CASE NOS. A10-1439 and A10-1447

State of Minnesota
In Court of Appeals

AMES & FISCHER CO., II, LLP, et al.,
Respondents,

vs.

JOHN R. McDONALD, et al.,
Appellants (A10-1439),
Defendants (A10-1447),

LARSEN, LARSEN & ASSOCIATES, P.A., et al.,
Defendants (A10-1439),
Appellants (A10-1447).

APPELLANT/CROSS-RESPONDENT JOHN R. McDONALD, et al.'s RESPONSE AND REPLY BRIEF

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STATEMENT OF THE ISSUE ON RESPONDENTS' CROSS-APPEAL

Did the trial court err in refusing to adopt the continuous representation doctrine so as to toll the statute of limitations of the legal malpractice action against Appellant McDonald?

- The trial court did not apply the continuous representation doctrine.

Apposite authorities:
Fletcher v. Zellner, 909 F. Supp. 678, 684 (D. Minn. 1995);
Reid Enterprises, Inc. v. Deloitte & Touche, LLP, Ct. File No. C8-99-1801, 2000 WL 665684 (Minn. Ct. App. filed May 23, 2000).

ARGUMENT

A. Summary of Argument.

Despite Respondents' 60-page brief, the issue before this Court is straightforward – on the day that the 2001 income tax returns were filed by the Larsens[1] without a Section 754 election, could the Respondents have brought a cognizable legal malpractice action against McDonald based upon his alleged failure to recommend that the election be made? If the answer to that question is yes, then Respondents' claims against McDonald are barred by the statute of limitations. When the Court considers this issue, there can be no dispute that Respondents could have brought this very same legal malpractice action against McDonald the day after the 2001 income tax returns at issue were filed. Had Respondents brought such an action, they could have submitted the opinions of their present experts to support their claim that McDonald departed from accepted standards of care by failing to recommend the tax returns include the Section

[1] As with his principal brief, Appellant John R. McDonald will refer to himself simply as "McDonald" and will refer to Appellants Larsen, Larsen & Associates, P.A., James Larsen and Michael Larsen as the "Larsens."

754 election. Additionally, they could have made a cognizable claim of resulting damages consisting of the cost of correcting the faulty original income tax returns which should have contained the election and, in addition, a recovery for the loss of use of the funds used to pay the unnecessary taxes. Here, Respondents are undisputedly alleging that McDonald was negligent when he failed to recommend to the Larsens, prior to the filing of the 2001 income tax returns at issue, that a Section 754 election should have been made. Respondents further allege that, as a result of filing the income tax returns without the Section 754 election, they unnecessarily overpaid tax and began incurring damages resulting from the loss of use of the overpaid taxes and became obligated to have amended tax returns prepared and filed to correct the error. Accordingly, the moment that the erroneously prepared tax returns were filed, there was negligence that resulted in "some damage" to Respondents giving rise to a cause of action for legal malpractice. Dalton v. Dow Chemical Co., 158 N.W.2d 580, 584 (Minn. 1968) ("Thus, the alleged negligence…combined with alleged resulting damage is the gravamen of deciding the date upon which the cause of action at law herein accrues.").

In an effort to avoid the inevitable result that is compelled by the facts of this case, Respondents raise several arguments in an effort to convince this Court that the accrual date of their legal malpractice action should be pushed back so that at least a portion of their claim against McDonald is timely. First, Respondents simply ignore the fact that both they and their experts have asserted that the failure to make the election when the income tax returns were originally filed was negligent. Respondents argue that, while they admit that there was absolutely no reason for the Larsens not making the election when the returns were filed[2] and their experts opine that it was negligent not to do so, the "real" breach occurred when McDonald failed to correct his alleged negligence before the end of the one-year automatic extension period. Second, relying on the argument that the breach did not occur until the opportunity to correct the prior error was lost, Respondents argue that it is theoretically impossible for them to have suffered any damage before the real breach. Both of these arguments fail.

As to Respondents' first argument, that they have never claimed that there was a breach of the standard of care when the tax returns were filed without the Section 754 election being made, this argument is inconsistent with their own expert's opinions and

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[2] Respondents begin their brief by spending considerable time discussing a red herring. In an effort to give some rationale for their efforts to push back the accrual date of their claim against McDonald, Respondents appear to adopt the Larsens' argument that a decision whether or not to make a Section 754 election is a fluid one based upon various factors such as the value of the real estate and whether the property would be sold quickly. (See e.g., Respondents' Brief at pp. 4, 5, 10-12.) Through their lengthy commentary on all of the factors which play into the decision whether or not to make a Section 754 election, Respondents would have this Court believe that they agree with the Larsens that it was entirely appropriate not to make the Section 754 election with the original return and to take this "wait and see" approach during the automatic extension period (Respondents' Brief at p. 5). Yet this is not Respondents' position. Respondents' own expert, Tom Woessner, disputes that any of these factors which are discussed throughout Respondents' brief were applicable here or that time was needed to "gather facts" to determine if the election was appropriate. He states that, in Respondents' circumstances, there was "no good reason not to make the 754 election" because there was "little, if any downside" to doing so (M.A. 287). Respondents themselves concede later on in their brief, that the reasons the Larsens gave for not making the election were faulty (Respondents' Brief at pp. 22-23). Respondents also attempt to minimize the importance of failing to make the election with the original tax return by asserting that waiting to make the election is "equally acceptable" (Respondents' Brief at p. 5). Respondents suggest that there were no consequences to deferring the decision. Respondents fail to candidly remind the Court that there are consequences for not making the election with the original return such as unnecessarily overpaying taxes and having to prepare and file amended returns – consequences that Respondents seek to recover in this case.

their brief in this case. Their own experts have opined that McDonald's failure to recommend to the Larsens that they should make the Section 754 election with the initial return was negligent (M.A. 286; M.A. 89). Respondents argue that while the standard of care required McDonald to recommend a Section 754 election prior to the returns being filed, his failure to do so was not a "breach" because there was an opportunity to fix the error later. What Respondents are really advocating is that even if the 754 election should have been made with the original income tax return and that negligence resulted in "some damage," this Court should toll the statute of limitations during the time period in which the error could have been corrected. Such an argument is contrary to longstanding Minnesota law.

Respondents' second argument is equally flawed. Respondents contend that if this Court agrees with them that the breach did not occur until they were unable to correct the faulty return, it is impossible that they suffered "some damage" before that time. Yet, at the same time, Respondents concede that they overpaid taxes due and owing the moment they filed the faulty returns and immediately began incurring damages as a result of the loss of use of those funds. In an effort to harmonize these mutually exclusive positions, Respondents argue that the losses suffered at the time the returns were filed cannot be considered "damages" when they were originally incurred but somehow ripen into recoverable "damage" once the time to correct the faulty tax returns runs. Once again, this argument has no support in Minnesota law.

By notice of related appeal, Respondents have sought review of the trial court's decision not to apply the continuous representation doctrine as an alternative reason for denying McDonald's motion for summary judgment. Respondents contend that if the statute of limitations on their legal malpractice claim has run, this Court should adopt the "continuous representation" doctrine to toll the statute of limitations until McDonald stopped representing these Respondents. This argument, too, must fail. The Minnesota Supreme Court has never adopted the "continuous representation" doctrine to toll the statute of limitations in legal malpractice cases. Furthermore, even if it were adopted in Minnesota, it would not be applicable in this case. For the "continuous representation" doctrine to apply, the attorney must have been continuously representing the client in the specific transaction over the course of years. Here, however, there is no claim that McDonald was continuously representing these Respondents with respect to a Section 754 election or with regard to the income tax returns at issue. Based on the evidence taken in the light most favorable to the Respondents, McDonald's involvement with the tax returns at issue was a single discrete recommendation given by McDonald to the Larsens prior to the tax returns being filed. There is no claim that after the alleged conversation between the Larsens, where McDonald supposedly concurred with the Larsens that a Section 754 election should not be made, and his alleged review of the returns prior to filing, that he was ever asked by anyone to provide further advice regarding the 754 election or the income tax returns at issue. The mere fact that McDonald represented these Respondents on other matters over the years does not mean that the "continuous representation" doctrine extends the statute of limitations on any claim that arose during that 40-year representation.

B. McDonald's Reply to Respondents' Responsive Brief.

1. Respondents acknowledge that any claim they have against McDonald relating to the 2000 tax return is barred by the statute of limitations.

Respondents conceded that even under their unique accrual analysis, any claim against McDonald arising out of the failure to make the Section 754 election in connection with the 2000 tax return is barred by existing Minnesota law.

2. Respondents' legal malpractice claim against McDonald arising out of the alleged failure to recommend a Section 754 election prior to the filing of the 2001 tax return is barred by the statute of limitations.

a. Respondents' claim against McDonald is that he breached the standard of care when he failed to recommend to the Larsens that they make the Section 754 election with respect to the original 2001 tax return.

In their responsive brief, Respondents attempt to redefine their claim against McDonald to extend the statute of limitations. Respondents submit to the Court that their "claims aren't that McDonald's negligence occurred when the tax returns were originally filed without the 754 elections" but that McDonald was "negligent when he failed to timely recommend that the 754 elections be made" (Respondents' brief at p. 45). Respondents now claim that any negligence did not occur until April 15, 2003 when the ability to make the Section 754 election was lost. Even if this were the case, it is the <u>filing</u> of the returns that caused "some damage" resulting in the accrual of the claim and the subsequent ability to amend the original faulty return is simply an opportunity to mitigate the damages which would result. Respondents' argument on appeal simply ignores the opinions of their expert and fails to recognize that once the breach occurs and damages result, the cause of action accrues even if an opportunity to partially mitigate those damages remains.

Respondents now claim that they are not claiming that McDonald's negligence occurred when the tax returns were originally filed without the 754 election (Respondents' brief at p. 45). They claim, rather, he should have told Respondents sometime during the one-year automatic extension period to make the election. Thus, Respondents are now attempting to argue that the "real breach" did not occur until McDonald failed to ensure that the Section 754 election was made prior to the end of the automatic extension period. There are multiple problems with Respondents' arguments. The first and most obvious is that it is inconsistent with the facts of the case and the opinions of their experts. Respondents' attorney expert, Tom Woessner, opines:

> [A]ccording to the Larsens, McDonald reviewed the subject returns before they were filed and agreed with the Larsens not to make the elections. Which, if true, was negligence by McDonald and a breach of the fiduciary duty he owed to the Fischers.

(M.A. 286.)

Similarly, Respondents' accounting expert, Tom Boesen, has opined that:

> [T]he election should have been included in FMP and AFC's 2000 or 2001 tax returns.

(M.A. 89.[3])

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[3] With regard to Respondent FSA, it admits that a Section 754 election was made many years before and was therefore in place for the transactions at issue (Respondents' brief at 21). Respondent FSA claims, however, that it is pursuing a claim against McDonald based upon the 10% chance that the IRS would reject this prior election

For Respondents to deny that they are making any claim that McDonald was not negligent when the original returns were filed is at odds with the opinions of their own experts. Second, the facts of this case support that any negligence by McDonald occurred prior to the filing of the return. Respondents' entire claim against McDonald is based upon James Larsen's testimony that he spoke with McDonald prior to filing about the tax returns and McDonald actually reviewing those returns prior to filing. Larsens contend that McDonald did not recommend that the Section 754 election be made (L.A. 0158-0159, 0178-0179). This is a single act of negligence that occurred on or before a discrete date, the filing of the 2001 tax returns. Such a failure, alone, may not create a cause of action because damages were yet to occur. Once the tax returns were filed, however, and excess taxes were paid due to the failure to make the election, the cause of action accrued.

Confronted with this problem, Respondents apparently claim that McDonald, after originally giving negligent advice, had an ongoing duty to discover his error. Then if we assume such a duty, the cause of action had already accrued because negligence combined to cause damage once the returns were filed. Respondents argue, however, that the cause of action should not accrue until the last day the error can be fixed. This argument is without merit. Minnesota law has long held that a cause of action accrues when there is negligence and damage. Dalton, 158 N.W.2d at 584. Furthermore, Minnesota does not allow a plaintiff to extend the statute of limitations by simply

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(Respondents' brief at 21). This is, in essence, a loss-of-a-chance theory which has been rejected in Minnesota. Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993).

claiming that the professional had an ongoing duty to discover his or her malpractice. Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993) (after failing to diagnose cancer, physician's continuing non-treatment of that cancer in subsequent visits does not toll statute of limitations); D'Amaro v. Joyce, 297 F.3d 768, 771 (8^{th} Cir. 2002) (noting that in Fabio, "the plaintiff argued, among other things, that the failure to make a correct diagnosis was a continuing omission and that, as a matter of fairness, the failure should toll the statute or prevent it from running in the first place. The Fabio court rejected that argument."); Purcell-Auge v. Metro Family Physicians, Ct. File No. C0-97-1223, 1998 WL 27303 (Minn. Ct. App. Jan. 27, 1998) (rejecting claim that where physician failed to correctly diagnose lump as breast cancer during office visit in 1991 and 1992, statute of limitations was tolled by physician's ongoing duty to discover prior misdiagnosis).

The reasoning of Fabio has been followed in legal malpractice cases as well. For example, the Leon Jones Feed & Grain, Inc. v. General Business Services, Inc., 333 S.E.2d 861 (Ga. Ct. App. 1985) decision is instructive. In that case, the plaintiff made the identical argument raised by Respondents here. The client/taxpayer had three years to rectify the tax error and seek a refund. The plaintiff alleged that the advisor had an ongoing duty to tell him of the error and, as such, the claim was not barred. In rejecting that argument, the Georgia Court of Appeals noted:

> Jones' argument that the three-year refund which could have been gotten if properly advised in 1977 should be recoverable is also disposed of by a Jankowski [v. Taylor, Bishop and Lee, 273 S.E.2d 16 (1980)] principle. In division 2 of Jankowski, the court held that a failure to correct the act which caused damage is not a separate breach for which the client has a new cause of action. Thus, in the present case, GBS' alleged failure to advise Jones in 1977 that a refund could be had was merely a failure to

> correct the earlier breach for which damage had already been incurred, as discussed above. Thus, had GBS advised Jones at that time, it would have only ameliorated damages incurred for the earlier wrongful acts but the failure to so advise was not a new act of negligence which would trigger the running of the statute of limitations anew. The situation in the present case is closely analogous to that in the Jankowski case, supra. In Jankowski, the client suffered slight damage when the lawyer allowed the case to be dismissed without prejudice. This was within the statute of limitations; had the lawyer discovered the breach, the action would have been reinstated. The damage incurred when the suit was dismissed was not irreparable. Court costs and delays in the progress of the case were factors of damage mentioned by the court in Jankowski [cites omitted]. Severe damage was incurred only when the statute of limitations ran and the action had not been re-filed. The plaintiff in Jankowski advanced the argument that a new tort occurred when the statute of limitations ran and he completely lost his right to proceed. The court in Jankowski specially rejected this argument, holding that the loss of the right to proceed was but an additional damage flowing from the earlier breach. In the present case, as we have discussed above, Jones had a cause of action each time he paid the sales tax unnecessarily. The fact that GBS failed to advise the company that a refund could be have was merely greater damage (loss of the amount paid) added to the damage already incurred (loss of the use of the amount paid).

Leon Jones Feed & Grain, Inc., 333 S.E.2d at 863. (Emphasis added.)

This same rule was recognized in Goulding v. Solomon, 475 N.Y.S.2d 723 (N.Y. City Civ. Ct. 1984). There, the court stated:

> Plaintiff's theory that the statute does not begin to run until the time to "cure" the defective return has lapsed would create a novel rule for all professional malpractice cases. It would, in effect, cast on the professional the duty to constantly review all of his or her activities in times past ... to ascertain and cure the past malpractice. Moreover, it would be at war with the date-of-accrual unless one proceeded on the untenable theory that a new act of malpractice is committed so long as a professional remains ignorant of his malpractice.

Goulding, 475 N.Y.S.2d at 956; see also, Bagley v. Hall, 1992 WL 132454 (Oh. Ct. App. filed June 11, 1992) (unpublished) (where plaintiff claimed that accountant was negligent not only for filing the erroneous return but in failing to amend that return during the three-year time to amend, "to the extent that defendant had an independent duty to correct his initial error in the 1984 tax return, defendant first breached that duty immediately after filing the erroneous return in 1985; hence the negligent conduct occurred more than four years before filing the present action").

Here, like in Fabio, Leon Jones Feed & Grain, Inc., and Goulding, Respondents cannot ignore the fact that the cause of action accrued when the taxes were filed and excessive taxes paid by arguing that greater damages could have been prevented by future acts made to ameliorate the same mistake already made.

b. Respondents sustained "some damage" upon the filing of the 2001 return without the Section 754 election.

In his initial brief, McDonald submitted that immediately upon filing the faulty 2001 tax returns at issue, Respondents sustained "some damage" consisting of overpaid taxes and the resulting damages for the loss of use of those funds and the costs to prepare amended returns that was necessitated by the original faulty tax return. See Herrmann v. McMenomy & Severson, 590 N.W.2d 641 (Minn. 1999) (statute of limitations in legal malpractice action begins to run "so long as 'some damage' has occurred as a result of the alleged malpractice"); Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006) ([A] cause of action accrues, and the statute of limitations begins to run, on the occurrence of any compensable damage, whether specifically identified in the complaint or not.").

In their responsive brief, Respondents concede that their damages "are generally overpaid taxes by the partners of the three entities" (Respondents' brief at p. 23). Respondents concede that, as a result of the failure to make the Section 754 election in the original 2001 income tax returns, they were unable to take additional depreciation deductions that resulted in paying more in taxes than would otherwise have been required (Respondents' brief at p. 10) ("754 elections therefore created the opportunity for the partners of the partnerships to decrease the amount of taxes they would pay when compared to taxes paid if the 754 election is not made"). Furthermore, nowhere in their responsive brief do Respondents dispute they unnecessarily overpaid taxes upon the filing of the 2001 income tax returns or that they sustained damage by the loss of use of those funds when the 2001 tax returns were originally filed. Indeed, Respondents are suing McDonald for the very damages their brief strives to ignore. Nowhere in Respondents' brief do they argue that overpayment of taxes or loss of use of funds is not "some damage." Leon Jones Feed & Grain, Inc. v. General Business Services, Inc., 333 S.E.2d 861 (Ga. Ct. App. 1985) (loss of use of overpaid tax is damage recoverable against a tax adviser); Bagley v. Hall, 1992 WL 132454 (Oh. Ct. App. filed June 11, 1992) ("[a]n overpaying taxpayer is damaged immediately upon making such overpayment"); Brosterman v. Loeb & Loeb, 2003 WL 1373698 (Cal. App. 2 Dist. 2003) ("loss of use of funds is also considered damages from malpractice").

Respondents' sole argument as to why the loss of use of the funds is not damage is based upon an entirely artificial construct. Respondents claim that, under their new analysis that there was not a "breach" until the automatic extension period ran without an amended return being filed, it is impossible for them to have sustained damage before that breach. This is a non sequitur that is easily corrected with the simple recognition that Respondents' claim is obviously based upon a breach which they claim occurred when

McDonald failed to recommend a Section 754 election prior to the tax returns at issue being filed. Under Respondents' tortured analysis, they did unnecessarily overpay taxes and they did lose the use of those funds when the tax returns were filed. They argue, however, that they were not yet "damaged" for accrual purposes. Respondents go on to argue that once the automatic extension period ran without the amended return being filed, then there was a breach of the standard of care which then transforms those prior overpayments and loss of use of those funds into "some damage" which they can recover in this malpractice action. That analysis makes no sense because it is based upon a failure to recognize these were the result of the actual breach. Here, Respondents' claim is that the 2001 tax returns should have included a Section 754 election. They acknowledge that, had they been properly filed with that Section 754 election, they would have paid less in taxes. By failing to make the 754 election, Respondents are claiming that they immediately overpaid taxes and suffered damages resulting from the loss of use of those funds. This is certainly "some compensable damage" for purposes of triggering the running of the statute of limitations.

In their responsive brief, Respondents do not dispute that once the 2001 income tax returns were filed without the Section 754 election, an attendant cost to correct that alleged error also arose. See, 26 C.F.R. 301.9100-2. As McDonald pointed out in his original brief, costs which a client must incur in order to attempt to correct the malpractice of the lawyer are recoverable in a legal malpractice action. See, Bloomer v. Gibson, 912 A.2d 424, 432 (Vt. 2006) ("if plaintiff had incurred legal fees to correct the adverse consequences of defendant's malpractice, those fees may be recoverable because they were 'caused by wrongful act or omission.'").

Respondents argue, however, that in this case, the cost to correct the faulty 2001 income tax returns should not be considered "some damage" for statute of limitations purposes. First, Respondents claim that the cost of correcting the error cannot represent "damage" when the returns were not corrected. The issue is not whether the returns were corrected but whether a claim existed for this cost following the filing of the defective returns. They were not corrected because the later running of the time to make the election made the corrections moot. Simply put, it could no longer have been done. But on April 16, 2002, the returns could have been corrected and that cost was immediately recoverable and supported the claim. See, Herrmann, 590 N.W.2d at 643 (Minn. 1999) (rejecting plaintiff's claim that the statute of limitations did not begin to run until it began expending money to address the prohibited transaction); May v. First National Bank of Grand Forks, 427 N.W.2d 285, 289 (Minn. Ct. App. 1988) (tax lien against property is "some damage" when filed because "time, money and energy have to be expended to either pay it off or to prove that it should not exist, and have it formally removed").

Next, Respondents claim that the cost to correct the earlier error could not be "some damage" because "if those costs were incurred, they would have been incurred if the Larsens were performing their obligations, not breaching them" (Respondents' brief at p. 41). Again, this argument ignores the plain reality that the 2001 tax returns should not have been filed without the election. While the cost of correcting and re-filing the returns before the deadline to make the election would, indeed, have prevented the "real" breach as argued by Respondents, it nevertheless represented a collectible cost against Appellant for failing to file the correct tax returns in the first instance.

Finally, Respondents contend that the cost of attempting to fix the faulty returns is not damage is supported by Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006) and Herrmann v. McMenomy & Severson, 590 N.W.2d 641 (Minn. 1999). Respondents' reliance on these two cases is simply misplaced.

Turning to Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006), Respondents contend that McDonald's argument that the cost to correct the error is "some damage" is like attorney Mirviss arguing that there was "some damage" when he presented the negligently drafted antenuptial agreement to the parties for signature because, at that point, the client could have recognized the error and demanded that it be redrafted (Respondents' brief at p. 42). McDonald is not and never has argued that Respondents' cause of action accrued on the date that the Larsens negligently prepared the faulty return. The date that the return was prepared, but not yet filed, was not a "point of no return" because it was still simply a draft document subject to revision. Rather, the damage in this case arose (and it became a "point of no return") when the tax returns were filed because unnecessary taxes were paid and the cost of preparing and filing an amended return arose. As of the date of filing, like the date of marriage in Antone, rights were lost and damages were incurred. It was at that point, Respondents paid more in taxes than they were otherwise required to pay and began incurring damages for loss of use of those overpaid taxes. Similarly, upon filing the faulty return, the necessity for preparing and filing an amended return was created. That obligation, and its attendant cost did not exist prior to filing. The cost of preparing and filing the amended return is compensable damage in a legal malpractice case.

Respondents' reliance on Herrmann v. McMenomy & Severson, 590 N.W.2d 641 (Minn. 1999) is similarly misplaced. Respondents claim that in Herrmann, the statute of limitations began to run on the date that the excise taxes and penalties became fixed which was the date that they engaged in prohibited transactions. They argue, therefore, that Herrmann compels the result that the statute of limitations does not run until the liability for the taxes at issue became a certainty which is only after the automatic extension period ran. The problem with Respondents' analysis is that the facts of Herrmann and the facts of this case are different. In Herrmann, the negligence was the failure to advise the client not to engage in certain transactions. The damages were incurred when the transactions took place resulting in immediate liability for excise taxes. Unlike the present case, in Herrmann there were no damages prior to the client engaging in the prohibited transactions. In this case, there were damages that existed prior to Respondents losing the ability to correct the error. There was overpayment of taxes and loss of use of funds. There was also the attendant cost resulting from the failure to file the Section 754 election with the original taxes.

Here, there can be no dispute that Respondents suffered compensable damages immediately upon filing of the faulty returns. Those damages include the loss of use of funds caused by the unnecessary overpayment of taxes and the necessary cost of amending the return to fix the prior error. Had these damages been alleged in a legal malpractice action brought on April 16, 2001, they would have survived a Rule 12 motion.

C. McDonald's Response to Respondents' Cross-Appeal.

1. The Minnesota Supreme Court has never adopted the "continuous representation" doctrine to toll the statute of limitations in a legal malpractice case and, furthermore, the doctrine is inapplicable in this case.

By notice of related appeal, Respondents have sought review of the trial court's refusal to apply the "continuous representation" doctrine as an alternate basis for denying McDonald's motion for summary judgment. Respondents argue that if this Court concludes that their legal malpractice claims against McDonald are barred by the statute of limitations under the "some damage" rule, it should then apply the "continuous representation" doctrine to toll the accrual of the statute of limitations on these claims because McDonald continued to represent them in various matters through 2007. Respondents' request for this Court to apply the continuous representation doctrine should be rejected. First and foremost, the Minnesota Supreme Court has never recognized the "continuous representation" doctrine in a legal malpractice case. Furthermore, even if the doctrine had been adopted in Minnesota, it is inapplicable here. Under the "continuous representation" doctrine, the statute of limitations is tolled while the attorney continues to represent a client in a specific transaction. In this case, there is no claim here that McDonald continued to provide the Respondents any legal advice regarding the Section 754 election or the income tax returns at issue after they were filed. To the contrary, it is clear that any claim that McDonald provided legal advice regarding the Section 754 election or the income tax returns at issue, that representation ceased when he allegedly concurred with the Larsens not to make the election. At that point, McDonald had given his advice on that issue and his legal representation on that issue terminated. The mere fact that he continued to represent the Respondents in other matters cannot be used to extend the statute of limitations for this claim. Accordingly, Respondents' argument that the "continuous representation" doctrine should be applied in this case should be rejected.

In those jurisdictions which have adopted the "continuous representation" doctrine, it:

> tolls the statute of limitation or defers the accrual of cause of action while the [professional] continues to represent the client in the representation relates to the same transaction or subject matter as the allegedly negligent acts.

Schuster v. McGee, Ct. File No. C1-92-501, 1992 WL 213566 (Minn. Ct. App. Sept. 8, 1992) (unpublished).

Minnesota, however, has never adopted the continuous representation doctrine. See, Reid Enterprises, Inc. v. Deloitte & Touche, LLP, Ct. File No. C8-99-1801, 2000 WL 665684 (Minn. Ct. App. May 23, 2000) ("The district court could not properly [find the statute tolled by continuing representation] because Minnesota has not yet recognized the tolling of statute of limitations by "continuous representation in situations such as this"); Hellman v. Hertogs, Ct. File No. C6-97-1467, 1998 WL 8461 (Minn. Ct. App. Jan. 13, 1998).

In arguing for the "continuous representation" doctrine, Respondents disregard the last two decades of Minnesota statute of limitations cases in legal malpractice matters and claim that, despite the numerous appellate court decisions confirming the "some damage" rule in legal malpractice actions, Minnesota law really holds that a cause of action against a lawyer does not accrue until the representation is completed. Respondents rely on the dated decisions of Schuster v. McGee, Ct. File No. C1-92-501, 1992 WL 213566 (Minn. Ct. App. Sept. 8, 1992) (unpublished), Anoka Orthopedic Associates, P.A. v. Mutschler, 773 F. Supp. 158, 169 (D. Minn. 1991), May v. First National Bank, 427 N.W.2d 285 (Minn. Ct. App. 1988), and Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976). Respondents' reliance on these cases to support the proposition that the "continuous representation" doctrine has been adopted in Minnesota is misplaced for a number of reasons.

Respondents cite to Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976), and to May v. First National Bank, 427 N.W.2d 285 (Minn. Ct. App. 1988) for the proposition that Minnesota follows the last date of representation rule. In reviewing these cases, however, it is unclear whether these courts were ever intending to adopt the continuing representation rule. For example, in Bonhiver, Bonhiver, acting as a receiver, sued an insurance company's accountant and the accounting firm as a result of damages sustained through ongoing misappropriation by a third party. Bonhiver claimed that the accountant's negligence allowed the misappropriation to occur and continue. On this issue of the statute of limitations, the Minnesota Supreme Court noted:

> Defendant Graff left the employ of Schwartz, Frumm November 5, 1964. The last act of negligence chargeable to Schwartz, Frumm occurred either by that date or sometime in November 1964. The Kitzers were withdrawing money continuously during this period. Thus, as of some time in November 1964, the company's cause of action against Schwartz, Frumm had accrued: All of the negligent acts chargeable to Schwartz, Frumm had been committed and damage to American Allied had occurred.

Bonhiver, 248 N.W.2d 291, 296 (Minn. 1976).

Based on these facts, the Minnesota Supreme Court concluded that the commencement of the accounting malpractice action in October 16, 1970 was within the six-year statute of limitations. Unfortunately, other than these few sentences cited above, there is no analysis as to how the court reached this conclusion. Relying on Bonhiver for the proposition that Minnesota recognizes the continuing representation doctrine, a concept that is never even mentioned or analyzed in the decision, is misplaced.

Respondents next cite to May v. First National Bank of Grand Forks, N.D., 427 N.W.2d 285 (Minn. Ct. App. 1988). A close review of May demonstrates that the court was less concerned with adopting a "continuing representation" rule than it was with showing that under either analysis the claim was barred. In May, the plaintiff alleged that the lawyers were negligent in failing to advise them over a period of years that certain transactions violated tax rules. On the statute of limitations issue, the Minnesota Court of Appeals found that:

> The trial court determined that actual damage, if any, had to occur between May 1, 1979 the date the first cash lease payment was accepted and February 10, 1981 the date First Bank was discharged as personal representative and the last date of any legal services provided to the plaintiffs by the defendant law firm. We agree.

May, 427 N.W.2d at 289.

Given the fact that the lawsuit in May was not commenced until October 1987, the Minnesota Court of Appeals concluded that the claim was time-barred. Id. Again, this one sentence in May cannot be used to support the proposition that Minnesota has adopted the rule that continuing representation to toll the statute of limitations. In May, the court did not have to make a determination as to when the damage occurred because, regardless of what particular point during the representation "some damage" occurred, the case was clearly brought more than six years after the end of the attorney-client relationship. See Fletcher v. Zellner, 909 F. Supp. 678, 684 (D. Minn. 1995) (rejecting the position that May supports the "continuing representation" doctrine on that basis). Accordingly, Respondents cannot rely on May for the proposition that Minnesota follows a "continuing representation" rule.

Respondents also rely on Anoka Orthopedic Associates v. Mutschler, 773 F. Supp. at 158 (D. Minn. 1991) and the unpublished case of Schuster v. McGee, Ct. File No. C1-92-501, 1992 WL 213566 (Minn. Ct. App. Sept. 8, 1992). While it is true that both of these cases did appear to apply the "continuing representation" doctrine, their holdings have been explicitly called into question and the application of the rule has been rejected in all subsequent cases. See, Fletcher v. Zellner, 909 F. Supp. at 785 (D. Minn. 1995) (questioning Anoka Orthopedic Associates on the basis that "This [decision] does not indicate that the continuing representation doctrine is controlling in all legal malpractice cases."); Hellman v. Hertogs, Ct. File No. C6-97-1467, 1998 WL 8461 (Minn. Ct. App. filed Jan. 13, 1998) ("Nor do we address appellants' arguments that their claims were not barred, other than to note that the Minnesota Supreme Court has not adopted the continuous representation rule"); Reid Enterprises, Inc. v. Deloitte & Touche, LLP, Ct. File No. C8-99-1801, 2000 WL 665684 (Minn. Ct. App. filed May 23, 2000) ("The district court could not properly [find the statute of limitations tolled by continuing representation] because Minnesota has not yet recognized the tolling of the statute of limitations by 'continuous representation' in situations such as this.").

Furthermore, even to the extent that these cases adopted a "continuing representation" rule, every subsequent decision from the Minnesota Supreme Court has held that the "some damage" rule applies in legal malpractice cases. Antone v. Mirviss, 720 N.W.2d 331, 336 (Minn. 2006); Herrmann, 590 N.W.2d at 643.[4] Here, Respondents can make no serious argument, given the last two decades of Minnesota malpractice statute of limitations jurisprudence, that the "continuing representation" doctrine has been adopted in Minnesota. Quite to the contrary, Minnesota appellate courts have consistently and unambiguously held that a legal malpractice action accrues and the statute of limitations begins to run, on the date that the plaintiff suffers "some damage," not when the representation ends.

Respondents' argument suffers from an additional flaw. Even if this Court were to conclude that the "continuing representation" doctrine should be adopted in Minnesota, it

[4] In fact, in Herrmann, the attorney continued to represent the clients after they began engaging in the prohibited transactions (M.A. 179). If, as Respondents contend, Minnesota law tolls the statute of limitations in a legal malpractice action so long as the attorney continues to represent the client, one would think that the Minnesota Supreme Court would have noted that fact in its opinion. To the contrary, the Herrmann court obviously concluded that the continuing representation was irrelevant to the analysis.

would not be applicable in this case. In those jurisdictions that have adopted some version of the continuing representation doctrine, it is applied in cases where the attorney continues to represent the client in the "same transaction or subject matter" over the course of years. See, Schuster v. McGee, Ct. File No. C1-92-501, 1992 WL 213566 (Minn. Ct. App. Sept. 8, 1992) (unpublished); Binstock v. Tschider, 374 N.W.2d 81, 85 (N.D. 1985) (while attorney represented clients on other matters both before and after the transaction at issue, there was no evidence that attorney continued to provide legal advice regarding the transaction at issue); Greene v. Morgan, Theeler, Cogley & Petersen, 575 N.W.2d 457 (S.D. 1998) (even though attorney and client tangentially discussed the negligently drafted antenuptial agreement in subsequent matters, that is insufficient to establish ongoing representation regarding the antenuptial agreement). The mere fact that the attorney continues to represent the client on other matters, even matters tangentially related to the alleged malpractice, does not toll the statute of limitations. Greene, 575 N.W.2d at 460; Smith v. Stacy, 482 S.E.2d 115, 121 (W. Va. 1996) (continuous representation doctrine does not apply where attorney's subsequent representation is only tangentially related to the allegedly negligent services); Kearney v. Firley, Moran, Freer & Cassa, P.C., 651 N.Y.S.2d 781 (N.Y. App. Div. 1996) ("The mere recurrence of professional services does not constitute continuous representation where the later services were not related to the original service."); Apple Bank for Savings v. PricewaterhouseCoopers, LLP., 895 N.Y.2d 361 (N.Y. App. Div. 2010) (statute of limitations on accounting malpractice action arising out of improper tax advice accrued on the date of the advice and subsequent accounting services provided by the defendant did not constitute continuing representation because there was no mutual agreement that firm would continue to provide advice on the topic after the original advice); McCoy v. Feinman, 755 N.Y.S.2d 693, 785 N.E.2d 714 (N.Y. App. Div. 2002) (Continuous representation doctrine applies "where there is a mutual understanding of the need for future representation on the specific subject matter underlying the malpractice claim."). This "same transaction or subject matter" limitation in the "continuous representation" doctrine is akin to the limitation which is applied in the "continuing course of treatment" rule applicable in medical malpractice cases. See Grondahl v. Bulluck, 318 N.W.2d 240, 243 (Minn. 1982) (continuous course of treatment doctrine tolls the statute of limitations until "the physician's treatment of the particular condition ceases"); Fabio v. Bellomo, 504 N.W.2d 758, 762 (Minn. 1993) (under continuous course of treatment rule, cause of action accrues when the "physician's treatment of the particular condition ceases").

In this case, McDonald asserts that he was never retained by Respondents to review the income tax returns at issue or analyze the appropriateness of making Section 754 elections in the various returns. It is significant that Respondents have never claimed that they retained McDonald to review the tax returns at issue or provide them advice regarding whether or not they should make a Section 754 election. Respondents' claim against McDonald is based upon the testimony of the Larsens that, prior to filing the returns, they contacted McDonald about making the election and that he recommended against making the election (L.A. 0158-159; 0178-179). The Larsens also claim that they sent the applicable tax returns to McDonald to review prior to filing and that he again did not recommend that the Larsens make the election (L.A. 113 at ¶ 18, L.A. 0157).

Although McDonald disputes the accuracy of this testimony of the Larsens, even if the Court assumes these facts to be true, there is no "continuing representation" by McDonald on the issue of these tax returns or making a Section 754 election after he allegedly reviewed the faulty returns. It was discrete legal advice that was completed on or before the tax returns were filed. There is no claim that the Larsens or Respondents ever sought additional advice from McDonald after the filing of the 2000 income tax return about whether the election should be subsequently made for that tax year. Similarly, there is no claim that after the filing of the 2001 income tax return that the Larsens or Respondents sought additional advice from McDonald regarding whether the election should be subsequently made for that tax year. Simply put, there is no evidence that McDonald was continuing to represent the Respondents with regard to either the 2000 or 2001 income tax returns or was continuing to represent them with regard to making a 754 election. In fact, Respondents appear to concede this point. They argue that the failure to give advice with regard to the Section 754 election in 2001 was an "independent" breach based upon separate and distinct facts (Respondents' brief at p. 8).

The facts here are similar to Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993). In Fabio, the physician told the plaintiff that he did not recommend any further treatment for her breast lump. Fabio, 504 N.W.2d at 762. The physician did, however, continue to treat the patient with regard to other medical issues. The Supreme Court concluded that when the physician concluded no further treatment was necessary, his treatment of that condition ceased. Id. That is similar to this case. Here, the Larsens alleged that they spoke with McDonald about the income tax returns prior to being filed and asked him to review the returns. The Larsens allege that McDonald did not want to make a Section 754 election. At that point, McDonald's legal advice on that issue ceased and his representation on that issue terminated.

Apparently recognizing that McDonald's involvement with these tax returns and the Section 754 election terminated on or before the tax returns were filed, Respondents not only ask this Court to adopt the continuing representation doctrine but adopt a version of the doctrine that is even more expansive than applied under the continuing course of treatment rule. Respondents argue that the statute of limitations should be tolled until the attorney terminates his representation entirely.[5] Because the continuing representation doctrine has not been adopted in Minnesota, there is no case law that would support Respondents' analysis. This Court may, however, find medical malpractice cases considering a continuing course of treatment rule instructive. Under the continuing course of treatment rule, like the continuing representation rule for lawyers, a malpractice claim against a physician will run when the physician's treatment of a particular condition ends. Fabio, 504 N.W.2d at 762. The Minnesota appellate courts have been clear that the mere fact a physician continues to treat a patient for other unrelated conditions, does not extend the statute of limitations until the physician terminates treatment for any condition. Id. As noted above, the fact that McDonald continued to

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[5] Respondents' view of the continuing representation doctrine is that so long as representation is ongoing, even though it is in unrelated matters, the statute of limitations will be tolled. In this case, Respondents apparently believe that, if they had a claim of negligence dating back to 1968 against McDonald, they would still be able to pursue that claim because the cause of action was tolled until the end of any representation that occurred in 2007.

represent Respondents until 2007 does not extend the statute of limitations with regard to any negligence with respect to a particular matter in which McDonald's representation terminated on or before April 15, 2002.[6]

CONCLUSION

The district court's March 31, 2010 order denying McDonald's motion for summary judgment on statute of limitations grounds should be reversed. In this case, it is undisputed that Respondents' cause of action against McDonald accrued on the date the income tax returns at issue were filed. On that date, there had been allegedly negligent conduct and resulting damage which is all that is needed for the cause of action to accrue. Because Respondents did not commence this action within six years of filing the defective 2001 partnership tax returns, this matter is barred by the statute of limitations and the trial court's denial of McDonald's motion for summary judgment must be reversed.

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[6] Respondents previously filed a motion to dismiss this appeal on the basis that the statute of limitations issue is not important or doubtful under Minn. R. Civ. App. P. 103.03(i). McDonald submitted an Informal Memorandum opposing that motion. To the extent that this Court will further address that motion, McDonald directs this Court to his previously filed Informal Memorandum and the arguments raised in his principal brief and this responsive/reply brief.

Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8,119 words. The brief was prepared using Microsoft Office® Word 2003.

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