

A10-1439

NO. A10-1447

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

Ames & Fischer Co., II, LLP, et al.,  
Respondents,

v.

John R. McDonald, et al.,  
Appellants (A10-1439),  
Defendants (A10-1447),  
Larsen, Larsen & Associates, P.A., et al.,  
Defendants (A10-1439),  
Appellants (A10-1447).

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... ii

**ARGUMENT** ..... 1

    I.    **THE CONTINUOUS REPRESENTATION DOCTRINE SHOULD BE APPLIED TO FISCHERS’ CLAIMS AGAINST LARSENS AND MCDONALDS** ..... 1

        A.    **The Continuous Representation Doctrine Should Apply to Fischers’ Claims Against the Larsens So That Those Claims Do Not Accrue Until at Least April 5, 2002**..... 1

        B.    **The Continuous Representation Doctrine Should Apply to Fischers’ Claims Against McDonald So That Those Claims Do Not Accrue Until at Least April 9, 2003**..... 5

**CONCLUSION**..... 15

TABLE OF AUTHORITIES

**Cases**

*Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006)..... 5, 8

*Bonhiver v. Graff*, 248 N.W.2d 291, 296-97 (Minn. 1976) ..... 2

*Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993)..... 13, 14

*Fletcher v. Zellmer*, 909 F. Supp. 678 (D. Minn. 1995), *aff'd* 105 F.3d 662  
(8<sup>th</sup> Cir. 1997) ..... 6

*Hellman v. Hertogs*, 1998 WL 8461 (Minn. Ct. App. Jan. 13, 1998)..... 7

*Herrmann v. McMenemy & Severson*, 590 N.W.2d 641 (Minn. 1999)..... 5, 8

*May v. First National Bank*, 427 N.W.2d 285, 289 (Minn. Ct. App. 1988),  
*rev. denied* ..... 6

*Reid Enterprises, Inc. v. Deloitte & Touche, LLP*, 2000 WL 665684  
(Minn. App. May 23, 2000) ..... 2, 7

*Schuster v. Magee*, 1992 WL 213566 (Minn. Ct. App.) (unpublished)..... 1, 6, 7

**I. THE CONTINUOUS REPRESENTATION DOCTRINE SHOULD BE APPLIED TO FISCHERS' CLAIMS AGAINST LARSENS AND MCDONALDS.**

The continuous representation doctrine:

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

*Schuster v. Magee*, 1992 WL 213566 (Minn. Ct. App.) (unpublished) (citations omitted).<sup>1</sup>

When the doctrine is applied, the statute of limitations "begins to run as of the date when the last professional service was performed." *See Anoka Orthopaedic Associates, P.A. v. Mutschler*, 773 F.Supp. 158, 169 (D. Minn. 1991).

**A. The Continuous Representation Doctrine Should Apply to Fischers' Claims Against the Larsens So That Those Claims Do Not Accrue Until at Least April 5, 2002.**

Larsens were Fischers' business and personal accountants, and prepared Fischers' business and personal financial statements and tax returns for 20 years, from 1987 to 2007. During that time, Larsens failed to ensure that 754 Elections were made for three different entities for two different tax years, and their failures and breaches spanned the time period of at least 2002 and 2003 -- well past April 5, 2002.<sup>2</sup> (Larsens were actually still contemplating trying to make the 754 Elections in 2007).<sup>3</sup> The continuous representation doctrine should therefore be applied, which results in all of Fischers' claims against Larsens not accruing until at least April 5, 2002.

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<sup>1</sup> L.A.261-63.

<sup>2</sup> L.A.271-73, ¶¶15-27.

<sup>3</sup> L.S.A.489.

In their Reply, Larsens contend that “no Minnesota Supreme court case has ever recognized or applied “continuing representation” in an accounting malpractice case.”<sup>4</sup> This is simply incorrect, as the doctrine was applied by the Minnesota Supreme Court in *Bonhiver v. Graff*, 248 N.W.2d 291, 296-97 (Minn. 1976). In *Bonhiver*, the Court applied the doctrine to determine that an accounting malpractice claim for negligent failure to detect embezzlement accrued as of the last date of service by the accountants. Fischers cited to *Bonhiver* in their first brief, but Larsens do not even address it in their Reply.

Larsens contend that “continuing representation should not apply in accounting malpractice cases due to the fact CPAs do not typically owe fiduciary duties to their clients.”<sup>5</sup> But the doctrine is applied to professional negligence causes of action, not causes of action for breach of fiduciary duty. And there was no breach of fiduciary duty claim even alleged in *Bonhiver*. So Larsens’ attempt to distinguish claims against accountants is irrelevant to whether the doctrine should be applied here.

Larsens again argue that the unpublished *Reid Enterprises, Inc. v. Deloitte & Touche, LLP*, 2000 WL 665684 (Minn. App. May 23, 2000) opinion weighs against applying the continuous representation doctrine to Fischers’ claims against them. But in *Reid*, the court decided to not apply the continuous representation doctrine based on its determination that it was only applied where there were “continuous and repeated breaches.” Since the court had determined that the claim could have been asserted in

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<sup>4</sup> Larsens’ Reply Brief, pp. 8-9.

<sup>5</sup> Larsens’ Reply Brief, p. 9.

1982, and that the accountants did not engage in continuous and repeated breaches during the performance of their services for Reid until 1996, it did not apply the doctrine.

But here, there are “continuous and repeated breaches” by Larsens in 2002 and 2003 that warrant extending the accrual date to at least April 5, 2002.<sup>6</sup> Larsens breached their obligations when they 1) didn’t timely make the Elections for the 2000 tax year by April 15, 2002, for three different Fischer partnerships; and 2) didn’t timely make the Elections for the 2001 tax year by April 15, 2003, for three different Fischer partnerships. And Larsens had several reminders that they should be timely making the Elections by their due dates for both tax years during the relevant time period. As expert Tom Boesen opined:

15. The ability to timely make the Elections up and until April 15, 2002, for tax year 2000, and up and until April 15, 2003, for tax year 2001, is especially important in this case, because the Larsens were reminded of the obligations to timely make the Elections after the original filing of the returns but prior to April 15 of the following year.
16. In 2002, when the Larsens prepared the Fischers’ tax returns for 2001,<sup>7</sup> they should have realized that they should make the 754 Elections for the previous tax year of 2000, and they still had time to do so prior to April 15, 2002, as a matter of right. But the Elections were not made prior to April 15, 2002, which was a breach of the standard of reasonable care that Larsens owed to the Fischers, which breach caused the damages described in my reports.
17. And the same is true as to tax year 2001. When Larsens prepared the 2002 tax returns in 2003,<sup>8</sup> they were reminded of their obligations to timely make the Elections for tax year 2001, and still had time to do so prior to April 15, 2003.

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<sup>6</sup> L.A.271-73, ¶¶15-27.

<sup>7</sup> L.S.A.179-93; 194-226; 291-321.

<sup>8</sup> L.S.A.361-95; 407-35; 436-67.

18. Larsens had a second reminder in July, 2002, to timely make the 754 Elections for tax year 2001 by April 15, 2003. The Larsen Firm drafted the initial and the amended estate tax return for Mathias Fischer. The estate return requires valuations for all of the investments owned at death including the three partnerships AFC, FMP, and FSA. These three partnerships were a significant portion of the estate of Mathias Fischer. The combined value of these three entities was valued in excess of \$12 million. Larsens prepared and sent to the IRS an amended estate tax return for Mathias Fischer in July, 2002. That amended estate tax return included the appraisals and other information that should have reminded Larsens that the 754 Elections should be made for the 2001 partnership interest transfers for tax year 2001, and there was still time to make those Elections by April 15, 2003.
19. Larsens had a third reminder in October of 2002, to timely make the 754 Elections for tax year 2001 by April 15, 2003. FMP received notification from the IRS that it planned to audit FMP's income tax returns. The Larsen firm represented FMP in this audit. Notice of the IRS's intent to audit prompts tax preparers and advisors to assess the taxpayers' tax positions and to take action to reduce any tax exposure that can be identified.
20. But none of these three reminders to the Larsens in 2002 resulted in the Elections being made prior to April 15, 2003, for tax year 2001, which was a breach of the standard of reasonable care that Larsens owed to the Fischers, which breach caused the damages described in my reports.<sup>9</sup>

The failures by the Larsens to timely make the 754 Elections for the three partnerships for both tax years, despite these reminders, constitute "continuous and repeated breaches" that justify extending the accrual date to at least April 5, 2002.

Larsens also argue that the continuous representation doctrine should not be applied because it is "inconsistent with the "some damage" rule."<sup>10</sup> But the two doctrines are not inconsistent. The some damage rule applies to professional negligence claims

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<sup>9</sup> L.A.271-72, ¶¶15-20.

<sup>10</sup> Larsens' Reply Brief, p. 9.

where there is a discrete scope of representation and limited services rendered, as was the case in both *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006), and *Herrmann v. McMenemy & Severson*, 590 N.W.2d 641 (Minn. 1999). But where, as here, there is a continuing representation of the client or “continuous and repeated breaches” by the professional, the doctrine should be applied so that the accrual date for the negligence claim is tolled until the continuous representation ceases.

In sum, the continuous representation doctrine should be applied to Fischers’ claims against Larsens. When it is, all of Fischers’ claims against Larsens do not accrue until after April 5, 2002, and are all timely-asserted as a matter of law.

**B. The Continuous Representation Doctrine Should Apply to Fischers’ Claims Against McDonald So That Those Claims Do Not Accrue Until at Least April 9, 2003.**

Fischers’ contention that the continuous representation doctrine should be applied to their claims against McDonald is also strong. McDonald represented the Fischers for 45 years, and during that time he was intimately involved with providing advice and services relating to the Fischers’ family and business planning. And McDonald’s role increased upon the death of Math Fischer and during the most relevant time period (2001-2003). The continuous representation doctrine should therefore be applied, which results in Fischers’ claims against McDonald not accruing until at least April 9, 2003.

McDonald makes three principal arguments for why the doctrine should not be applied, each of which is without merit. First, McDonald makes several misstatements regarding Minnesota case law in a misguided attempt to convince this court that

Minnesota law does not allow for application of the continuous representation doctrine in this case.

For example, McDonald contends that “Minnesota... has never adopted the continuous representation doctrine.”<sup>11</sup> But that is simply false. Minnesota courts have applied the doctrine to legal malpractice cases to toll the accrual date to when the “last professional service was performed.” See *Schuster*, 1992 WL 213566 (Minn. Ct. App.) (unpublished)(applying the doctrine to claim against attorneys); *Anoka Orthopaedic*, 773 F.Supp. at 169-70 (discussing and applying the continuous representation doctrine to claims against attorneys); *May v. First National Bank*, 427 N.W.2d 285, 289 (Minn. Ct. App. 1988), *rev. denied* (affirming trial court’s determination that cause of action for legal malpractice did not accrue until “the last date of any legal services provided to [clients] by the defendant law firm”); *Fletcher v. Zellmer*, 909 F. Supp. 678 (D. Minn. 1995), *aff’d* 105 F.3d 662 (8<sup>th</sup> Cir. 1997) (discussing the doctrine but finding it not applicable to specifics of legal malpractice claims asserted in the action).<sup>12</sup>

Apparently recognizing the overstatement that “Minnesota has never adopted” the doctrine, McDonald admits later in his brief that both *Anoka Orthopedic* and *Schuster* “did appear to apply the “continuing representation” doctrine[.]”<sup>13</sup> McDonald then contends that those cases were later “called into question and the application of the rule has been rejected in all subsequent cases.” But this is another overstatement by McDonald. For example, in *Fletcher*, the court did not “reject application of the rule.”

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<sup>11</sup> McDonald’s Reply Brief, p. 18.

<sup>12</sup> Other jurisdictions have also adopted the doctrine. See M.A.135, n.44.

<sup>13</sup> McDonald’s Reply Brief, p. 21.

Rather, it stated that the doctrine is not “controlling in all legal malpractice cases,” and found that the particular facts of that case did not warrant its application.

The doctrine was also not applied in the unpublished case of *Hellman v. Hertogs*, 1998 WL 8461 (Minn. Ct. App. Jan. 13, 1998), not because the court “rejected application of the rule,” but rather because the appellate court did not even reach the issue. This court affirmed the trial court’s dismissal of the legal malpractice claim based on appellants’ failure to support their claim with expert testimony. In its order affirming the dismissal, this court expressly declined addressing appellants’ arguments that their claims were not time-barred because the court had already affirmed dismissal based on the failure to state a claim. The court noted, in dicta, that “the Minnesota Supreme Court has *not yet* adopted the continuous representation rule.” But this dicta in an unpublished decision does not translate into a precedential rejection of the doctrine by this court.

And in the unpublished *Reid* case, as already described, the court decided not to apply the doctrine not because Minnesota law wouldn’t allow it, but rather because the court found that the defendant accountants had not committed continuous and repeated breaches of their duties to their clients. So McDonald is simply incorrect when he contends that the continuous representation doctrine has been “rejected” in all the cases subsequent to *Anoka Orthopedic* and *Schuster*.

McDonald makes another overstatement by contending that

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.<sup>14</sup>

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<sup>14</sup> McDonald’s Reply Brief, p. 22.

McDonalds' purported support for this statement is *Antone* and *Herrmann*. But, as Fischers noted in their opening brief, in neither case 1) was there continuous representation by the defendant attorney or law firm; 2) did the plaintiff even argue that the doctrine should apply; or 3) did the Minnesota Supreme Court even address the doctrine. So those cases do not in any way suggest that this court should not apply the doctrine to Fischers' claims in this case.

In sum, Minnesota courts have utilized the continuing representation doctrine in accounting and legal malpractice cases, and the Minnesota Supreme Court has not rejected application of the doctrine in general or suggested that it can or should not be applied here. McDonald's first argument that Minnesota law does not allow for the doctrine to be applied in this case is therefore without merit.

McDonald's second argument is equally meritless. McDonald contends that the doctrine is not applicable in this case because he did not continuously represent the Fischers after what he contends were his allegedly negligent acts, and that his representation of the Fischers ended on April 15, 2002, the due date for the 2001 tax returns.<sup>15</sup> McDonald contends that Fischers' sole claim against him is based on Larsens' testimony that McDonald reviewed the 2000 and 2001 tax returns before they were originally filed, and he did not recommend that the 754 Elections be made. With that incorrect premise, McDonald argues that

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<sup>15</sup> McDonald's Reply Brief, p. 27.

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 [Fischers] 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 [Fischers] 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.<sup>16</sup>

This second argument is defective and should be rejected, for at least two reasons.

First, it is based on the false premise that Fischers’ claims are that McDonald’s negligent acts were his failures to recommend that the 754 Elections be included with the original tax returns. As set forth in Fischers’ original brief, Fischers’ claims are not that McDonald failed to recommend that the 754 Elections be made with the original tax returns, but rather that he failed to recommend that the Elections be timely made by their due dates of April 15, 2002, for tax year 2000, and April 15, 2003, for tax year 2001. And, in fact, Fischers do allege in their complaint that McDonald breached his duties for each tax year after the tax returns for both tax years were originally filed. In their complaint, Fischers allege:

64. On information and belief, McDonald breached his duty of reasonable care by not telling Larsen or Plaintiffs to take steps to make 754 Elections and file Section 743 Statements for Fischer Marketplace, Ames and Fischer, and FSA *for the tax returns that had already been filed* for the 2000 and 2001 tax years.

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<sup>16</sup> McDonald’s Reply Brief, p. 25.

So McDonald's premise that Fischers don't allege that McDonald breached his duties after the original tax returns were filed is simply false.

The second defect with McDonald's argument is that it fails to address how the undisputed evidence shows that McDonald did engage in continuous representation of the Fischers and did engage in "continuous and repeated breaches" during the relevant time period. Since Fischers commenced their action against McDonald on April 9, 2009, the issue presented on appeal is whether all or any of their claims against McDonald accrued on or after April 9, 2003 (6 years prior to the commencement date). McDonald contends that all of Fischers' causes of action against him accrued on or before April 16, 2001, the day after the due date for the 2000 tax returns. This argument is defective, of course, because it fails to address the April 15, 2002, deadline for the 754 Elections for tax year 2000, and it fails to address the independent negligent acts for tax year 2001 that did not even occur until April 16, 2003.

But even if McDonald's argument that the claims against him accrued upon the due dates for the 2000 and 2001 tax returns is accepted, then at best for him the issues presented by Fischers' Notice of Related Appeal are: 1) for tax year 2000, was there continuous representation by McDonald between April 16, 2001, and April 9, 2003; and 2) for tax year 2001, was there continuous representation by McDonald between April 16, 2002, and April 9, 2003. And the undisputed evidence shows that McDonald did continuously represent the Fischers for both time periods. McDonald testified that he

- has “represented the Mathias H. Fischer family including his wife Ann S. Fischer, his daughter, Liza A. Robson, and his son, Peter W. Fischer, and various business entities from 1962 through 2007.”<sup>17</sup>
- “personally organized all of the entities and trusts which are plaintiffs in [the lawsuit].”<sup>18</sup>
- is “personally acquainted with [Larsens] and have met with them, jointly and severally, on numerous occasions in conjunction with my representation of [Fischers]. In addition I have over the years written to [Larsens] concerning [Fischers’] business planning.”<sup>19</sup>

Liza Robson testified that McDonald represented the Fischer family and entities continuously from 2000 to 2007,<sup>20</sup> and that after her father died in 2000,

the reliance that the Fischer Family and Fischer Entities placed on the Larsens and McDonald increased because my brother, Peter, my mother Ann, and I knew less about what was going on with the financial and tax issues than [my father] Math did, and it took quite awhile for us to “get up to speed” about what was going on with those issues.<sup>21</sup>

McDonald also wrote memos to the Fischers and Larsens recommending the partnership transfers in 2001 that provided an independent basis for and opportunity to make the 754 Elections for all three partnerships for the 2001 tax year.<sup>22</sup> So McDonald did continuously represent the Fischers between April 15, 2001, and April 9, 2003, the relevant time period for both tax years.

Moreover, Fischers’ expert, Tom Woessner, opined that McDonald continuously represented the Fischers during the two time periods, and that there were several

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<sup>17</sup> L.A.108, ¶6.

<sup>18</sup> L.A.108, ¶7.

<sup>19</sup> L.A.108, ¶6.

<sup>20</sup> L.A.76-77, ¶¶6-7.

<sup>21</sup> L.A.77, ¶9.

<sup>22</sup> L.S.A.103-116, 144-171.

opportunities and reminders to recommend that the 754 Elections be made for both tax years that McDonald missed. According to Woessner,

The ability to make the election up and until April 15, 2002, for tax year 2000, and up and until April 15, 2003, for tax year 2001, is especially important in this case, because McDonald breached his duties of care and his fiduciary duty to the Fischers when he missed additional opportunities to recommend that the election be made after the original filing of the returns but prior to April 15 of the following year.

Larsens have testified that McDonald reviewed and approved the tax returns that Larsens prepared for at least tax years 2000 and 2001. McDonald worked for the Fischers for over 40 years, and at least during the years 2000-2006. In 2002, when the Larsens prepared the Fischers' tax returns for 2001, and according to the Larsens showed them to McDonald prior to April 15, 2002,<sup>23</sup> McDonald should have realized that the 754 election should have been made for the previous tax year of 2000, and there was still time to do so prior to April 15, 2002, as a matter of right. McDonald also wrote a 3/18/02 letter to the IRS regarding the Math Fischer estate (Depo. Ex. 20),<sup>24</sup> a 3/20/02 memo to the Larsens re the "Fischer Tax Returns – 2000" (Depo. Ex. 21),<sup>25</sup> and on 4/11/02, he faxed to Larsens Fischer gift tax returns for 2001 (Depo. Ex. 22).<sup>26</sup>

Without limitation, these three activities by McDonald presented additional opportunities and reminders to McDonald that he should recommend that the 754 elections be made for the 2000 tax year. But McDonald did not recommend that the elections be made for any of the three entities prior to April 15, 2002, which constituted additional breaches of the standard of reasonable care and fiduciary duties that McDonald owed to the Fischers, which breaches caused Fischers the damages described in Boesen's Report.

The same is true as to tax year 2001. When Larsens prepared the 2002 tax returns in 2003, and apparently showed those returns to McDonald,<sup>27</sup> McDonald should have realized that he should recommend that the 754 elections be made for tax year 2001, and that there still was time to do so prior to April 15, 2003. In addition, McDonald prepared and wrote a memo

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<sup>23</sup> L.S.A.175-93; 194-226; 291-321.

<sup>24</sup> L.S.A.233-34.

<sup>25</sup> L.S.A.235-39.

<sup>26</sup> L.S.A.260-64.

<sup>27</sup> L.S.A.361-95; 407-35; 436-67.

dated December 31, 2002, regarding the “Partner’s Partnership Basis” for FMP (Depo Ex. 34),<sup>28</sup> and attended a meeting on January 7, 2003, with the Larsens and Fischer representatives to discuss the “1998-2001 1040’s and 709’s for the various family members as well as looking forward to 2002 tax year.” (Depo Ex. 32).<sup>29</sup>

These activities by McDonald presented additional opportunities and reminders that should have resulted in McDonald recommending that the 754 elections be made for the three entities for tax year 2001 prior to April 15, 2003. But McDonald failed to make that recommendation, which constituted additional breaches of the standard of reasonable care and the fiduciary duty that he owed to the Fischers. Those breaches caused the damages described in Boesen’s Report, which damages relating to the 2001 tax year did not occur until April 15, 2003, at the earliest.<sup>30</sup>

This expert testimony is further, undisputed evidence that from April 15, 2001, to April 9, 2003, McDonald continuously represented the Fischers and engaged in “continuous and repeated breaches” of his duties to the Fischers when he failed to recommend that the Elections be timely made for the three entities for both tax years, which breaches caused Fischers damages. So McDonald’s second contention, that he did not continuously represent the Fischers from April 15, 2002, to April 9, 2003, is equally meritless.

McDonald’s third argument is to attempt to draw a parallel between his arguments and those of the defendant physician in *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993).<sup>31</sup> In *Fabio*, Dr. Bellomo noticed a lump in patient Fabio’s left breast on two occasions, once between 1982 and 1984, and once in 1986. On both occasions, Fabio had gone to see Dr. Bellomo for an unrelated ailment, and Dr. Bellomo told Fabio not to

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<sup>28</sup> L.S.A.331-41.

<sup>29</sup> L.S.A.342-58.

<sup>30</sup> L.A.100.

<sup>31</sup> McDonald’s Reply Brief, pp. 25-26.

worry about the lump because it was a “fibrous mass.” The mass later turned out to be cancerous, and Fabio brought a medical malpractice action based on the misdiagnosis in 1986, which claim was timely. Fabio later sought to amend her complaint to add a claim based on the misdiagnosis between 1982 and 1984, which motion was denied by the trial court because the court found that the claim arising out of that first misdiagnosis was time-barred.

On appeal, the court addressed whether the trial court abused its discretion in denying the motion to amend the complaint, and whether the trial court was correct that “there was no continuing course of treatment” that would extend the accrual date on the claimed misdiagnosis between 1982 and 1984. The court noted:

When Dr. Bellomo examined Fabio’s breast between 1982 and 1984, he did not recommend any further treatment. His treatment of her condition ceased at the time he told her not to worry about it. We therefore hold that the trial court was correct to rule that Dr. Bellomo’s examinations of Fabio’s breast that occurred between 1982 and 1984 are barred by the statute of limitations, because these examinations were not part of a continuing course of treatment.

*Fabio*, 504 N.W.2d at 763. McDonald argues that he, like Dr. Bellomo, ceased representing the Fischers upon the filing of the 2000 and 2001 tax returns without the 754 Elections.

But the facts in this case stand in stark contrast to those in *Fabio*, where the defendant physician did not even have contact with the plaintiff for approximately two years, and the plaintiff was attempting to establish “continuing treatment” by the doctor during that two-year gap. There is no similar gap in McDonald’s representation of the Fischers. As addressed above, McDonald’s representation was continuous during the

relevant time period of April 15, 2001 to April 9, 2003. During that time period, McDonald continued to represent the Fischers in the same capacity that he had prior to the filing of the tax returns, and had several post-filing reminders that he should be recommending that the 754 Elections be timely made for each of the three entities, for both tax years. So McDonald's representation of Fischers was more continuous than was Dr. Bellomo's treatment of Fabio, and McDonald's reliance on the holding in *Fabio* is therefore misplaced. His third argument for why the continuous representation doctrine should not be applied to the claims against him is therefore also without merit.

In sum, the continuous representation doctrine should be applied to Fischers' claims against McDonald. When it is, all of Fischers' claims against McDonald, including those independent claims relating to tax year 2000, do not accrue until after April 9, 2003, and are all timely-asserted.

### CONCLUSION

This court should apply the continuous representation doctrine to Fischers' claims against Larsens and McDonald, determine that all of Fischers' claims are timely-asserted, and dismiss Appellants' statute of limitations defense.

Dated: December 22, 2010.

**SIEGEL, BRILL, GREUPNER,  
DUFFY & FOSTER, P.A.**

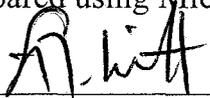
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**CERTIFICATION**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 131.01, subd. 5(d)(7)(C), for a brief produced with a proportional font. The length of this brief is 4,314 words. This brief was prepared using Microsoft Word, Version 2003.

  
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