 

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.,

*Defendants (A10-1439),*
*Appellants (A10-1447).*

## BRIEF AND ADDENDUM OF APPELLANTS LARSEN, LARSEN & ASSOCIATES, P.A., JAMES LARSEN AND MICHAEL LARSEN

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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).

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## STATEMENT OF THE LEGAL ISSUE

The district court certified the following question:

> Does a cause of action for professional malpractice arising out of a failure to make a Section 754 election accrue when (1) the tax return is filed without the election, or (2) upon the expiration of the automatic extension period?

Answer: A cause of action for professional negligence accrues upon the occurrence of "some damage" as the result of the defendant's alleged breach of care. These respondents began to suffer damage when the CPA prepared the allegedly negligent returns without the 754 elections for the respondents to file. At that point, the respondents were exposed to additional tax liability and other damages. To mitigate that liability, the respondents would have had to take later corrective action, including utilizing an extension period to file amended returns to claim the 754 elections. The cost of this corrective action is itself an element of damage that triggered the running of the statute. The later extension period represents nothing more than an opportunity to ameliorate the damage and does not affect when the cause of action accrued.

Authority: Minn. Stat. § 541.05, subd. 1(5); *Antone v. Mirviss*, 720 N.W.2d 331, 335 (Minn. 2006); *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999).

## STATEMENT OF THE CASE

Respondents sued their CPAs, the Larsen firm, in April 2008 for damages allegedly resulting from failing to apply a tax-saving strategy known as a "754 election" in income tax returns that were prepared more than seven years earlier. In April 2009, respondents sued their long-time attorney, John R. McDonald, for the same alleged negligence and damages. In September 2009, McDonald moved for summary judgment. On October 8, 2009, the District Court for the First Judicial District, Dakota County, Judge Martha Simonett presiding, determined that the cause of action had accrued no later than April 15, 2001 and granted McDonald's motion.

Then, Larsen moved for summary judgment. On December 31, 2009, the district court (Judge Simonett again presiding) denied the motion and determined that the cause of action had not accrued until April 15, 2003. The court also granted permission to file a motion to reconsider the judgment in favor of McDonald. On April 1, 2010, the district court reconsidered the judgment in favor of McDonald. On April 22, 2010, the district court issued amended orders denying the summary-judgment motions of both sets of defendants and certifying the questions presented as "important and doubtful" pursuant to Minn. R. Civ. P. 103.03(i). Both sets of defendants appealed. On June 15, 2010, this Court remanded for further consideration whether the case presents an important and doubtful issue and, if so, for specification of the precise legal question being certified. On July 28, 2010, the district court issued a supplemental Order identifying a specific legal question and making various findings supporting the determination that the issue is important and doubtful. This appeal followed.

## STATEMENT OF THE FACTS

### I. Introduction to the Parties and their Relationships.

Respondents are an intertwining group of wealthy family-owned businesses and trusts. The three primary respondents are Fischer Marketplace ("FMP"), Ames & Fischer ("A&F"), and Fischer Sand & Aggregate ("FSA"). The other 16 respondents each own varying interests, directly or indirectly, in FMP, A&F and FSA. (L.A., 8-10, ¶¶ 31-36.)[1] Respondents' long-time attorney was John R. McDonald of La Crosse, Wisconsin. (Id., 7, ¶ 22.) McDonald represented respondents in business and tax planning for more than 40 years. (Id., 76A, 109.) At the times relevant to this lawsuit – 2000 through early 2002 – the CPA firm of Larsen, Larsen & Associates, P.A. consisted of James Larsen and his son Michael Larsen. (Id., 111.)

## II. Respondents' Claims for Liability and Damages.

Respondents seek damages for professional negligence and breach of contract arising out of the preparation of income tax returns for the years 2000 and 2001. (L.A., 3-29.) Respondents contend that they should have been advised to make "754 elections" in connection with certain tax returns filed in those years and that the failure to make these elections caused damages. (Id., 8-10.)

### A. The "754 election."

A provision under the federal tax code known as section 754 allows a partnership to elect to adjust the basis of a partner's interest in the partnership when a "qualifying transfer" occurs. The 754 election is made by preparing a section 743(b) adjustment statement and attaching it to the income tax return for the year in which the basis step-up is made. (L.A., 352-53.) An amended return enclosing the 743(b) statement can be prepared and filed within one year of the original return. (Id., 406.) Such an election can be advantageous because it lowers taxable gain and, therefore, reduces taxes; in addition,

[1] Larsen has filed two appendices. The first contains publicly-filed material, and citations to that appendix follow the format (L.A., __.) The second appendix contains materials that were filed under seal, and citations to that appendix follow the format (L.S.A., __.)

increasing the basis can allow for additional depreciation deductions, which also can reduce taxes. The basis of respondents' claims is that such a step-up in basis in the interests in FMP, A&F and FSA would have been advantageous because it would have permitted the partners in the three entities to have taken additional depreciation deductions – and thereby reduce taxable income – in tax returns prepared by Larsen beginning with tax year 2000. (Id., 8-12; 347-384.)

**B. The opportunities to have made 754 elections.**

A trust established by the Fischer family patriarch, Mathias Fischer, owned partnership interests in A&F, FMP and FSA. (L.A., 8.) Mr. Fischer died in July 2000. (Id.) Fischer's death was a "qualifying event" that gave rise to an opportunity to have made the 754 elections for the partnership interests in connection with the 2000 tax returns for A&F, FMP and FSA. After the death of Mr. Fischer, the members of the Fischer family engaged in a complex series of transfers of interests in family partnerships and trusts. (Id., 7-8.) These transfers were structured by attorney John R. McDonald, the Fischer family counsel. (Id., 76A-77, 113-114; L.S.A. 11-42; 95-116, 144-159.) McDonald handled the family estate and financial planning and appears to have represented all of the various persons and entities involved in the transactions. (Id.)

**C. Respondents' allegations regarding liability and damages.**

Respondents contend that both Larsen and McDonald erred by not ensuring the 754 elections were made for the 2000 and 2001 tax returns for FMP, FSA and A&F. (L.A., 8-11.) Respondents allege that Larsen should have, but did not, "prepare or attach" the form for the 754 election for the 2000 returns for A&F, FMP and FSA, and did not later amend the returns to make such an election. (Id., 24, ¶¶ 39-41.) Respondents make similar allegations for the 2001 returns. (Id., 25, ¶¶ 44-48.) Based upon these and related allegations, respondents alleged:

> Defendants breached their duty of reasonable care to Plaintiffs when they failed to provide appropriate services and advice regarding obtainment of stepped up basis for partnership assets upon the occurrence of qualifying transfers, when they failed to make Section 754 Elections and file Section 743 statements for the partnerships Fischer Marketplace and Ames & Fischer, and when they failed to make a protective Section 754 Election and file a Section 743 Statement for FSA, for the tax years of 2000 and 2001.

(Id., 27-28, ¶¶ 57, 64.) Thus, respondents specifically claimed that Larsen's negligence occurred in the preparation of the tax returns for 2000 and 2001.

In their separate Complaint against McDonald, respondents made a nearly-identical set of allegations regarding the 2000 returns as well as the 2001 returns. (L.A. 11-12, ¶¶ 43-46; 51-54.) Respondents allege that McDonald should have ensured that the 2000 and 2001 returns included the 754 elections. (Id.)[2] Based upon these allegations, respondents claimed that McDonald's breach of duty consisted of:

> . . . not telling Larsen or plaintiffs to make Section 754 Elections and file Section 743 Statements for the partnerships Fischer Marketplace and Ames & Fischer, and to make a protective Section 754 Election and file a Section 743 Statement for FSA, for the tax years of 2000 and 2001.

(Id., 12, ¶¶ 64, 71.)

[2] Based upon McDonald's close involvement in the estate planning and these transactions, Larsens' experts have opined that McDonald – not Larsen – bore the responsibility to ensure that the 754 elections were made on the relevant tax returns. (L.A. 358-359, 406-412.)

The 2000 tax return for FMP was dated February 22, 2001 and presumably was filed by respondents shortly thereafter. (L.A., 340; L.S.A., 77.) The 2000 tax return for A&F was dated February 14, 2001 and presumably was filed by respondents shortly thereafter. (L.A., 340; L.S.A., 49.) The 2000 tax return for FSA was dated April 4, 2001 and presumably was filed shortly thereafter. (L.A., 340; L.S.A., 117.) Thus, all of the 2000 tax returns were prepared by Larsen, for filing by the respondents, at least seven years before this lawsuit was commenced. The 2001 tax returns for FMP, A&F and FSA were dated February 21, 2002, March 7, 2002 and May 7, 2002, respectively, and presumably were filed soon thereafter. (L.A., 340; L.S.A., 175, 193, 291.) Thus, two out of the three 2001 income tax returns at issue were prepared by Larsen, for filing by the respondents, more than six years before this lawsuit was commenced in April 2008. The only return Larsen prepared within six years of the commencement of this lawsuit was the 2001 return for FSA.

Respondents claim that the failure to make the 754 elections in the 2000 and 2001 returns caused damages. (L.A., 26.) Specifically, respondents' Complaint alleges:

> All or some of the Plaintiffs are entitled to recover damages from [Larsen], including without limitation damages relating to loss of tax deductions to all or some of the Plaintiffs, increased taxes on sale of partnership assets, increased taxes on the future sale of partnership assets, and professional fees and expenses expended to correct the accounting errors resulting from the failure to effectuate the Section 754 elections and file the Section 743 statements for tax years 2000 and 2001.

(Id., 27-28, ¶¶ 59, 66).) Respondents' Complaint against McDonald includes nearly identical language. (Id., 12-14, ¶¶ 67, 74.) The damages respondents seek include "overpayment of taxes by the entity's partners and interest on overpayment of taxes." (L.A., 344.) Respondents also seek "fees and expenses expended to correct the accounting errors resulting from the failure to effectuate the Section 754 elections and file the Section 743 statements for calendar years 2000 and 2001." (Id., 26.)

**D. Respondents' expert's reports.**

Respondents initially supported their allegations with a report dated October 16, 2008, from their CPA expert, Thomas M. Boesen. (L.A., 34-71.) Later, respondents provided two new affidavits from Boesen. (Id., 79-87, 268-313.) Respondents also provided an affidavit from an expert who is both an attorney and a CPA, Tom Woessner. (Id., 88-101.)

**1. The opinions expressed regarding liability and damages in the initial Boesen report.**

Boesen's poorly-organized initial report makes a series of interrelated and repetitive claims that Larsen failed to recognize and act on information in its possession in 200o regarding respondents' financial condition. (Id., 41-45.) He cites a number of circumstances that existed at the time that should have prompted Larsen to include a 754 election when Larsen prepared and signed the 2000 and 2001 returns for the three key entities. (Id.) Specifically:

- Boesen claims, "It is my professional opinion that Larsen and Larsen violated Standards for Tax Service No. 1, Tax Return Positions, when they prepared and signed FMP's 2000 tax return." (L.A., 41). He claims this return used a "stepped-up tax basis for the land that had no realistic possibility of being sustained" and that the result of this was "lost tax basis in the amount of $6,201,767." (Id.)

- Boesen similarly claims that Larsen violated professional standards when it prepared and signed the FSA 2000 and 2001 returns. (Id.)
- Boesen claims that Larsen violated applicable standards in responding to Question 11 on the 2000 returns for all three subject entities. (Id., 41-42.) He opines that responding to Question 11 would have prompted a tax preparer to consider a 754 election. (Id.) He focuses on the 2000 and 2001 returns for FMP, arguing that question 11 was "especially important" for those returns and that making a 754 election on the 2000 return "would have made a material difference in tax paid." (Id., 41-42.)
- Boesen states that Larsen's errors in connection with the 2000 returns included a failure to realize that the basis of certain FMP assets "was greatly in excess of their real tax basis." (Id., p. 42.)
- Boesen states, "The need for a 754 Elections should have been anticipated." (Id., 43.)

Boesen states in the Conclusion to his initial report:

> Larsen breached its duty "by failing to use proper judgment to ensure that FMP would receive timely tax advice relative to the availability and potential benefit of a timely 754 Election with its 2000 or 2001 partnership tax returns.
>
> * * *
>
> Unless a fully informed taxpayer declined to make the 754 Election, the election should have been included with FMP and AFC's 2000 or 2001 tax returns. Since Larsen and Larsen didn't make the 754 Election in 2000, they breached their duty in both years.

(Id., 44-45.) Thus, Boesen opined that Larsen breached its duty when it prepared the income tax returns for FMP, FSA and A&F in 2000 and in 2001.

In his initial report, Boesen contended that respondents' damages were in excess of $2.4 million. (L.A., 46.) The Boesen report claims that the three main entities – FMP, FSA and A&F – all incurred damages as a result of the preparation of the returns beginning in tax year 2000. (Id., 46-71.) In answers to Larsen's second set of interrogatories dated September 4, 2009, respondents verified that the initial Boesen report describes the "majority of the damages suffered by the entity's partners, with the report organizing those partners' damages by entity." (Id., 344.)[3] The damages claimed by respondents from the negligently-prepared returns include overpayment of taxes beginning in tax year 2000 and continuing through subsequent years. (Id., 46-71.) Respondents also claim interest on the overpaid taxes; i.e., loss of use of the money. (Id.) In a series of tables made part of his report, Boesen set forth his calculation of the damages. The following summarizes the key part of the tables in Boesen's initial report:

| Entity | 2000 Excess Taxes | 2000 Interest | 2001 Excess Taxes | 2001 Interest |
|---|---|---|---|---|
| FMP | $1,487.00 | $1,020.00 | $3,524.00 | $2,055.00 |
| A & F | $14,169.00 | $9,722.00 | $24,191.00 | $14,110.00 |
| FSA | $1,663.00 | $1,141.00 | $6,856.00 | $4,000.00 |

(Boesen Report, Table FMP-3 (L.A. 54-55); Table AFC-1 (id., 62-63); Table FSA-3 (id., 68-69.) In short, Boesen opined that respondents' became liable for excess taxes, and

[3] Plaintiff Ann S. Fischer's answers to Larsen's second set of interrogatories contain the same text as the answers to interrogatories directed to the other respondents.

resulting interest costs for "loss of use" of money, upon the filing of the tax returns that Larsen prepared that allegedly should have included the 754 elections.

#### 2. The opinions expressed regarding liability and damages in the supplemental Boesen reports.

After McDonald filed his motion for summary judgment, which relied upon Boesen's opinion that negligence and damage occurred upon the preparation of the 2000 tax returns, respondents produced a second report from Boesen. (L.A., 79-87.) After Larsen filed its motion, respondents produced yet a third report from Boesen. (L.A., 269-313.) Boesen did not retract his conclusion that the 2000 returns were negligently prepared. Instead, based upon the ability to file a later amended return to include the section 743(b) statement, Boesen broadened his allegation of negligence to include allegations that the two sets of professionals had later opportunities to make the elections. (L.A., 82-84, 270-71.) He also clarified that the figures for the 2000 overpaid taxes represented sums that respondents paid or became obligated to pay in 2001 with the filing of the 2000 returns. (Id.)

## III. Procedural History.

These consolidated matters have an involved procedural history.

### A. Respondents' Commencement of the Lawsuits.

Respondents commenced their lawsuit against Larsen on or about April 4, 2008. (L.A., 29.) On or about April 10, 2009, respondents commenced their separate lawsuit against McDonald. (Id., 16.)[4] On May 14, 2009, the District Court granted Larsen's motion to consolidate the two lawsuits effective September 5, 2009.

**B. The Motions for Summary Judgment and Reconsideration.**

The district court heard McDonald's motion for summary judgment on September 17, 2009. On October 8, 2009, the court concluded that the cause of action had accrued no later than April 15, 2001 and granted McDonald's motion. On November 10, 2009, the court denied respondents' request to reconsider the judgment in favor of McDonald. On November 20, 2009, the district court heard Larsen's motion for summary judgment. On December 31, 2009, the court denied Larsen's motion. (Add., 1.) That same day, the court reversed its previous denial of respondents' request to move to reconsider the judgment in favor of McDonald. The court heard respondents' motion to reconsider on March 1, 2010. On March 31, 2010, the court granted respondents' motion to reconsider and vacated the October 8, 2009 decision in favor of McDonald. On April 22, 2010, the court issued Amended Orders denying Larsen's and McDonald's motions for summary judgment; in these Amended Orders the court certified that the statute-of-limitations issues presented were "important and doubtful." (Add., 6.) Both sets of defendants appealed. On June 15, 2010, this Court remanded for further consideration whether the case presents an important and doubtful issue and, if so, for specification of the precise legal question being certified. On July 28, 2010, the district court issued a supplemental Order identifying a specific legal question and making various findings supporting the determination that the issue is important and doubtful. This appeal followed.

[4] It appears respondents were considering suing McDonald at the same time they sued Larsen. (L.A., 31-32.)

## ARGUMENT

In a case with complex factual and legal issues, it can become easy to miss the forest for the trees. In this appeal from the district court's denial of its motion for summary judgment, Larsen asks this Court focus upon the following:

- The foundation of respondents' case is their contention that the 2000 and 2001 tax returns were prepared in violation of the applicable standard of care.
- Larsen prepared the 2000 returns for FMP and A&F in February 2001 and for FSA in April 2001; Larsen prepared the 2001 returns for FMP in February 2002, for A&F in March 2002, and for FSA in May 2002. Respondents filed these returns without making any changes.
- Respondents contend that they suffered damages including overpaid taxes and interest resulting from the preparation of the 2000 and 2001 returns.

Faced with these facts, respondents have tried to point to isolated trees within the forest: they ignored what their Complaint actually says about when the alleged violation of the standard of care initially occurred, they had their expert come up with additional opinions, and they contended that Minnesota law allows "continuing representation" to toll the statute of limitations. When the district court granted McDonald's summary-judgment motion, it refused to allow these tactics to obscure its view of the forest, but after Larsen filed its motion, respondents' tactics somehow caused the court to focus upon some of the trees and to change its position.

Quite simply, the district court got it right when it initially granted McDonald's motion for summary judgment. This Court should reject each of respondents' tactics, should reverse the district court's later decision regarding the statute of limitations, and should remand this case for entry of judgment in Larsen's favor.

## I. Standard of Review.

Summary judgment exists "to . . . relieve the court system of the burden and expense of unfounded litigation." *Cook v. Connolly*, 366 N.W.2d 287, 292 (Minn. 1985). Summary judgment is required when evidentiary materials on file "show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03; *Goins v. West Group*, 635 N.W.2d 717, 722 (Minn. 2001) (citing *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001) and *Rathbun v. W. T. Grant Co.*, 219 N.W.2d 641, 646 (1974)). A party opposing summary judgment "must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05 (1996). The non-moving party must submit "significant probative evidence" that creates a genuine issue of material fact. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989) (citing *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 250 (1986)). If the non-moving party fails to produce facts that create a genuine issue, summary judgment is proper. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

## II. Respondents' Claims Against Larsen Are Time-Barred.

Here, the undisputed material facts show that Larsen is entitled to summary judgment on the ground the claims accrued more than six years before the lawsuit was commenced and, therefore, are time-barred.

### A. The Statute of Limitations for Accounting Liability Claims Is Six Years From the Date the Claim Accrues.

"Statutes of limitation serve a general purpose of repose [and] the interest of both the defendant and society in freedom from stale claims." *Bartlett v. Miller & Schroeder Muns., Inc.*, 355 N.W.2d 435, 439 (Minn. App.1984). Professional negligence claims, including accounting-malpractice claims, must be brought within six years. Minn. Stat. § 541.05, subd. 1(5); *see Bonhiver v. Graff*, 311 Minn. 111, 116, 248 N.W.2d 291, 296 (1976). The limitation period starts to run when the cause of action accrues; "that is, when the plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted." *Antone v. Mirviss*, 720 N.W.2d 331, 335 (Minn. 2006) (citing *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 152-53, 158 N.W.2d 580, 584 (1968) (cause of action accrues "at such time as it could be brought in a court of law without dismissal for failure to state a claim.")).

In *Antone*, the Minnesota Supreme Court reaffirmed that a legal malpractice action accrues when plaintiff sustained "some damage" as the result of the defendant's negligence. *Antone*, 720 N.W.2d at 335-36; *see also Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). The cause of action accrues upon occurrence of <u>any</u> compensable damage, not just the damage for which the precise relief is sought in the complaint. *Antone*, 720 N.W.2d at 336, n. 6 (citations omitted) (emphasis added). Mere ignorance of a cause of action will not toll the accrual of the claim. *Id.*, 720 N.W.2d at 335 (citing *Dalton*, 280 Minn. at 152-53, 158 N.W.2d at 584 (1968)). Of course, *Antone* was a legal-malpractice claim and this is an accounting-malpractice claim. But the statute of limitations is the same for both kinds of professional negligence cases.

The same subdivision – Minn. Stat. § 541.05, subd. 1(5) – applies to both legal- and accounting-malpractice claims. And for both kinds of malpractice cases, the limitations period begins to run at the time the plaintiff(s) could bring a claim that would survive a motion to dismiss.

The rationale of the unpublished decision in *Reid Enters., Inc. v. Deloitte & Touche*, No. No. C8-99-1801, 2000 WL 665684 (Minn. App. 2000) (unpublished) demonstrates that claims for accounting malpractice accrue as do claims for legal malpractice.[5] In *Reid*, Deloitte prepared plaintiff's tax returns for a number of years beginning in 1982. Plaintiff alleged that Deloitte provided negligent advice about the "LIFO Conformity Rule." Because Deloitte negligently prepared the returns beginning in 1982, this Court held, "The district court correctly concluded that Reid could have commenced its lawsuit anytime after 1982 and survived a motion to dismiss." Thus, the *Reid* opinion shows that an accounting-malpractice claim – like a legal-malpractice claim – accrues at the time the plaintiff could bring an action that would survive a Rule 12 motion to dismiss.

In short, the statute of limitations applicable to respondents' claims is six years from the date the claim accrued – the date respondents allegedly suffered "some damage" as a result of defendants' conduct. As set forth in the next section, the claim accrued seven years before respondents commenced this lawsuit.

[5] The *Reid* opinion is enclosed at L.A. 327.

### B. Respondents' Claims Accrued Upon the Preparation of the Tax Returns.

This Court should conclude that respondents' claims against Larsen accrued upon the preparation of the 2000 returns in early 2001. A claim for accounting liability requires proof of the following: A duty arising from the existence of an accountant-client relationship, the breach of that duty (the failure to discharge the duty of reasonable care), factual and legal causation, and damages. *Brown-Wilbert, Inc. v. Copeland, Buhl & Co.*, 732 N.W.2d 209, 218 n. 4 (Minn. 2007) (further citations omitted). Here, respondents would have been able to allege, sufficient to withstand a Rule 12 motion to dismiss, each of these elements beginning the moment Larsen prepared and signed the tax returns for 2000 in early 2001 – seven years before respondents commenced this lawsuit. Therefore, respondents' allegations are time-barred.

#### 1. The alleged negligence occurred at the time of preparation of the initial 2000 income tax returns.

This Court should hold that the first element of the claim – breach of the duty – occurred at the time the 2000 returns were prepared without the section 754 elections. From the beginning of this case, respondents have alleged that Larsen's malpractice consisted of failing to make the 754 elections on the 2000 and 2001 income tax returns Larsen prepared for FMP, FSA and A&F. (L.A., 27-28.) The 2000 returns were completed by Larsen by April 4, 2001. This lawsuit was commenced on April 4, 2008. Thus, Larsen's alleged negligence occurred at least seven years before this lawsuit was commenced.

Respondents' experts' reports further demonstrate that the initial error was made at the time the 2000 returns were prepared. Boesen opined that Larsen violated the standard of care when it "prepared and signed" the 2000 and 2001 tax returns. (L.A., 41-42.) Woessner opined that it was an error not to make the election with the 2000 returns because there was "little, if any, downside" in making such an election and "no good reason not to make" the election at that time. (L.A., 98-99.)

In short, whatever later opportunities existed to correct the situation, the record is clear: Respondents' case is founded upon an allegation that the 2000 tax returns Larsen prepared and signed (and McDonald reviewed) were erroneously prepared because the returns should have contained the information necessary to make the 754 elections.

**2. Respondents suffered "some damage" at the time of preparation of the initial 2000 income tax returns.**

The record also demonstrates that respondents suffered "some damage" upon the preparation of the initial 2000 income tax returns in early 2001. "A cause of action survives a motion to dismiss as long as 'some damage' has occurred as a result of the alleged malpractice." *Herrmann*, 590 N.W.2d 343, *Antone*, 720 N.W.2d at 336. It is immaterial if the damage that occurred is not the damage for which the relief is sought in the complaint. *Antone*, 720 N.W.2d at 336, n. 6 (citations omitted). Minnesota cases have consistently given a broad interpretation to the "some damage" rule and have held that even "minimal" damages will start the running of the statute of limitations. *See Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003) ("The showing that a plaintiff must make in order to survive a motion to dismiss under Rule 12.2(e) is minimal.") *Antone* illustrates the broad interpretation given to the "some damage" rule. The

Supreme Court held that the plaintiff had suffered "some damage" upon the signing of a prenuptial agreement, even though the damage was not manifested until the marital separation many years later. *Antone*, 720 N.W.2d at 337-38.

In this case, respondents unquestionably suffered "some damage" upon the preparation of the returns in 2000. Respondents claim they became liable for overpaid taxes as result of the 2000 return Larsen prepared. Boesen calculated FMP's overpaid taxes as $1,487.00; A&F's overpaid taxes as $1,469; and FSA's overpaid taxes initially calculated as $1,633. In addition, Boesen calculated the "loss of use of money" damages as $1,020.00 for FMP; $9,722.00 for A&F, and $1,141 for FSA. These amounts – which respondents became liable to pay upon their filing of the 2000 returns Larsen prepared – represent "some damage" that would have been compensable in a legal action commenced immediately after Larsen prepared those returns.

Respondents contend that these damages would not have occurred if the election had later been made. The way to correct the error and to obtain recovery of the overpaid taxes would be to prepare an amended return with the appropriate section 743 statement making the election. But the cost of preparing the amended return making the election would itself be an element of recoverable damage. *See Herrmann*, 590 N.W.2d at 643. In *Herrmann*, the plaintiffs argued that the cost to address the problem did not constitute "some damage" until it had been actually paid. But the Supreme Court held that the fact the cost to repair had not yet actually been paid was irrelevant to the issue of when "some damage" occurred. Id. Thus, the cost to correct the error – whether or not that cost is actually incurred – triggers the running of the statute.

In this case, if respondents had decided to make the elections at any point after Larsen prepared and signed the returns, they could have engaged a different CPA firm to prepare the amended returns with the proper statement. Respondents could then have sought to recover from Larsen the cost of preparing the amended returns and whatever loss-of-use damages (interest costs) would have accrued from overpaying the taxes.[6] Immediately after the original returns were prepared without the election, the damages would have been smaller, but respondents' claim would have withstood a Rule 12 motion to dismiss.

In short, from the moment Larsen "prepared and signed" (in Boesen's words) the 2000 returns for the three key entities, respondents would have been able to assert a claim against Larsen. Therefore, respondents' claim accrued upon the preparation of those returns. Because respondents did not commence this lawsuit until more than seven years later, their claims are time-barred.

### C. This Court Should Reject Respondents' Arguments.

Before the district court, respondents advanced three main theories why the claim did not accrue in early 2001. First, they claimed that the negligence and damages did not occur until after the expiration of the one-year period in which the previously-filed returns could have been amended to claim the 754 elections. Second, they claimed that the preparation of the 2001 returns in early 2002 constituted a separate act of negligence

[6] Whether respondents were aware of that possibility immediately after Larsen initially prepared the returns is of no relevance, because it is well-established that ignorance of the cause of action will not toll the statute of limitations. *Antone*, 720 N.W.2d at 335 (citations omitted).

that re-started the limitations period. Third, respondents claimed that the "continuous representation doctrine" extends the statute. This Court should reject all three theories.

### a. The time to amend the returns to make the 754 elections does not extend the statute of limitations.

This issue is the heart of the question certified by the district court. Respondents contend that the negligence did not occur until the expiration of the period in which to file amended returns making the elections. This Court should reject respondents' arguments.

Respondents' claim is that the section 754 elections should have been made, and that the 2000 returns were negligently prepared because they did not include the elections. Respondents claim, further, that Larsen (and McDonald) should have utilized later opportunities to make the elections. But while utilizing the extension period may have lessened the damage by allowing respondents to avoid overpaying taxes or claiming a refund for the overpaid tax, this does not change the fact that negligence and damage occurred upon the initial preparation of the returns. At a minimum, the cost of preparing an amended return to include the elections would represent "some damage" that immediately occurred. The ability to prepare and file amended returns to correct the error may mitigate the damages, but does not affect the determination of when the error actually occurred in the first place.

Case law from other jurisdictions that also apply the "some damage" rule shows that an allegation of an ongoing duty to reconsider and fix the error does not extend the statute. In *Leon Jones Feed & Grain, Inc. v. General Bus. Servs, Inc.*, 333 S.E.2d 861 (Ga. Ct. App. 1985) the court stated,

> . . . 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 [the taxpayer] in 1977 that a refund could be had was merely a failure to correct the earlier breach for which damage had already been incurred . . . The fact that GBS failed to advise the company that a refund could be had was merely greater damage (loss of the amount paid) added to the damage already incurred (loss of use of the amount paid).

Similarly, in *Goulding v. Solomon*, 123 Misc.2d 954, 475 N.Y.S.2d 723 (N.Y. City Civ. Ct. 1984), the court held that a claim against a CPA for negligence in preparing tax returns accrued upon the filing of the returns, not the later deadline to amend. *Goulding*, 475 N.Y.S.2d at 725. 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.

Id. These cases, which are consistent with the "some damage" rule in Minnesota law, show that the ability to file amended returns does not extend the limitations period.

This Court should conclude that the statute of limitations began to run upon the preparation of the 2000 returns, not the expiration of the period in which to file amended returns.

**b. The preparation of the 2001 returns did not re-start the statute of limitations.**

Next, respondents have argued that the preparation of the 2001 returns, in early 2002, re-started the six-year statute of limitations. The alleged mistake in the 2001 returns involved the same tax code provision, the same parties, and the same alleged damages. This Court should reject this argument.

In *Herrmann*, the plaintiff sought damages arising out of the participation in a series of essentially identical transactions that were prohibited under Federal tax law. *Herrmann*, 590 N.W.2d at 642. The Minnesota Supreme Court held that the claim accrued at the time of the first of these transactions. Id. at 643-44. *Herrmann* is similar to this case in that the opportunity to make the 754 election for the 2001 returns was essentially identical to the opportunity to have made the elections for the 2000 returns. Thus, under the rationale of *Herrmann*, the failure to make the elections in the 2001 returns did not re-start the statute.

*Reid* further supports Larsen's argument. In *Reid*, the alleged negligence consisted of the CPA's failure to properly apply the "LIFO Conformity Rule." This error was made in tax returns which Deloitte prepared "in each and every year" from 1982 at least through 1991. *Reid*, *2. The district court held that the claim accrued at the time Deloitte prepared the first tax return in 1982. This Court affirmed and noted that the claim accrued "in the 1980s." *Reid*, *2. This Court also rejected Reid's argument that there was separate negligence in each year in which the returns were prepared. As this Court noted,

> But Minnesota law is clear that when a professional provides a series of separate and distinct services over a period of years, the existence of an ongoing relationship does not toll the statute of limitations with regard to negligence for which service has been completed.

Reid, *3 (citing *Herrmann*, 590 N.W. 2d at 643-44). Thus, the rationale in *Herrmann* and *Reid* shows that, when a tax preparer makes the same alleged error in one set of tax returns, and repeats that error in later years, the claim accrues upon the preparation of the *first* return. Making the same alleged error in later years does not extend the statute.

Before the district court, respondents cited *Deveraux v. Stroup*, No. A07-0103, 2009 WL 72712 (Minn. App. 2008) (unpublished decision), to claim that the two years of returns represented separate acts. But in *Deveraux* the facts were completely distinguishable from the facts in this matter:

> This case concerns a dispute between the Devereauxs and Kevin Stroup regarding two acts of alleged malpractice that occurred while Stroup served as the Devereauxs' attorney. The first act involves gifting and tax advice that Stroup gave the Devereauxs in May 1997. The second act involves Stroup's responsiveness to official requests for financial data and legal advice he gave to the couple while he represented them in 2002 regarding criminal and civil investigations and charges that resulted after the Devereauxs followed Stroup's 1997 advice.

*Id.* at *1. Thus, in *Deveraux* the court was concerned with wholly separate and unconnected acts of negligence. The later conduct was of a completely different kind from the original negligence, and the later negligence resulted in wholly new and independent damages. *Id.* at *3. The court found that the statute of limitations expired as to the 1997 gifting and tax advice, but had not elapsed as to the advice counsel gave in 2002 regarding the various investigations. *Id.* Here, as noted above, the alleged errors were the same and resulted in the exact same kinds of damages. Thus, *Devereaux* does not support respondents' position.

Before the district court, respondents also argued that the 2001 returns involved a separate decision-making process. They suggest that Larsen may have had a valid reason not to make the election in the 2000 returns. But this argument is nothing other than a restatement of respondents' claim that Larsen should have corrected the error that was initially made. As noted above, respondents' experts Boesen and Woessner both specifically opined that, in the circumstances of this case, the election should have been made with the 2000 returns. Woessner stated that there was "no good reason not to make a 754 election" with the 2000 tax returns. (L.A., 98-99.) Thus, the claim accrued with the preparation of the 2000 returns.

In fact, the Woessner report demonstrates that the preparation of the 2001 returns without the elections was not an independent act that resulted in new damages. Woessner opines that the error occurred with the preparation of the 2000 and 2001 tax returns and there was "no good reason" not to make elections with those returns. (L.A., 98-99.) He states,

> These breaches caused the Fischers damages, because the discussion [of the 2000 and 2001 returns] should have included a recommendation by McDonald to make the elections, which would have resulted in making the election for all three entities in both tax years.

(Id., pp.) Woessner goes on to analyze the "additional opportunities and reminders" for these same elections to have been made pursuant to the one-year period in which the returns could be amended to make the election. (Id., 100.) Based upon this analysis, Woessner states that if the elections had later been made,

> . . . the resultant damages to the Fischers caused by the failure to make the 754 elections for the 2000 tax year (by April 15, 2002) would have been reduced.

(Id., 101.) Thus, Woessner's report shows that the failure to make the elections in the second year was not a separate act that resulted in new damages; instead, doing so would merely have reduced the damages.

Thus, the fact the elections were not made for the 2001 returns is immaterial. This Court should reject respondents' argument that the preparation of the 2001 returns, in early 2002, constituted a new act of negligence that re-started the statute of limitations.[7] The claim accrued upon the preparation of the 2000 returns, in early 2001, and was time-barred for more than one year before respondents commenced their lawsuit.

**c. The "continuous representation" doctrine does not apply.**

Finally, respondents also claim the "continuous representation" doctrine supports their position. This Court should reject respondents' argument. This doctrine has been applied in medical malpractice cases, as the continuing treatment rule, given the short two-year statute of limitations applicable to those matters. *See Fabio v. Bellomo*, 504 N.W.2d 758, 760-62 (Minn. 1993) (refusing to apply continuing treatment rule in situation where claim was based upon a single examination). But the Minnesota Supreme Court has never adopted or applied the "continuous representation" doctrine in cases against lawyers or accountants, and the doctrine is inconsistent with Minnesota Supreme Court case law.

[7] Even if the preparation of the 2001 returns re-started the statute, most of respondents' claims would still be time-barred. The returns for FMP and A&F were prepared in February 2002. The return for FSA was prepared on May 7, 2002. Thus, if the preparation of the 2001 returns re-started the statute, the only potentially viable claim would arise out of failing to make the 754 elections on the 2001 returns for FSA.

Before the district court, respondents relied on *Schuster v. Magee* , No. C1-92-501, 1992 WL 213566 (Minn. App. 1992) (unpublished). But this reliance is misplaced. *Schuster* was decided before *Herrmann* and *Antone*. In 2000, this Court noted that the "continuous representation" is inconsistent with the "some damage" rule articulated by the Supreme Court in *Herrmann* and later reaffirmed in *Antone*. *Reid* * 3. In *Reid*, this Court affirmed that the claim against a CPA for negligent tax preparation accrued in 1982, even through the CPA continued to prepare returns with the same error into the 1990s. Moreover, in *Schuster* the Court relied upon an argument that the plaintiff was ignorant of the claim, whereas under Minnesota law ignorance of the potential claim does not toll the running of the statute. *Antone*, 720 N.W.2d at 335 (citation omitted). Thus, to the extent *Schuster* ever reflected Minnesota law, it no longer does so.

Finally, "continuing representation" does not apply to accounting liability cases. To the extent the doctrine has any validity, it grows out of the fiduciary relationship an attorney owes to the client, and the attorney's ongoing duty to act in the best interest of the client. CPAs, on the other hand, typically do not owe fiduciary duties to their clients. *Brown-Wilbert, Inc. v. Copeland, Buhl & Co.*, No. A07-2462 (Minn. App. Dec. 30, 2008) (unpublished opinion), (citing *Funds of Funds, Ltd. v. Arthur Anderson & Co.*, 545 F.Supp. 1314, 1356 (S.D.N.Y. 1982)). Thus, even if continuing representation doctrine would apply, it would not affect the accrual of respondents' claims.

Thus, the Court should reject respondents' argument that the "continuing representation" doctrine tolls the statute of limitations.

## CONCLUSION

This Court should not miss the forest for the trees. Respondents' claim against the Larsen accounting firm accrued upon the preparation of the tax returns for the year 2000, which occurred in early 2001. Respondents filed those returns, as prepared by Larsen without any changes, shortly after they were prepared. Because these events occurred more than seven years before respondents commenced this lawsuit against Larsen, respondents' claims are barred by the six-year statute of limitations and must be dismissed. Larsen respectfully asks this Court to answer the certified question with an Order stating that the claims accrued upon the preparation of the 2000 tax returns and directing the district court to enter judgment in Larsen's favor, dismissing this case with prejudice.

Respectfully submitted,

Dated: September 20, 2010

By: ______________________

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## FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 7285.

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