vendor's underlying interest in the land. In the Hoffman case, legal advice was received and the contract was drafted in 1982. The foreclosure of the vendor's interest occurred and plaintiff had notice of said foreclosure in 1987, yet they did not commence their malpractice action until four years later in October of 1991. A closer reading of the Hoffman opinion suggests that the court focused on the fact that plaintiffs had actual and constructive notice of the mortgage and foreclosure and notice of *actual damages* in 1987 yet did not commence the malpractice action until 1991. Id., at \*2.

### CONCLUSION

The Court of Appeals fulfilled its purpose, correcting the trial court's error and mis-reading of this Court's rule of law in Herrmann. The Antone decision is not an expansion of the law, but simply an application of this Court's existing precedent. For all the foregoing reasons, this appeal should be denied.

RESPECTFULLY SUBMITTED,

JEFFREY A. OLSON, PLLC



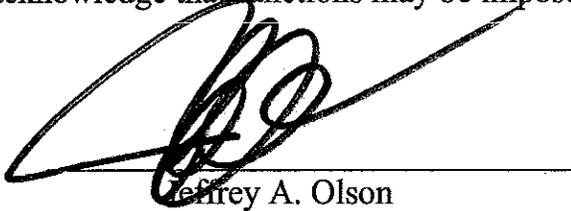
Date: August 25, 2005

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The parties, by their attorney, acknowledge that sanctions may be imposed under Minnesota Statute § 549.211.



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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).