

CASE NOS. A10-1439 and A10-1447

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**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).*

**BRIEF AND ADDENDUM OF APPELLANTS**  
**JOHN R. McDONALD, et al.**

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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 CERTIFIED QUESTION

- A. **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.**

- **The district court held: the statute of limitations does not begin to run on Respondents' legal malpractice claim against McDonald until the expiration of the automatic extension period.**

Apposite authorities:

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

Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006);

Leisure Dynamics, Inc. v. Falstaff Brewing Corp., 298 N.W.2d 33 (Minn. 1980).

## STATEMENT OF THE CASE<sup>1</sup>

On April 4, 2008, Respondents commenced an accounting malpractice action against Larsen, Larsen and Associates, P.A., James Larsen and Michael Larsen (the "Larsens") venued in Dakota County District Court. In that matter, Court File No. 19-HA-CV-08-564 (the "Larsen Action"), Respondents alleged that their accountants failed to make an Internal Revenue Code Section 754 election<sup>2</sup> for three Respondent entities in

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<sup>1</sup> Given the fact that this appeal has been consolidated with the appeal of Larsen, Larsen & Associates, P.A., Appellant John McDonald has numbered his appendix "M.A." and his addendum "M.Add."

<sup>2</sup> A Section 754 election is a provision under the United States tax code that allows a partnership to elect to adjust the basis of partnership property upon occurrence of certain events such as a transfer of a partnership interest by sale or death of a partner. When a "qualifying transfer" occurs, Section 754 allows the partnership to take a step-up in the tax basis of the partnership assets for the benefit of the transferee partner. The Section 754 election is made by attaching an election form and a Section 743(b) adjustment statement to the partnership's timely filed tax returns. Respondents allege that their step-up in basis permitted by a Section 754 election is financially advantageous because it permits additional depreciation deductions to the partners and, if partnership assets are sold, the income taxes of the transferee partner are based upon the stepped-up basis and greater after tax profits are realized by the transferee partner. (M.A. 19 and

their 2000 and 2001 tax returns. As a result, Respondents allege that they have incurred \$2.6 million in tax obligations which they claim could have been avoided if the Section 754 election had been made correctly.

On April 10, 2009, Respondents commenced a separate action against attorney John R. McDonald and his law firm (“McDonald”) also venued in Dakota County District Court. In that legal malpractice action, Court File No. 19-HA-CV-09-2162 (the “McDonald Action”), Respondents alleged that attorney John McDonald was negligent in failing to recommend to the Larsens and/or to Respondents to make the Section 754 election for the three Respondent entities in the 2000 and 2001 tax returns. (M.A.15.)

Shortly after the McDonald Action was commenced, the Larsens moved the district court to consolidate the Larsen Action and the McDonald Action pursuant to Minn. R. Civ. P. 42.01. By order dated May 15, 2009, the district court granted the motion to consolidate and ordered that consolidation would become effective on September 5, 2009. (M.A.29.)

On August 17, 2009, McDonald served and filed his motion for summary judgment contending that Respondents’ legal malpractice claim was barred by the statute of limitations. Although the motion was served and filed prior to the consolidation

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M.A. 25.) If, as in this case, the accountant and/or taxpayer neglects to make a Section 754 election in connection with a timely filed tax return, the taxpayer has one year to correct the error. To correct the error, it is undisputed that an amended return will need to be prepared and filed along with the Section 754 election and the Section 743(b) adjustment statement. 26 C.F.R. § 301.9100-2.

becoming effective, the motion was not argued until two weeks after the consolidation became effective.

On October 8, 2009, the district court, the Honorable Martha M. Simonett presiding, granted McDonald's motion for summary judgment finding that the statute of limitations on the Respondents' legal malpractice claim arising out of the 2000 and 2001 tax returns was barred by the statute of limitations. See Minn. Stat. § 541.05, subd. 1(5). (M.Add.1.) Judge Simonett held that, upon filing of the each of allegedly defective returns, Respondents "overpaid their 2000 and 2001 taxes" and incurred "loss of use damages such as interest on potential investments." (M.Add.3.) In addition, Judge Simonett found that "the cost of fixing the problem during the extension period is, in and of itself, a compensable item of damage that [Respondents] could have recovered in an action immediately after the defective returns were filed." (Id.) Accordingly, Judge Simonett concluded that the statute of limitations on Respondents' legal malpractice claim against McDonald accrued on the date the tax returns were filed without making the Section 754 election. (Id.) The district court also rejected Respondents' argument that the continuous representation doctrine should be applied to toll the statute of limitations. (Id.)

Respondents thereafter sought leave from the district court to bring a motion for reconsideration of its grant of McDonald's motion for summary judgment. The district court denied Respondents' request. (M.A.276.)

On November 20, 2009, the Larsens moved for summary judgment claiming, like McDonald, that Respondents' accounting malpractice claim against them was barred by

the statute of limitations. By order dated December 31, 2009, the district court denied the Larsens' motion for summary judgment. (M.Add.5.) In denying the Larsens' motion for summary judgment, Judge Simonett noted she had "changed [her] mind"<sup>3</sup> and rejected her own statute of limitations analysis contained in the October 8, 2009 Order granting McDonald's motion for summary judgment. (M.Add.5.) In her December 31, 2009 Order, Judge Simonett concluded that, because the Internal Revenue code provided an automatic one-year extension<sup>4</sup> after each of the defective returns were filed to fix the error, Respondents did not suffer any "irremediable" damage until they lost the ability to correct the problem. In essence, Judge Simonett concluded that until Respondents lost the ability to correct the problem allegedly caused by the Larsens and McDonald, their cause of action for malpractice would not accrue. Judge Simonett concluded that the immediate overpayment of tax upon filing each return, the damages attributable to the loss of use of those funds, or the cost of correcting the problem did not become recoverable items of damage in a legal malpractice action until the time to correct the problem had passed. (M.Add.8-9.) In its December 31, 2009 Order, the district court sua sponte permitted Respondents to file a motion for reconsideration of the October 8, 2009 order granting McDonald's motion for summary judgment. (M.Add.5.)

The motion for reconsideration was heard by Judge Simonett on March 1, 2010.

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<sup>3</sup> M.Add.13.

<sup>4</sup> Under the automatic extension provision, the Respondents had until April 15, 2002 (one year after the April 15, 2001 deadline to file Respondents' 2000 partnership returns) to correct the failure to the Section 754 election for the 2000 tax year and until April 15, 2003 (one year after the April 15, 2002 deadline to file Respondents' 2001 partnership tax returns) to make the Section 754 election for the 2001 tax year.

On April 1, 2010, the district court filed its Reconsideration Order Denying the McDonald's Motion for Summary Judgment. In so doing, the district court reversed its decision contained in the October 14, 2009 order and found that Respondents' claims against McDonald were timely brought. (M.Add.10.) In so doing, Judge Simonett, generally followed the analysis in her December 31, 2009 Order. (Id.)

On April 23, 2010, the trial court issued an Amended Reconsideration Order Denying the McDonald Defendants' Motion for Summary Judgment. (M.Add.16.) In its amended order, the trial court certified that the statute of limitations question presented the case was important and doubtful pursuant to Minn. R. Civ. App. P. 103.03(i). McDonald appealed the trial court's Amended Reconsideration Order Denying Defendants' Motion for Summary Judgment. This Court dismissed that appeal and remanded it back to the district court for further consideration of whether the case presented an important and doubtful issue and, if so, for a specification of the precise legal question being certified. (M.Add.22.)

On July 28, 2010, the trial court issued its Order Following Court of Appeals Remand of June 15, 2010. (M.Add.26.) In its order, the court set forth its findings as to why it concluded that the statute of limitations issue presented in this case is important and doubtful pursuant to Minn. R. Civ. App. P. 103.03(i). The trial court also specified the precise legal question being certified. This appeal follows.<sup>5</sup>

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<sup>5</sup> This Court has consolidated McDonald's appeal with the appeal by the Larsen's. Although the legal issue in the two matters are very similar, the record on appeal is different between the two cases. In addition, given the fact that the claim against McDonald was brought a year after the claim was commenced against the Larsens,

## STATEMENT OF THE FACTS

This legal malpractice action relates to adverse tax consequences allegedly incurred by the three principal Respondent entities and the partners/members of those entities as a result of a failure to make a Section 754 election at the time that the 2000 and 2001 partnership tax returns were filed.

From 1962 to 2007, attorney John McDonald represented Mathias H. Fischer, his wife Anne S. Fischer, his daughter Liza A. Robson, his son Peter W. Fischer and various of their business entities and trusts. (M.A.120.) John McDonald's representation involved performing legal work for the entities and trusts and estate planning for the various individuals. (M.A.120.)

Beginning in 1987, the Respondents hired the Larsens to perform accounting services and provide tax advice. (M.A.120.) The Larsens' duties included the preparation of federal and state income tax returns. (M.A.18.)

Respondents allege that the Mathias Fischer Living Trust, a revocable grantor trust established by Mathias Fischer, was a partner in three separate entities: Ames & Fischer, Co., II, LLP, Fischer Marketplace, LLP, and Fischer Sand & Aggregate, LLP. (M.A.20.) The remaining Respondents either have an interest in one of these limited liability partnerships or are a trustee for a trust that has an interest in one of the entities. (M.A.15-20.)

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Respondents assert certain arguments against the Larsens which, by their own concession, do not apply to McDonald.

On July 22, 2000, Mathias Fischer died. (M.A.20.) Respondents allege that the death of Mathias Fischer constituted a “qualifying transfer” of an interest in a partnership under Internal Revenue Code Section 754. (M.A.22.) Respondents allege that, given the fact that Mathias Fischer’s death triggered the ability for one or more of the entities to make a Section 754 election, Larsens should have made the 754 election in the 2000 partnership tax returns<sup>6</sup> for two of the Respondent entities, Ames & Fischer, Co., II, LLP and Fischer Marketplace, LLP. (M.A.23.)<sup>7</sup>

With regard to the third Respondent entity, Respondents claim that the accountants did not prepare or attach the required 743(b) adjustment statement with respect to Respondent Fischer Sand & Aggregate, LLP and did not make a protective 754 election in the 2000 tax return for that entity.<sup>8</sup> (M.A.23.) Although Respondents have not alleged that they ever retained McDonald to provide any legal advice with regard to the preparation of the entities’ 2000 partnership returns, the Larsens contend that, prior to

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<sup>6</sup> In the district court, the Respondents attempted to extend the statute of limitations by claiming that the alleged negligence did not occur when the returns were filed but, rather, when the time to correct the problem ran. This argument, however, was contrary to the opinions of their standard of care expert. (M.A.277.) Respondents’ expert clearly concludes that if Respondents’ version of the facts is true, McDonald’s failure to recommend the election prior to the returns being filed was negligent. (M.A.286.) (“...McDonald reviewed the subject tax returns before they were filed and agreed with the Larsens not to make the 754 election, which if true was negligence by McDonald and a breach of the fiduciary duty that he owed to the Fischers.”)

<sup>7</sup> Respondents claim that the 2000 tax returns should have been filed on or before April 15, 2001. The Fischer Marketplace, LLP return was dated February 22, 2001, the Ames & Fischer, Co., II, LLP return is dated February 14, 2001, and the Fischer Sand & Aggregate, LLP return is dated April 4, 2001.

<sup>8</sup> Respondents concede that a Section 754 election for Fischer Sand & Aggregate, LLP had been filed years before. Respondents contend that, given the fact that the election had already been made, the accountants should have filed a “protective” Section 754 election to reconfirm that.

filing the 2000 partnership tax returns, they sent to McDonald a copy of those returns for his review and comment. (M.A.25.) The Larsens make this claim despite the fact that they have no documentary evidence of sending the returns at issue to McDonald and despite the fact that the partnership returns at issue are not contained in McDonald's files. In any event, the Larsens contend that McDonald agreed with them that the Section 754 election should not be made in the 2000 partnership returns.<sup>9</sup> (M.A.25.) Based on these allegations, Respondents allege McDonald was negligent in failing to tell the Larsens and/or the Respondents to make the Section 754 election in the 2000 tax return. (M.A.26.)

Respondents admit that had the 2000 partnership tax returns had been filed with the appropriate Section 754 election, each of the Respondent entities would have been able to take additional depreciation deductions. (M.A.12.) In failing to make the Section 754 election, the Respondent entities were not allowed to take these additional depreciation deductions that resulted in overpaid taxes. Respondents' accountant expert, Thomas Boesen, calculated that Respondent Fischer Market Place, LLP overpaid its taxes upon the filing of the 2000 partnership tax return in the amount of \$1,487. (M.A.99.) Respondents' expert calculated that the failure to make the Section 754 election in the 2000 partnership return for Respondent Ames & Fischer, Co., II, LLP resulted in that entity the overpaying its 2000 taxes in the amount of \$14,169. (M.A.107.) Respondents' expert calculated that Respondent Fischer Sand and Aggregate, LLP lost

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<sup>9</sup> McDonald denies that he ever advised the Larsens not to make the Section 754 election or that they ever discussed it.

depreciation deductions in the amount of \$3,542, and thereby overpaid its 2000 tax obligation in the amount of \$1,663. (M.A.113.)

Respondents also claim that, by overpaying the tax otherwise due, they suffered damages relating to the loss of use of those funds. (M.A.99, M.A.107, M.A.113.)

Respondents go on to allege that in April and May of 2001, several of the Respondents engaged in various transfers and/or sales of their interests in one or more of the Respondent entities. (M.A.23.) Respondents allege that these sales and/or transfers during April and May of 2001 were additional “qualifying transfers” under Section 754. Again, Respondents claim that the Larsens could have, but did not, make the appropriate Section 754 election form or the Section 743(b) adjustment statement with the 2001 tax returns for the three Respondent entities. (M.A.24.)<sup>10</sup>

Respondents allege that, as a result of not making the Section 754 election in the 2000 partnership returns, each of the Respondent entities again lost the opportunity to take additional depreciation deductions and thereby overpaid the tax that was otherwise due and owing. Respondents’ expert has calculated that, because the Section 754 election was not made at the time the 2001 tax returns were filed, Fischer Marketplace, LLP overpaid tax in the amount of \$3,524; Ames & Fischer Co. II, LLP overpaid its taxes by \$24,191; and Fischer Sand & Aggregate, LLP overpaid its taxes by \$6,858. (M.A.99, M.A.107, M.A.113.) By overpaying the tax in for the 2001 tax year, Respondents allege that they were damaged by the loss of use of the overpaid taxes. (Id.)

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<sup>10</sup> Respondents claim that these returns should have been filed on or before April 15, 2002.

In addition to the overpaid tax and the resulting loss of use of those funds, Respondents allege that they have “incurred” professional fees and expenses to correct the accounting errors from the failure to effectuate the Section 754 elections and file the Section 743 statements for the tax years 2000 and 2001. (M.A.26.)

## ARGUMENT

### I. SUMMARY OF ARGUMENT.

The certified question presented in this case questions when a cause of action for legal malpractice accrues arising out of allegedly negligent tax advice that results in the overpayment of taxes, the loss of use of the funds used to pay those taxes and costs associated with correcting the problem. The district court concluded that the statute of limitations does not begin to run when the taxpayer overpays the tax (and thereby sustains damages resulting from the loss of use of those funds) or becomes burdened with the financial expense to correct the problem but, rather, when the time to attempt to correct the error has run. The district court’s decision identifies the immediately incurred damages that resulted from the alleged negligence but inexplicably concludes that these damages do not create a present cause of action. Such a holding is inconsistent with longstanding Minnesota law as set forth in Herrmann v. McMenemy & Severson, 590 N.W.2d 641 (Minn. 1999) and Antone v. Mirviss, 720 N.W.2d 331 (Minn. 2006). The only way that the district court’s order denying McDonald’s motion for summary judgment on the statute of limitations issue can be affirmed is if this Court concludes that, if a taxpayer overpays taxes as the result of the advice of its attorney, that the resulting loss of use of funds and the cost to cure do not represent a recoverable damages in a legal

malpractice action. In this case, it is undisputed that Respondents are claiming that the Section 754 election should have been filed concurrently with the 2000 tax return and/or concurrently with the 2001 tax return. It is undisputed that on the day that each of the tax returns were filed without the Section 754 election being made, the Respondents sustained “some damage.” Indeed, Respondents are seeking recovery for these very damages. Upon filing each of the tax returns at issue, it is undisputed that Respondents paid more in taxes than they were required to pay. By overpaying their taxes, they instantly began incurring damages resulting from the loss of use of funds that were overpaid. In addition, the day that those returns were filed, Respondents had a claim to recover the costs associated with correcting the improperly prepared return. Each of these items of damage constitute “some damage” which would have allowed Respondents to immediately commence an action against McDonald once the returns were filed. Given that such cause of action existed, the statute of limitations began to run. Accordingly, the trial court incorrectly determined that Respondents’ claim was timely.

## **II. STANDARD OF REVIEW.**

A motion for summary judgment should be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and either parties entitled to judgment is a matter of law. Minn. R. Civ. P. 56.03. In reviewing a trial court’s ruling on a summary judgment motion, the appellate court must ask whether there are any genuine issues of material fact and whether the lower court erred on this

application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

Construction and applicability of statutes of limitations are questions of law that this

Court reviews de novo. Noske v. Friedberg, 670 N.W.2d 740, 742 (Minn. 2003).

### **III. ARGUMENT.**

#### **A. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT RESPONDENTS' CLAIM AGAINST MCDONALD WAS TIMELY COMMENCED.**

It is well settled in Minnesota that the statute of limitations for a legal malpractice action is six years. Minn. Stat. § 541.05, subd. 1(5); Antone v. Mirviss, 720 N.W.2d 331, 336 (Minn. 2006); Herrmann v. McMenemy & Severson, 590 N.W.2d 641, 643 (Minn. 1999). The Minnesota Supreme Court has “consistently held that the statute begins 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, 720 N.W.2d at 335; Herrmann, 590 N.W.2d at 643. To state a claim for legal malpractice which will survive a Rule 12 motion to dismiss, a plaintiff must allege (1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of plaintiff’s damages; and (4) that “but for” the attorney’s conduct, the plaintiff would “have obtained a more favorable result in the underlying transaction than the result obtained.” Jerry’s Enterprises, Inc. v. Larkin, Hoffman, Daly, and Lindgren, Ltd., 711 N.W.2d 811 (Minn. 2006); Antone, 720 N.W.2d at 335; Blue Water Corp. v. O’Toole, 336 N.W.2d 279, 280 (Minn. 1983). “A cause of action survives a motion to dismiss so long as ‘some damage’ has occurred as a result of the alleged malpractice.” Herrmann, 590 N.W.2d at 343;

Antone, 720 N.W.2d at 336 (“Minnesota has taken the middle ground by adopting the ‘damage’ rule of accrual under which the cause of action accrues and the statute of limitations begins to run when ‘some’ damage has occurred as a result of the alleged malpractice.”) Minnesota courts adopt a broad interpretation of the “some damage” rule and find that even “minimal” damages were suffice to start the running of the statute of limitations. Antone, 720 N.W.2d at 336; Noske v. Friedberg, 670 N.W.2d 740, 742 (Minn. 2003) (“the showing that plaintiff must make in order to survive a motion to dismiss under Minn. R. Civ. P. 12.02(e) is minimal”); “Some damage” materializes upon the “occurrence of any compensable damage, whether or not specifically identified in the complaint or not.”) Antone, 720 N.W.2d 333, 336 (Minn. 2006). (Emphasis added.)

Minnesota courts do not extend the accrual of a cause of action until the damages are discovered. Dalton v. Dow Chemical Co., 280 Minn. 147, 153, 158 N.W.2d 580, 584 (1968); Herrmann, 590 N.W.2d at 643. Furthermore, Minnesota courts do not extend the statute of limitations for legal malpractice actions under the “continuous representation” doctrine. Reid v. Deloitte & Touche, No. C8-99-1801, 2004 WL 665684 (Minn. Ct. App. May 23, 2000). Finally, Minnesota courts do not extend the accrual of the cause of action simply because there remains the opportunity to correct the problem. Leisure Dynamics Inc. v. Falstaff Brewing Corp., 298 N.W.2d 33 (Minn. 1980). Although Leisure Dynamics is not a legal malpractice case, its analysis is significant here. In Leisure Dynamics, the plaintiff sold several items to the defendant between 1967 and 1970. No sales tax was paid on those transactions. The Minnesota Department of Taxation determined that sales tax should have been collected. The seller subsequently

contested the tax assessment. After several years of litigation in tax court, the seller was successful in avoiding sales tax on transactions outside of Minnesota but was unsuccessful in avoiding sales tax for sales transactions within Minnesota. The seller paid the tax and then pursued a claim against the buyer to collect the sales tax. At issue before the Minnesota Supreme Court was what statute of limitations applied to the seller's claim and when the cause of action accrued. On the first issue, the Minnesota Supreme Court concluded that the six year statute of limitations found at Minn. Stat. § 541.05, subd. 1(2) (1978) applied. In determining when the cause of action accrued, the Minnesota Supreme court concluded that it accrued on the date of sale because that is the date that the "debt" arose. In so doing, the Court rejected the seller's argument that the statute of limitations should not run during the time it spent attempting to correct the problem through litigation. Leisure Dynamics, 298 N.W.2d at 38. Accordingly, the rule of Leisure Dynamics is that even though a party can take steps to entirely correct the problem, the cause of action accrues when the initial damage occurs.

**B. ANY CLAIM BASED UPON THE ALLEGED FAILURE TO MAKE THE SECTION 754 ELECTION FOR THE 2000 TAX YEAR IS BARRED BY THE STATUTE OF LIMITATIONS.**

Respondents have conceded that, even under their analysis of Minnesota's accrual rule, 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.

C. THE ALLEGED NEGLIGENCE IN FAILING TO MAKE THE SECTION 754 ELECTION WITH THE ORIGINAL 2001 PARTNERSHIP RETURN RESULTED IN "SOME DAMAGE."

1. The overpayment of tax and loss of use of those funds represents "some damage."

There is no dispute in this case that Respondents are alleging that, as a result of the failure to make the Section 754 election in the original partnership returns, they overpaid taxes when both the 2000 tax returns were filed (at some point prior to April 15, 2001) and again overpaid taxes when the 2001 tax returns were filed (sometime prior to April 15, 2002.) (M.A.125.) Respondents' expert, Thomas Boesen, has calculated both the overpayment of tax for each of those years for each Respondent entity and has attempted to value the loss of use of those funds. Specifically, Mr. Boesen alleges that Respondent Fischer Marketplace, LLP lost depreciation deductions in the 2000 tax year which resulted in an immediate overpayment of taxes in the amount of \$1,487 when that return was filed and suffered damages relating to the loss of the use of those funds which he calculated to be \$1,020. (M.A.99.) He goes on to calculate that for the 2001 tax year, Respondent Fischer Marketplace, LLP was unable to take depreciation deductions in the amount of \$7,712 resulting in an overpayment of tax in the amount of \$3,524. He calculated the damages relating to the loss of use of those funds to be \$2,055. (Id.) Similarly, Mr. Boesen claims that Respondent Ames & Fischer, Co., II, LLP lost depreciation deductions when both the 2000 and 2001 partnership returns were filed resulting in an overpayment of tax in each of those years. He calculated that, for the 2000 tax year, Ames & Fischer Co., II, LLP lost depreciation deductions of \$30,178

resulting an overpayment of taxes in the amount of \$14,169 and, for the 2001 tax year, it lost depreciation deductions of \$52,079 resulting in an overpayment of tax in the amount of \$24,191. (M.A.107.) Mr. Boesen also calculated the damages for the loss of use of those funds to be \$9,722 and \$14,110 respectively. (M.A.107.) Finally, Mr. Boesen claims that Respondent Fischer Sand & Aggregate, LLP lost depreciation deductions in 2000 of the amount of \$3,542 and in 2001 of the amount of \$14,087. Mr. Boesen calculated that Fischer Sand & Aggregate, LLP overpaid its taxes, when the 2000 partnership return was filed in the amount of \$1,633 and in 2001 in the amount of \$6,858. Mr. Boesen calculated the damages relating to the loss of use of that money to result in damages in the amount of \$1,141 and \$4,000 respectively. (See, M.A.113.) Respondents have never disputed they overpaid taxes with the filing of the 2000 return and again upon the filing of the 2001 return or that they immediately sustained damage by the loss of use of those funds. Here, Respondents are suing McDonald for the very damages that the trial court concluded did not exist to support an immediate suit in April 2002. These amounts undisputedly constitute “some damage” that could have been compensable in a legal malpractice action. 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 tax payer 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”); Karam v. Sagemark Consulting, Inc., 383 F.3d 421, 424 (6<sup>th</sup> Cir. 2004) (noting that plaintiff’s

negligence claim against tax advisor included claims of loss of use of money needed to pay tax.); Brophy v. Mei, 2010 WL 94026 (Wis. Ct. App. filed Jan. 12, 2010) (noting that “[a]s a result of the alleged negligence, Brophy claimed to have sustained damage in the form of a judgment against him and incurred attorney fees, accountant fees and loss of use of that money.”); 3 Mallen & Smith, Legal Malpractice § 21:5 (2010) (“Interest, as an element of damages, may be recoverable in two situations... Second, interest may be awarded to compensate the client for the loss of use of the funds, including money that would have been received had the attorney performed competently.”)

The trial court concluded that the opportunity that, had the error been corrected and the election been made at some point before April 15, 2003, Respondents would have received a refund of the overpaid tax and, as such, there is no damage until they lost the opportunity to obtain that refund. This, however, ignores the loss of use component to their claim. Even if a subsequent refund could have been obtained when the error had been fixed does not change the fact that they had an uncontested and undisputed loss of the use of the overpaid taxes while it was in the hands of the IRS. That damage occurred on the day that Respondents overpaid the tax on the 2000 return and on the 2001 return and continued to increase every day thereafter.

This identical issue was considered by the Georgia Court of Appeals in Leon Jones Feed & Grain, Inc. v. General Business Services, Inc., 333 S.E.2d 861 (Ga. Ct. App. 1985). In Leon Jones Feed & Grain, the plaintiff sued his financial and tax adviser alleging that the adviser failed to recommend that the plaintiff take advantage of certain sales tax exemptions that were available to it. As a result, the plaintiff overpaid its taxes

for a number of years. The defendant subsequently moved for dismissal contending that the statute of limitations barred the claim. Under Georgia law, like Minnesota, a claim against a professional accrues when there is negligence and damage, even if the damage is “slight or nominal.” Leon Jones Feed & Grain, Inc., 333 S.E.2d at 862. The Georgia Court of Appeals affirmed the dismissal of the case. In so doing, the court noted:

The statute of limitations begins to run at the time the wrongful act accompanied by appreciable damage occurs. Applying this principal to the present case, is clear that each time Jones paid the sales tax in reliance on GBS’ advice a cause of action accrued in the favor of Jones and the four-year statute of limitations began to run. The damage incurred at that point would not be very great. It would simply be the loss of use of the money paid unnecessarily. This damage would remain even if GBS corrected the mistake immediately by properly advising its client and promptly applying for a refund as allowed by law. In that event, the damage incurred would be slight; nonetheless, it would be legally cognizable damage which, coupled with the wrongful act of failure to advise Jones of the sales tax exemption, would support a cause of action by Jones against GBS.

Leon Jones Feed & Grain, Inc., 333 S.E.2d at 862-863; See also, Bagley v. Hall, 1992 WL 132454 (Oh. Ct. App. filed June 11, 1992).

Here, like in Leon Jones Feed & Grain, Inc., and Bagley the cause of action accrued upon the overpayment of tax and the resulting damage flowing from the loss of use of those funds. Accordingly, this alone, establishes that Respondents sustained “some damage” upon the filing of the 2000 and 2001 tax returns. Respondents’ cause of action relating to the 2001 tax return accrued when the partnership returns were filed on or before April 15, 2002. Because this action was not commenced until April 2009, Respondents’ cause of action against McDonald is barred.

2. The cost to “repair” the failure to make the Section 754 election with original return represents “some damage” for the purposes of accrual of the statute of limitations against Appellants.

There can be no dispute that, once the 2000 and 2001 tax returns were filed, the Respondents had a claim against McDonald. If, as Respondents allege, McDonald was negligent in failing to recommend to the Larsens to make the Section 754 election and, as a result, a faulty return was prepared and filed, the Respondents had a claim against McDonald for the attendant cost to correct that alleged error. On the day that the 2000 and/or 2001 returns were filed, the only way that a Section 754 election could have been made is for an amended return to be prepared. See, 26 C.F.R. § 301.9100-2. This cost of preparing that amended return is yet another damage that would have supported a legal malpractice claim. If Respondents had discovered that the returns had been filed incorrectly on April 16, 2002, they could have brought this very claim against McDonald and sought to recover the cost of having another accountant prepare those amended returns. 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.’”); Hinman, Straub, Pigors & Manning v. Broder, 456 N.Y.S.2d 834 (3<sup>rd</sup> Dept. 1982) (plaintiff in legal malpractice action entitled to recover fees paid to subsequent lawyer to perform the duties which attorney had agreed to perform.); Nettleton v. Stogsdill, 899 N.E.2d 1252, 1259 (Ill. App. 2008) (fees incurred in attempting to remedy negligence of attorney recoverable); Cole and Co. v. Dearborn and Ewing, 977 S.W.2d 528, 531-34

(Tenn. 1998) (the fees incurred by plaintiff for work performed to correct the problem caused by the negligent attorney are recoverable in a legal malpractice claim); Jones v. Link, 463 F.Supp.2d 465 (E.D. Va. 2007) (“[It] is worth noting that, had plaintiff incurred legal fees to correct the adverse consequences of defendant’s negligence, for example, if plaintiff had retained an attorney to prepare his § 2255 motion, those fees might be recoverable because they were arguably proximately caused by defendant’s wrongful act or omission.”)

The fact that Respondents did not actually pay the cost associated with correcting the error in 2002 is of no consequence for the statute of limitations analysis. This very issue was addressed in Herrmann v. McMenemy and Severson, 590 N.W.2d 641 (Minn. 1999). In Herrmann, the Minnesota Supreme Court held that a cause of action for legal malpractice accrued upon the creation of a liability for future payment arose not when it was actually paid. In Herrmann, the law firm established a qualified employee trust for its client in 1986. In 1987, the law firm assisted the client in creating a joint venture in which engaged in prohibited transaction with the trust in violation of the Internal Revenue Code. Herrmann, 590 N.W.2d at 642. As a result of engaging in these prohibited transactions, the client became liable for federal excise tax and interest. The client did not discover the problem until 1993 and, at that point, began incurring out of pocket fees attempting to correct the problem. In 1996, the IRS actually imposed the excise tax and interest. The plaintiff in Herrmann argued that the statute of limitations should not begin to run, at the earliest, until they paid something out-of-pocket. Minnesota Supreme Court rejected this position. The Herrmann court concluded that the

statute of limitations accrued in 1987, when the prohibited transactions began, because the future exposure, albeit, unpaid, represented “some damage.” Herrmann, 590 N.W.2d at 643.

In this case, like in Herrmann, upon the filing of the 2001 return, Respondents incurred a future exposure – the cost of correcting the faulty returns. It is of no moment that Respondents did not pay that cost because the time ran for the amendment before the problem was discovered. The focus of this Court’s inquiry is whether, immediately after the allegedly faulty returns were filed, could Respondents have brought a claim against McDonald for the cost to correcting the problem. Absolutely they could. Because Respondents had a legitimate and prosecutable claim against McDonald to recover the costs which would be required to fix the problem created by his alleged advice on the date the allegedly faulty returns were filed, Respondents’ cause action accrued in 2002 and is, therefore, barred by the statute of limitations.

3. The district court erred in concluding, given Respondents' ability to correct the defective 2001 partnership returns for one year, the cause of action against McDonald did not accrue April 15, 2003.

Although the district court recognized that Respondents overpaid tax on the date that each defective return was filed in 2002, that they began to immediately incur damages for the loss of use of those funds and incurred the liability for the costs associated with correcting the problem, it concluded that these damages were not actionable until April 15, 2003 – the date that Respondents lost the ability to correct the defective returns. The district court cited no authority for this position as to why an

immediate damage incurred (and sought here) could not have been immediately sought. The district court's decision is inconsistent with Minnesota law. See Leisure Dynamics, 298 N.W.2d at 38-39. The fact that a client has an opportunity to attempt to correct the error caused by his/her lawyer does not mean that the cause of action has not accrued. If the district court's position were to be adopted, Minnesota's legal malpractice statute of limitations analysis would drastically change and what recoveries sought would be brought into question. Under that analysis, anytime a client has the opportunity to undertake steps to correct the problem caused by the lawyer, the client's cause of action against the lawyer for the error would not exist. For example, if an attorney negligently drafts a deed for a client, any cause of action against the attorney would not accrue until the time to seek reformation of the deed runs. While such actions may greatly reduce the amount of damages that would have resulted from the error, it does not change the fact that immediate and irremediable damage did occur. Furthermore, the district court's analysis fails to address the damages, which are necessarily required to "fix" the problem.

In this case, the statute of limitations on Respondents' legal malpractice claim accrued when they incurred "some damage." Respondents undisputedly suffered "some damage" the instant the returns were filed without the Section 754 election being made.

### **CONCLUSION**

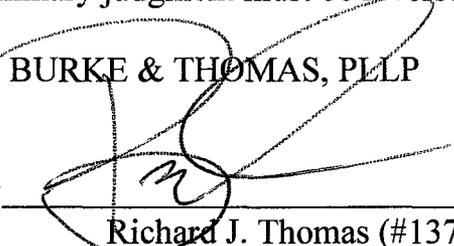
The district court's March 31, 2010 order denying McDonald's motion for summary judgment on statute of limitations grounds should be reversed. Here, there is no dispute that Respondents suffered "some damage" on the date the defective

partnership income tax returns were filed. If the error had been discovered immediately after the returns were filed, Respondents could have brought this very claim against McDonald to seek the very same damages sought here. The Respondents would have been entitled to seek from McDonald the costs that they would incur in correcting the problem and the cost of the loss of use of the funds they used to overpay their taxes. These damages were clearly actionable on the date the returns at issue were filed and, as such, Respondents' legal malpractice claim accrued on that date. 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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Dated: 9/20/10

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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, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,620 words. The brief was prepared using Microsoft Office® Word 2003.

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Dated: 9/20/10

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