

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).

RESPONDENTS' BRIEF

Steven J. Weintraut (#251975)
Kristin L. Kingsbury (#346664)
Siegel, Brill, Greupner, Duffy & Foster, P.A.
100 Washington Avenue South
Suite 1300
Minneapolis, MN 55401
Telephone: (612) 337-6100

*Attorneys for Respondents
Ames & Fischer Co., II, LLP, et al.*

Charles E. Jones (#202708)
Meagher & Geer, PLLP
33 South Sixth Street, Suite 4400
Minneapolis, MN 55401
(612) 338-0661

*Attorneys for Appellants
Larsen, Larsen & Associates, P.A., et al.*

Richard J. Thomas (#137327)
Bryon G. Ascheman (#237024)
Burke & Thomas, PLLP
3900 Northwoods Drive, Suite 200
St. Paul, MN 55112-6966
(651) 789-2208

*Attorneys for Appellants
John R. McDonald, et al.*

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIESv

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE4

FACTS.....9

 A. 754 Elections and Their Impact9

 B. How and When 754 Elections Are Made 11

 C. Independent Opportunities and Failures to Make the Elections
 for Tax Years 2000 and 2001 for Three Fischer Partnerships 13

 D. Appellants’ Breaches for Failing to Ensure that the Elections were
 Timely Made for FMP For Either Tax Year 14

 1. Larsens’ Explanation for their Failure to Timely Make the
 Elections 14

 2. McDonald’s Explanation for His Failures to Recommend
 that the Elections Be Timely Made For Any of the Three
 Partnerships for Either Tax Year 15

 3. Appellants’ Breaches 18

 E. Appellants’ Breaches for Failing to Ensure that the Elections Were
 Timely Made for AFC For Either Tax Year 19

 1. Larsens’ Explanation 19

 2. Appellants’ Breaches 20

 F. Appellants’ Breaches for Failing to Ensure that the Elections
 Were Timely Made for FSA For Either Tax Year 21

 1. Larsens’ Explanation 21

 2. Appellants’ Breaches 22

G.	The Nature of the Damages to the Fischers Caused by the Missed 754 Elections, and When They Occurred.....	23
1.	The Nature of Damages to the Fischers.....	23
2.	When Damages For the 2000 and 2001 Tax Years Occurred	24
ARGUMENT		25
I.	STANDARD OF REVIEW	25
II.	THE DISTRICT COURT’S ORDER REGARDING THE LARSENS SHOULD BE AFFIRMED	26
A.	There Is No Breach by Larsens or Damage to Fischers relating to the Failure to make the 754 Elections for tax year 2000 until April 16, 2002 at the Earliest.....	28
1.	There Was No Breach until April 16, 2002, at the Earliest...28	
2.	There Was No Damage until April 16, 2002 at the Earliest..30	
B.	There Is No Breach by Larsens or Damage to Fischers relating to the Failures to make the 754 Elections for tax year 2001 until April 16, 2003, at the Earliest.....	32
1.	There Was No Breach until April 16, 2003, at the Earliest...32	
2.	There Was No Damage until April 16, 2003, at the Earliest	32
3.	The Failures to Timely Make the Elections by April 15, 2003, for Tax Year 2001 Were Independent Negligent Acts	32
C.	Minnesota Supreme Court Precedent Mandates Dismissal of Larsens’ Statute of Limitations Defense	37
D.	Larsens’ New Appellate Arguments are Also Without Merit	42

III.	IF THIS COURT DOES NOT APPLY THE CONTINUOUS REPRESENTATION DOCTRINE, THE DISTRICT COURT’S ORDER REGARDING MCDONALD SHOULD BE AFFIRMED.....	45
A.	The Court’s Order is Correct That There Are No Breaches by McDonald or Damage to Fischers relating to tax year 2001 until April 16, 2003, at the Earliest.....	48
1.	There Was No Breach until April 16, 2003, at the Earliest...	48
2.	There Was No Damage until April 16, 2003, at the Earliest	49
3.	McDonald’s Failures to Timely Recommend that the 754 Elections be made by April 15, 2003, for Tax Year 2001 Were Independent Negligent Acts.....	49
B.	Minnesota Supreme Court Precedent Mandates Dismissal of McDonald’s Statute of Limitations Defense as to Tax Year 2001 ...	50
C.	McDonald’s Arguments Are All Without Merit	52
1.	<i>Leisure Dynamics</i> Does Not Aid McDonald’s Argument.....	52
2.	Georgia Law Supports the District Court’s Conclusion and Does Not Aid McDonald’s Argument	53
3.	Ohio Law Actually Supports Fischers’ Argument that All of Their Claims Against McDonald are Timely-asserted.....	54
4.	McDonald’s Arguments Regarding the Hypothetical Cost to Amend the Tax Returns Constituting “Some Damage” are as Unavailing as Larsens’	55
IV.	THE DISTRICT COURT’S ORDERS APPLYING THE “SOME DAMAGE” RULE SHOULD NOT BE REVERSED BECAUSE THE LEGAL QUESTION CERTIFIED BY THE DISTRICT COURT IS NOT “DOUBTFUL”	55

V.	THE CONTINUOUS REPRESENTATION DOCTRINE IS AN INDEPENDENT BASIS FOR RULING THAT FISCHERS' CLAIMS ARE ALL TIMELY-ASSERTED AS A MATTER OF LAW	56
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.....	56
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.....	59
	CONCLUSION	60

TABLE OF AUTHORITIES

Cases

<i>Anoka Orthopaedic Associates, P.A. v. Mutschler</i> , 773 F.Supp. 158 (D. Minn. 1991)	3, 56, 60
<i>Antone v. Mirviss</i> , 720 N.W.2d 331 (Minn. 2006).....	passim
<i>Bagley v. Hall</i> , 1992 WL 132454 (Oh. Ct. App. June 11, 1992).....	54
<i>Benigni v. County of St. Louis</i> , 585 N.W.2d 51, 54 (Minn. 1998).....	25
<i>Bonhiver v. Graff</i> , 248 N.W.2d 291 (Minn. 1976).....	3, 27, 56
<i>Brodsky v. Brodsky</i> , 733 N.W.2d 471, 478 (Minn. Ct. App. 2007).....	43, 44
<i>Devereaux v. Stroup</i> , 2008 WL 73712 (Minn. Ct. App.) (unpublished)	36, 50
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60, 71 (Minn. 1997)	26
<i>Fabio v. Bellomo</i> , 504 N.W.2d 758, 761 (Minn. 1993).....	26
<i>Fletcher v. Zellmer</i> , 909 F.Supp. 678 (D. Minn. 1995), <i>aff'd</i> 105 F.3d 662 (8 th Cir. 1997)	3, 60
<i>Golden v. Lerch Bros.</i> , 203 Minn. 211, 220, 281 N.W. 249, 253 (1938).....	25
<i>Herrmann v. McMenemy & Severson</i> , 590 N.W.2d 641 (Minn. 1999).....	passim
<i>Leisure Dynamics v. Falstaff Brewing Corp.</i> , 298 N.W.2d 33 (Minn. 1980)	52
<i>Leon Jones Feed & Grain, Inc. v. General Business Services, Inc.</i> 333 S.E.2d 861 (Ga. Ct. App. 1985)	53, 54
<i>May v. First National Bank</i> , 427 N.W.2d 285 (Minn. Ct. App. 1988), <i>rev. denied</i>	3, 60
<i>New Concept Housing v. United Department Stores</i> , 2009 WL 1362347, *7 (Oh. Ct. App. 1 Dist. May 15, 2009).....	54
<i>Noske v. Friedberg</i> , 670 N.W.2d 740 (Minn. 2003).....	1, 2, 30
<i>Reid Enterprises, Inc. v. Deloitte & Touche, LLP</i> , 2000 WL 665684 (Minn. App. May 23, 2000) (L.A.327-33)	39, 40, 58

Schuster v. Magee, 1992 WL 213566 (Minn. Ct. App.) (unpublished).....56

Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988).....25

Statutes

Minn. Stat. § 541.05(5)25

Rules

26 U.S.C. § 497539

STATEMENT OF THE ISSUES

1. Under the “some damage” rule, when Respondents’ (“Fischers”) claims accrue is based on when they could survive a Rule 12 motion to dismiss. A claim for accounting or legal malpractice survives a Rule 12 motion to dismiss, and therefore accrues, when there is both 1) a breach; and 2) “some damage” caused by that breach. Can a cause of action for accounting or legal malpractice accrue for statute of limitations purposes before the alleged breach occurs? I.e., can there be “some damage” caused by a breach before the breach?

District court’s ruling: The district court ruled that the causes of action did not accrue until there was both a breach and some damage caused by that breach.

Most apposite authority: *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006); *Herrmann v. McMenemy & Severson*, 590 N.W.2d 641 (Minn. 1999); *Noske v. Friedberg*, 670 N.W.2d 740 (Minn. 2003).

2. For tax year 2000, Fischers claim that Appellants breached their duties when they failed to ensure that the 754 Elections were timely made for three partnerships. The 754 Elections could have been timely made, as a matter of right, at any point on or before April 15, 2002. The breaches by Appellants therefore did not occur until April 16, 2002, when the time period for making the Elections as of right expired. Once the Elections were not timely made, Fischers became liable for overpaid taxes for tax year 2000.

Do Fischers’ causes of action relating to the 2000 tax year accrue when the breaches occurred on April 16, 2002, or prior to when the breaches occurred?

District court’s ruling: The district court ruled that the causes of action relating to tax year 2000 did not accrue until at least April 16, 2002.

Most apposite authority: *Antone; Herrmann; Noske.*

3. Even though Appellants didn't ensure that the 754 Elections were timely made for tax year 2000, they still could have ensured that the Elections were timely made for tax year 2001 based on an independent set of partnership transfers in 2001. Fischers claim that Appellants also breached their obligations to Fischers by not ensuring that the 754 Elections were timely made for the three partnerships for tax year 2001, which independently caused Fischers approximately \$1.93 million of damages.

The 754 Elections for tax year 2001 could have been timely made, as a matter of right, at any point on or before April 15, 2003. The breaches by Appellants therefore did not occur until April 16, 2003, when the time period for making the Elections as of right expired. Once the Elections were not timely made, Fischers became liable for overpaid taxes for the 2001 tax year.

Do Fischers' causes of action relating to the 2001 tax year accrue when the breaches occurred on April 16, 2003, or prior to when the breaches occurred?

District court's ruling: The district court ruled that the independent causes of action relating to tax year 2001 did not accrue until at least April 16, 2003.

Most apposite authority: *Antone; Herrmann; Noske.*

4. Professional negligence claims, including those against accountants and attorneys, can be subject to the continuous representation doctrine, which results in the clients' claims not accruing until the work performed for the clients ceases. The continuous representation doctrine is typically applied by Minnesota courts where there is a continuing opportunity and obligation to perform, which would prevent damage to the clients, that is missed by the professionals.

Here, Appellants Larsen and Larsen, et al ("Larsens") were Fischers' accountants for 20 years, until 2007, and Appellants John McDonald et al ("McDonald") was the Fischers' attorney for approximately 45 years, until 2007. Larsens and McDonald did not ensure that the 754 Elections were timely made for two different tax years, for three different Fischer partnerships, in 2002 and 2003, and continued to represent the Fischers until 2007.

Should the continuous representation doctrine be applied so that the causes of action against Larsens do not accrue until at least April 5, 2002? Should the continuous representation doctrine be applied so that the causes of action against McDonald do not accrue until at least April 9, 2003?

District court's ruling: The district court decided not to apply the continuous representation doctrine to either Larsens or McDonald.

Most apposite authority: *Anoka Orthopaedic Associates, P.A. v. Mutschler*, 773 F.Supp. 158 (D. Minn. 1991); *May v. First National Bank*, 427 N.W.2d 285 (Minn. Ct. App. 1988), *rev. denied*; *Fletcher v. Zellmer*, 909 F.Supp. 678 (D. Minn. 1995), *aff'd* 105 F.3d 662 (8th Cir. 1997); *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976).

STATEMENT OF THE CASE

754 Elections, when made, change the tax basis of the partner's ownership interest in partnership assets to reflect the market value of the assets at the time of and upon the occurrence of a qualifying transfer. If the market value of the partnership assets is higher than the tax basis of those assets, the 754 Election provides a "stepped-up basis" that increases the basis of those assets to their fair market value, resulting in a reduction in the future taxes paid by the affected partners.

If the market value of the partnership assets is lower than the tax basis of those assets at the time of the qualifying transfer, however, the 754 Election provides a "stepped-down" basis that reduces the basis of those assets to their fair market value, resulting in an increase in the future taxes paid by the affected partners.

A 754 Election, once made, is irrevocable and applies to all subsequent qualifying transfers, including sales of partnership interests. Because the fair market value of the partnership's assets may increase or decrease in the future, the initial decision whether to make a 754 Election for a particular partnership upon the occurrence of a qualifying transfer is an important one. In recognition of this importance, the tax code gives partnerships ample time to make the 754 Election – until 12 months after the partnership tax return is due.

For a calendar year partnership, the due date of the 754 Election is due on April 15 of the *second* year after the end of the calendar year (April 15, 2002 for a qualifying

event occurring during the 2000 calendar year). At any point prior to the initial due date, the partnership can timely make the 754 Election as a matter of right.

A timely 754 Election can be made using either of two equally acceptable methods. The 754 Election can be made on the partnership's timely filed tax return or during the subsequent 12 months (before the due date of the 754 Election) by filing an amended partnership return making the election. A partnership may forgo making the election on the partnership's initial tax return to take advantage of the additional time afforded by the Internal Revenue Code for making the 754 Election to gather further facts before committing the partnership. There is no consequence to deferring the decision in this manner, as the second method for making the 754 Election is equally effective. It is only when both methods for making the 754 Election are not used before the due date that the ability to make a 754 Election is lost.

Appellants John McDonald and his law firms represented the Fischer Family (husband Math and wife Ann, their son Peter and daughter Liza Robson) and most of the Fischers with respect to the Fischers' personal and business financial planning for approximately 45 years, from 1962 to 2007. Larsens worked as the Fischers' personal and business accountants for approximately 20 of those years, from approximately 1987 to 2007.

During those 20 years, McDonald and the Larsens worked cooperatively in representing Fischers' financial interests, and the Fischers relied upon their expertise and advice. And when the family patriarch Math Fischer died on July 22, 2000, the Fischers relied even more on McDonald and the Larsens.

In 2000 and 2001, two independent events allowed McDonald to recommend and Larsens to make 754 Elections for three different Fischer partnerships for either tax year, which would have provided tax benefits to the owners of each partnership. The first, in July 2000, was the death of Math Fischer.

The second, in 2001, was a series of intra-family transfers of partnership interests documented by McDonald. McDonald failed to recommend and Larsens failed to make the 754 Elections for the qualifying event that occurred during the 2000 tax year by the due date for the Elections of April 15, 2002, and McDonald and Larsens again negligently failed to recommend and make the 754 Elections for the independent qualifying events that occurred during the 2001 tax year by the due date for the Elections of April 15, 2003.

Appellants' failures to ensure that the 754 Elections were timely made for either tax year have resulted in the entities' owners paying more taxes than they should have, and have caused approximately \$2.6 million in damages. Defendants' independent failures to ensure that the 754 Elections were timely made for tax year 2001 caused approximately \$1.93 million of damages.

Fischers brought negligence and breach of contract claims against the Larsens on April 4, 2008, and against McDonald on April 10, 2009. The actions were consolidated. Both Larsens and McDonald brought motions for summary judgment, seeking dismissal based on a statute of limitations defense. The court denied their motions, and also denied Fischers' request that the court apply the continuous representation doctrine to either

Larsens or McDonald, and therefore ruled that as to McDonald, only Fischers' independent claims relating to tax year 2001 were timely-asserted.

And the district court certified to this court the legal question of when a cause of action for malpractice accrues against Larsens and McDonald pursuant to the "some damage" rule. Fischers filed a Notice of Related Appeal, asking this court to review the district court's decision to not apply the continuous representation doctrine to Fischers' claims against either Larsens or McDonald.¹

The district court correctly applied the "some damage" rule to Fischers' claims against Larsens relating to tax years 2000 and 2001, and to Fischers' independent claims against McDonald relating to tax year 2001. The district court's rulings on these issues should be affirmed. Fischers also ask this court to reverse the district court's decision to not apply the continuous representation doctrine to Fischers' claims against Larsens and McDonald, and to thereby find Fischers' independent claims against McDonald relating to tax year 2000 to also be timely-asserted.

Fischers' claims relating to tax year 2000 did not accrue until April 16, 2002, because it was not until then that Appellants breached their obligations to ensure that the 754 Elections were timely made for tax year 2000. It took the failures to ensure that the 754 Elections were made using the second method by April 15, 2002, for Appellants to have breached their obligations to the Fischers. Since there can be no claim for negligence until there is both a breach and damages caused by that breach, there was no claim until April 16, 2002, for tax year 2000.

And the fact that the calculation of Fischers' damages relate back in time to 2000 does not make the date of accrual for tax year 2000 occur earlier than April 16, 2002, because the damages can not occur until the breach occurs. Since the breaches and the damages didn't occur until April 16, 2002, at the earliest, Fischers' claims relating to the 2000 tax year accrue after April 4, 2002 (less than six years before Fischers brought their action against Larsens), and are timely-asserted against Larsens as a matter of law.

Fischers have also asserted independent claims relating to the 2001 tax year that are timely-asserted. Appellants' failures to ensure that the 754 Elections were timely made for the 2000 tax year did not preclude their ability and obligation to ensure that the 754 Elections be timely made for the independent qualifying transfers that occurred during the 2001 tax year by April 15, 2003. While it is true that had the 754 Elections been made for the 2000 tax year, no new 754 Elections would have been required for the 2001 tax year, the subsequent qualifying transfers in 2001 created a second independent opportunity and obligation to recommend and make the 754 Elections.

Appellants' failures relating to the 2001 tax year were therefore independent breaches, which did not occur until the time period in which the 754 Elections could have been timely made as a matter of right expired – April 16, 2003. Fischers' independent claims relating to the missed 754 Elections for the 2001 tax year therefore did not accrue until no earlier than April 16, 2003 (less than six years before Fischers commenced the actions against Larsens and McDonald).

¹ Respondents' Appendix ("R.A.") 1-9.

The district court was correct in applying the “some damage” rule and determining that all of Fischers’ claims against Larsens are timely-asserted, and that Fischers’ independent claims against McDonald for tax year 2001 are also timely-asserted.

Finally, under Minnesota law, the continuous representation doctrine can be applied to claims asserted against professionals where, as here, there is a continuing opportunity and obligation to perform, which would prevent damage to the clients, that is missed by the professionals. Larsens and McDonald continuously represented the Fischers until 2007 but did not ensure that the 754 Elections were timely made for any of the three partnerships for either tax year. Application of the doctrine is therefore appropriate, which makes all of Fischers’ claims timely, including the claims against McDonald relating to tax year 2000.

FACTS

A. 754 Elections and Their Impact.²

When partnership assets are sold, the difference between the sale price and the “tax basis” of the asset is taxed, either as a capital gain or ordinary income. Increasing the tax basis so that it is similar in value to the market value of the asset can be financially advantageous, because it results in less taxable gain and therefore less taxes. Increasing the tax basis can also allow for additional depreciation deductions, which deductions also decrease the amount of taxable gain and therefore the amount of taxes.

Internal Revenue Code Section 754 authorizes a partnership to make a Section 754 Election for a tax year in which there is a “Qualifying Transfer,” which includes sales or

exchanges or upon the death of a partner. If a partnership makes a Section 754 Election, then thereafter each time a Qualifying Transfer of an interest in a partnership occurs, the tax basis of the partner's ownership interest in the partnership assets is adjusted to reflect the market value at the time of the Qualifying Transfer. When the market value of the asset is higher than its current tax basis, then the 754 Election results in an increase in the tax basis of partnership assets, which is commonly referred to as "stepped-up basis."

Obtaining a stepped-up basis in partnership assets is financially advantageous because additional depreciation deductions may be available to the partner(s), which reduces the taxable gain, and if partnership assets are sold, income taxes resulting from the sale will be reduced due to the stepped-up basis. 754 Elections therefore created the opportunity for the partners of the partnerships to decrease the amount of taxes they would pay when compared to taxes paid if the 754 Election is not made.

If, however, the market value of the partnership assets are lower than the tax basis of the assets, there may be a "step-down" in those assets from the 754 Election that creates additional taxes. There are, therefore, circumstances in which a 754 Election is not advisable, such as when the current market value of the partnership assets is lower than the tax basis of those assets on the partnership books. Once the 754 Election is made, it is irrevocable unless revocation is approved by the IRS. The decision whether to make a 754 Election for a partnership for a tax year in which there was a Qualifying Transfer is therefore an important one.

² L.A.269, ¶¶2-5.

B. How and When 754 Elections Are Made.³

The Department of Treasury Regulations therefore provide partnerships ample time to make the decision of whether to make a Section 754 Election. A partnership is automatically granted a 12 month extension beyond the original filing date to file a Section 754 Election. Section 754 Elections can therefore be made any time up to the 12 months after the date that the partnership tax return is originally due.

A Section 754 Election can be made either (i) by attaching an election form and Section 743 Statement to the partnership's timely filed income tax return for the year in which a Qualifying Transfer occurs, or (ii) by attaching an election form and Section 743 Statement to the partnership's amended return filed within 12 months after the partnership tax return is originally due.

Therefore, at a minimum a partnership has until April 15 of the *second* year following a Qualifying Transfer (October 15 of the second year if the original tax return due date was extended) to timely file the Section 754 Election with an amended form 1065 tax return. Making the 754 Election by amending the original tax return is not the correction of an error but is an alternative prescribed method for making the 754 Election. The due date for the 754 Election is unaffected by the date the original partnership return is actually mailed.

If a Qualifying Transfer occurs in a tax year, the 754 Election can be made irrespective of whether it was made for a previous tax year in which a Qualifying Transfer occurred. In other words, if there are two Qualifying Transfers that occur in

³ L.A.270, ¶¶6-10.

separate tax years, if the 754 Election is not made in the first tax year for the first Qualifying Transfer, the 754 Election can still be made in the second tax year for the second Qualifying Transfer. The benefits of the 754 Election will have been lost for the first tax year, but they will have been captured for the second tax year and all subsequent tax years.

There may be circumstances where it is advisable to forgo making the 754 Election with the original filing of the partnership return. For example, if partnership assets dramatically decrease in market value between the date of the Qualifying Transfer and the original filing of the tax return, it might be advisable to not make the Election with the original return, but to wait and if appropriate make it with an amended return by the due date.

Or there may be circumstances where it is advisable not to make the 754 Election for one tax year in which a Qualifying Transfer occurred, but the 754 Election should be made in a subsequent tax year in which a Qualifying Transfer occurred. For example, if partnership assets dramatically increase in market value between two different tax years, it might be advisable to not make the election for the first tax year in which a Qualifying Transfer occurred, and make it by the due date for the subsequent tax year in which a Qualifying Transfer occurred.

C. Independent Opportunities and Failures to Make the Elections for Tax Years 2000 and 2001 for Three Fischer Partnerships.⁴

When Math Fischer died on July 22, 2000, his death was a Qualifying Transfer that allowed for the 754 Elections to be made for tax year 2000 for three Fischer partnerships -- AFC, FMP, and FSA. The deadline to make the 754 Elections for tax year 2000 was April 15, 2002.⁵

On April 30, 2001, and May 1, 2001, there were transfers and sales of partnership assets that independently constituted additional Qualifying Transfers for tax year 2001 for AFC, FMP, and FSA. A 754 Election could have been made for tax year 2001 even though the 754 Elections weren't made for tax year 2000. Had the 754 Elections been made for tax year 2001 after they were not made for tax year 2000, most of the tax benefits from the 754 Elections would have been achieved. The deadline to make the 754 Elections for tax year 2001 was April 15, 2003.⁶

Accordingly, there were two separate and distinct events that allowed for the 754 elections to be made: 1) Math Fischer died on July 22, 2000, which allowed for the election to be made for that tax year, as a matter of right, up and until April 15, 2002; and, 2) on May 1, 2001, there were transfers of partnership interests that also allowed the election to be made for tax year 2001, as a matter of right, up and until April 15, 2003.

⁴ L.A.270-71, ¶¶11-13.

⁵ L.A.270, ¶11.

⁶ L.A.270-71, ¶12.

The failures to timely make the elections by those dates for either tax year for the three partnerships were distinct and separate negligent acts.⁷

D. Appellants' Breaches for Failing to Ensure that the Elections were Timely Made for FMP For Either Tax Year.

1. Larsens' Explanation for their Failure to Timely Make the Elections.

From 2000-2003, FMP owned primarily land and some buildings. Both Jim and Mike Larsen testified that they didn't make the 754 Elections for FMP for either tax year because FMP intended to sell all the land it owned as quickly as possible. Mike Larsen testified that the "Fischer family wanted to sell the property in Fischer Marketplace as quickly as possible," and that "under that circumstance a 754 election probably would not have been an election they would make."⁸ Mike Larsen further testified:

Q. You've said as to both the 2000 and 2001 opportunities for Fischer Marketplace that the Fischers wanted to sell the land that Fischer Marketplace owned and therefore the 754 election, and I may be misstating your testimony, but it wasn't a good idea. Is that correct?

A. I believe that it was – that's correct, yes, that at the time it was primarily land that they owned in that partnership with the intention of selling as quickly as possible. It was not a long-term -- there was no long-term plan for that entity and that property.⁹

Jim Larsen testified that all FMP "owned was land," and:

if you're going to sell the land, like that was their intention and that's what they did, if you're going to sell the land, why make a 754 election and have a little bit smaller tax and lose the capital gains treatment in the same year?¹⁰

⁷ L.A.271, ¶13.

⁸ L.A.519, p. 35, l. 20 – p. 35, l. 14.

⁹ L.A.520-21, p. 41, l. 15 – p. 42, l. 4.

¹⁰ L.A.474, p. 82, ll. 1-14.

According to Jim Larsen, the time value of money was not significant “because all of that [FMP] property was for sale and I know Pete and Liza wanted to sell it as fast as they could.”¹¹ Larsens’ decision regarding whether to make the 754 Election for FMP for tax year 2000 was therefore dependent on when FMP was going to sell its land.

According to Jim Larsen, when the FMP land was sold was important in the analysis because “You’d at least be [a] push and probably come out ahead, *depending on how fast you sold the lots.*”¹² Mike Larsen explained:

*“If, on the other hand, they were going to hold onto that land for a long time and make small sales or numerous sales over a longer period of time, then it might have been a good idea, but at the time that’s not what we had.”*¹³

Larsens’ testimony therefore establishes that their justification for failing to timely make the 754 Elections for FMP was dependent on if and when FMP sold its land.

2. McDonald’s Explanation for His Failures to Recommend that the Elections Be Timely Made For Any of the Three Partnerships for Either Tax Year.

McDonald’s explanation for why he didn’t recommend that the 754 Elections be timely made is the same for all three partnerships, for both tax years 2000 and 2001: McDonald claims that he was not retained by Fischers in that capacity and therefore had no obligation to recommend that the Elections be made. In his Answer to Fischers’ complaint, he alleges that he

¹¹ L.A 506, p. 210, ll. 1-4.

¹² L.A 506, p. 210, ll. 13-15 (emphasis added).

¹³ L.A 562, p. 206, ll. 2-15 (emphasis added).

was neither requested to give advice to the Plaintiffs or their partners as to whether or not it would be advantageous for Ames and Fischer and Fischer Marketplace to make a Section 754 Election with the [sic] respect to the death of Mathias Fischer nor asked to take any step to allow Ames and Fischer or Fischer Marketplace to make a valid Section 754 election or obtained [sic] a stepped-up basis in 2000 or 2001.¹⁴

McDonald also alleges the following as affirmative defenses in his Answer:

- McDonald denies that he “owed a duty to Plaintiffs as alleged because Plaintiffs never retained McDonald to provide legal services for the matters alleged in the Complaint.”;¹⁵ and
- McDonald affirmatively alleges that he was “never retained by Plaintiffs to provide legal services as alleged in the Complaint.... and that no attorney-client relationship ever existed between Plaintiffs and Defendants with respect to the matters alleged in the Complaint.”¹⁶

Fischers have not yet received McDonald’s answers to their written discovery requests, and McDonald has not yet been deposed, but his explanation is inconsistent with other evidence, including without limitation:

- McDonald’s own sworn testimony 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.”¹⁷
 - “personally organized all of the entities and trusts which are plaintiffs in [the lawsuit].”¹⁸
 - is “personally acquainted with [Larsens] and have met with them, jointly and severally, on numerous occasions in conjunction with my

¹⁴ R.A.12, ¶IX.

¹⁵ R.A.14, ¶XVII.

¹⁶ R.A.14, ¶XXII.

¹⁷ L.A.108, ¶6.

¹⁸ L.A.108, ¶7.

representation of [Fischers]. In addition I have over the years written to [Larsens] concerning [Fischers'] business planning.”

- McDonald’s communications to Fischers and Larsens, including his memos 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.¹⁹
- Liza Robson’s testimony that

from 1962 to 2007, McDonald “represented the Fischer Family and many of the Fischer Entities regarding business and estate planning” and that “McDonald wrote memos and letters to the Fischer Family and Fischer Entities, and also to the Larsens.”²⁰

From 1987 to 2007, “Larsens and McDonald worked together to provide advice and services to the Fischer Family and Fischer Entities regarding personal and business financial and tax issues, and estate planning” and “met with the Fischer Family and discussed personal and business financial and tax issues, and estate planning.”²¹

- Larsens’ testimony that:

McDonald played “the central role... in Fischer family financial planning”²² and that McDonald “regularly provided [them] with copies of memoranda and communications from [McDonald] to the Fischer family regarding his estate and tax-planning advice,”²³ and

Larsens sent the tax returns for the three partnerships for both tax years to McDonald for his review before the tax returns were filed.²⁴

¹⁹ L.S.A.103-116, 144-171.

²⁰ L.A.76A, ¶5.

²¹ L.A.76A, ¶6.

²² L.A.114, ¶24.

²³ L.A.113, ¶20.

²⁴ L.A.113, ¶18.

3. Appellants' Breaches.

The original contemplation of FMP immediately selling all of its land may have explained why Appellants didn't ensure that the 754 Elections were made with FMP's 2000 tax return, but it doesn't justify why they didn't ensure that the Elections were made by April 15, 2002, for the 2000 tax year, or by April 15, 2003, for the 2001 tax year.²⁵

As of January 1, 2000, FMP owned approximately \$12.9 million worth of land and approximately \$3.7 million worth of equipment and buildings (as measured by the book value of those assets). In 2000, FMP sold land with a book value of \$2,597,630, which was only 15.5% of the book value of the assets that FMP held that year. There were no sales of FMP assets in 2001, 2002, or in 2003 prior to April 15, 2003.²⁶ As of April 15, 2003, FMP still owned buildings and land that had a tax basis of over \$33 million. So between January 1, 2000, and April 15, 2003, FMP sold only approximately 15.5% of its assets, and those sales were all in 2000.²⁷

This lack of sales by FMP should have resulted in Appellants ensuring that the Elections were timely made for both tax years. For tax year 2000, the lack of sales between the preparation of the 2000 tax return (by April 15, 2001) and April 15, 2002, the due date for the 754 Election for tax year 2000, should have made it clear to Appellants that the 754 Election should be made for tax year 2000.

Appellants were reminded of the need to timely make the Election for tax year 2000 when Larsens were preparing the 2001 tax return for FMP between January 1 and

²⁵ L.A.271, ¶21; L.A.92-93; L.A.100-101.

²⁶ R.A.18, ¶4; R.A.22.

April 15, 2002, when they still had time to make the Election by April 15, 2002. Their failure to ensure that the Elections were timely made for tax year 2000 by April 15, 2002, was a breach of the Appellants' duties that caused Fischers damages.²⁸

And, of course, the additional passage of time between April 15, 2002 and April 15, 2003, should have alerted Appellants that they should be ensuring that the Elections were made by April 15, 2003, for tax year 2001.²⁹ They were again reminded of this issue when Larsens were preparing the 2002 tax return for FMP between January 1 and April 15, 2003. They received yet another reminder in October of 2002, when FMP received its audit notification from the IRS. This notification should have reminded Larsens to make the 754 Elections for FMP for tax year 2001.³⁰ Appellants' failures to ensure that the Election was timely made for FMP for tax year 2001 by April 15, 2003, was a breach of their duties that independently caused Fischers damages.³¹

E. Appellants' Breaches for Failing to Ensure that the Elections Were Timely Made for AFC For Either Tax Year.

1. Larsens' Explanation.

From 2000-2003, AFC owned one asset – a commercial office building located at 800 Washington Avenue in downtown Minneapolis. AFC didn't sell its only asset until

²⁷ R.A.18, ¶5.

²⁸ L.A.272, ¶22.

²⁹ L.A.272, ¶23; L.A.100-01.

³⁰ L.A.271, ¶19.

³¹ L.A.272, ¶¶20, 23; L.A.99-101.

January, 2008,³² so there was no possibility that the 754 Election wasn't advisable for that entity because of the Fischers' supposed plan in 2000 to immediately sell the asset.

And Larsens admit that their justification for not making the Elections for AFC was different than their explanation for FMP. Jim Larsen testified that they didn't make the 754 Elections for AFC for either tax year because AFC "had a loss anyway[,]"³³ and it "wouldn't have made any difference."³⁴ Mike Larsen testified that he had "no knowledge" of, and didn't recall, why the election was not made for AFC for tax year 2000 or 2001.³⁵

2. Appellants' Breaches.

But Larsens' determination that AFC "had a loss anyway" in 2000 doesn't justify not making the Election for tax year 2000 by April 15, 2002. The existence of a loss doesn't negate the positive tax benefits of a 754 Election.³⁶ And it offers no excuse for not making the Election for tax year 2001 by April 15, 2003. The failures of the Appellants to 1) ensure that the Election was timely made for tax year 2000 by April 15, 2002, and 2) ensure that the Election was timely made for tax year 2001 by April 15, 2003, were independent breaches that independently caused Fischers damages.³⁷

³² R.A.18-19, ¶6.

³³ L.A.170, p. 119, ll. 8-11.

³⁴ L.A.170, p. 120, ll. 10-14.

³⁵ L.A.272, p. 47, l. 6-18; p. 199, l.1 – l. 7.

³⁶ L.A.272, ¶24.

³⁷ L.A.272, ¶24; L.A.99-101.

F. Appellants' Breaches for Failing to Ensure that the Elections Were Timely Made for FSA For Either Tax Year.

1. Larsens' Explanation.

The Larsens' justifications for not making the Elections for FSA are different than those for either FMP or AFC. From 2000-2003, FSA owned equipment and land, and had in place a 754 Election that was made in 1985, and which therefore applied to the transactions in 2000 and 2001.³⁸ (Fischers' complaint against Appellants is that they didn't make a protective 754 Election for FSA for either tax year. This protective election would have ensured that the 754 Election was in place, in case the 754 Election from 1985 is not accepted by the IRS.³⁹ The damages that Fischers seek for the failures to make the protective 754 Elections for FSA are calculated based on the 10% chance that the 754 Election from 1985 is not accepted).⁴⁰

But the reason that Larsens didn't make protective 754 Elections for either tax year for FSA was not because FSA already had made the Election in 1985. Rather, Jim Larsen testified that they didn't make the Elections for FSA because McDonald supposedly told Jim Larsen that he didn't want the basis in that portion of the FSA assets owned by Ann Fischer to be increased in any way.⁴¹ But Jim Larsen also testified that there would have been no tax consequence to FSA caused by the 754 Election because "the assets were already valued at market."⁴²

³⁸ R.A.19, ¶7.

³⁹ M.A.90.

⁴⁰ M.A.108-09.

⁴¹ L.A.491, pp. 151, l. 19 – p. 155, l. 13.

⁴² L.A.493, p. 161, l. 3-16.

Mike Larsen testified that he didn't know why the 754 Election wasn't made for FSA,⁴³ but that he believed that the rationale for not making the 754 Election for FSA was the same as not making it for FMP – FSA's interest in 2000 in selling all of its property as quickly as possible.⁴⁴

But FSA didn't sell more of its assets any quicker than FMP did. In 2000, FSA owned approximately \$4 million in land and approximately \$7 million in equipment and buildings (as measured by the beginning book value of those assets).⁴⁵ In 2000, FSA sold approximately 8.7% of its assets. In 2001 and 2002, FSA sold approximately 4.0% and 10.6% of its assets, respectively. FSA did not sell any of its assets in 2003 prior to April 15, 2003. So between January 1, 2000 and April 15, 2003, FSA sold only approximately 4.3% of its assets.⁴⁶

2. Appellants' Breaches.⁴⁷

None of those inconsistent explanations by Larsens justify the failures to ensure that the Elections were timely made for both tax years 2000 and 2001. The assets were not valued at market as Larsen testified, and there would have been a positive tax consequence to FSA if the Election was timely made by April 15, 2002 for tax year 2000 and the 1985 Election was later determined to not be valid.

Moreover, Mike Larsen's explanation that the 754 Election wasn't advisable because of a supposed desire to sell all of FSA's assets doesn't justify the failures to

⁴³ L.A.521-22, pp. 45, ll. 6-10; p. 197, l. 19 – p. 198, l. 25.

⁴⁴ L.A.522, p. 46, l. 4 – p. 47, l. 4.

⁴⁵ R.A.19, ¶7; R.A.26.

⁴⁶ R.A.19, ¶¶8-9; R.A.26.

timely make the Elections for either tax year. As with FMP, FSA did not sell all or most of its assets in 2000 or 2001. Accordingly, Appellants still should have ensured that the protective 754 Elections were timely made for both tax years 2000 and 2001 by April 15, 2002, and April 15, 2003, respectively.⁴⁸

G. The Nature of the Damages to the Fischers Caused by the Missed 754 Elections, and When They Occurred.⁴⁹

1. The Nature of Damages to the Fischers.

Fischers' damages are generally overpaid taxes by the partners of the three entities.⁵⁰ Fischers have suffered approximately \$2.46 million of damages caused by Appellants' failure to ensure that the 754 Elections were timely made by April 15, 2002, for the 2000 tax year.⁵¹ The damages attributable to just the failures to make the Elections by April 15, 2003, for tax year 2001, is approximately \$1.93 million. (this damages calculation for only the 2001 tax year accepts that the 754 Elections were not made for tax year 2000 by April 15, 2002, and calculates the independent damages caused by the failures to make the Elections by April 15, 2003 for tax year 2001).⁵²

Fischers have also suffered an additional over \$100,000 in damages relating to professional accounting fees relating to the missed Elections.⁵³ *These damages are not related to the cost to correct Defendants' mistakes, however, because Defendants'*

⁴⁷ L.A.272, ¶25; L.A.99-101.

⁴⁸ L.A.272, ¶25; L.A.99-101.

⁴⁹ L.A.274, ¶33.

⁵⁰ L.A.274, ¶33.

⁵¹ L.A.274, ¶33.

⁵² L.A.274, ¶¶34, 35; L.A.279.

⁵³ R.A.19, ¶10; R.A.28.

mistakes were never corrected. They are the accounting fees that Fischers decided to incur when they hired the Larson Allen firm in 2007 to *calculate the amount of damages caused by the failures* to timely make the Elections.⁵⁴

2. When Damages For the 2000 and 2001 Tax Years Occurred.

The filing of the initial partnership tax returns without the Elections for either tax year did not by itself cause damages to the Fischers. It took both the failure to make the Elections with the initial partnership tax returns and the later failure to timely make the Elections by the 12 month automatic extension date for Appellants to have breached their obligations and caused damages to the Fischers.⁵⁵

It therefore wasn't until April 15, 2002, came and went without Appellants ensuring that the 754 Elections were made that Fischers suffered any damages relating to tax year 2000. Up until April 15, 2002, Appellants could have made the 754 Elections as a matter of right and Fischers would have received all of the tax benefits of the Elections, irrespective of whether the Elections were made when the 2000 tax returns were originally prepared without making the Elections. The damages relating to the 2000 tax year therefore did not start occurring until April 16, 2002.⁵⁶

The cost of amending the 2000 tax return to make a timely 754 Election is not "damages" because that expense would have been consistent and incurred in connection with a timely election. In fact, if Larsens' explanation that they were waiting to see what

⁵⁴ R.A.19, ¶10.

⁵⁵ L.A.271, ¶14; L.A.99-101.

⁵⁶ L.A.272-73, ¶26.

happened is believed, making the 754 Election by amending the tax return would have been the preferred course of action.

And it wasn't until April 15, 2003, came and went without Appellants ensuring that the 754 Elections were timely made that Fischers suffered any damages relating to tax year 2001. Up until April 15, 2003, Appellants could have made the 754 Elections as of right and Fischers would have received all of the tax benefits of the Elections, irrespective of whether the Elections were made when the 2001 tax returns were originally prepared without making the Elections. The damages relating to the 2001 tax year therefore did not start occurring until April 16, 2003.⁵⁷

ARGUMENT

I. STANDARD OF REVIEW.

Counts I and II of Fischers' Complaint against Larsens and McDonald are claims for negligence and breach of contract. Those claims are subject to the six year statute of limitations set forth in Minn. Stat. § 541.05(5), which provides that the six year period begins to run when "the cause of action accrues." The construction of a statute of limitation is a question of law, reviewed de novo. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998). The statute of limitations is an affirmative defense, and the party asserting it bears the burden of establishing that the claims are time-barred as a matter of law. See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Golden v. Lerch Bros.*, 203 Minn. 211, 220, 281 N.W. 249, 253 (1938).

⁵⁷ L.A.273, ¶27; L.A.99-101.

On appeal from a summary judgment motion, the reviewing court “must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But Larsens and McDonald must present evidence that creates more than a “metaphysical doubt as to a factual issue” in order to create a genuine issue of material fact sufficient to defeat summary judgment. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The district court denied Larsens’ and McDonald’s summary judgment motions and entered amended orders that dismissed the Larsens’ statute of limitations defense for both tax years and McDonald’s statute of limitations defense for tax year 2001. Accordingly, if Larsens and McDonald do not establish with this court that they met their burden of proof at the district court level to prove their statute of limitations defenses and at least create a genuine issue of material fact as to whether Fischers’ claims against them accrued prior to April 4, 2002, for Larsens, or prior to April 9, 2003, for McDonald, then the statute of limitations defenses should be dismissed.

II. THE DISTRICT COURT’S ORDER REGARDING THE LARSENS SHOULD BE AFFIRMED.

In the absence of application of the continuous representation doctrine, Fischers’ claims accrue and the statute of limitations begins to run when Fischers can allege sufficient facts to survive a Rule 12 motion to dismiss for failure to state a claim upon which relief can be granted. *See Antone*, 720 N.W.2d at 335. To state a claim for accounting malpractice, Fischers must allege that 1) Larsens breached their duty of reasonable care owed to Fischers, and 2) Fischers were damaged by that breach. *See*

Bonhiver, 248 N.W.2d at 296. The cause of action does not accrue and the six year statute does not begin to run until “‘some’ damage has occurred as a result of the alleged malpractice.” *Antone*, 720 N.W.2d at 336.

Accordingly, the court must determine both 1) when the alleged breach occurred, and 2) when “‘some damage’” *relating to that alleged breach* occurred. The date that “‘some damage’” relating to the alleged breach occurred is the date of accrual, and Fischers have 6 years after that date to bring their claims.

The first determination, when the alleged breach occurred, is where Larsens unsuccessfully attempted at the district court level to confuse and redefine the breaches they engaged in for purposes of the statute of limitations defense. Larsens (and McDonald) attempt to characterize their breach not as Fischers do, but rather as only related to the preparation of the tax returns, without the 754 Elections, for tax years 2000 and 2001. They then contend that there was “‘some damage’” caused by the due date of the returns -- April 15 of the year following the Qualifying Transfers.

But Fischers’ claims aren’t that the tax returns were negligently prepared – it’s that the 754 Elections weren’t timely made. In their complaint against Larsens, Fischers allege that:

57. [Larsen] 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 2001.⁵⁸

It took both the failure to make the Elections with the tax returns and the failure to timely make the Elections by the 12 month automatic extension date for Larsens to have breached their obligations and caused damages to the Fischers.⁵⁹

A. There Is No Breach by Larsens or Damage to Fischers relating to the Failure to make the 754 Elections for tax year 2000 until April 16, 2002 at the Earliest.

1. There Was No Breach until April 16, 2002, at the Earliest.

For tax year 2000, Larsens' breach was their failure to timely make the 754 Elections -- by no earlier than April 16, 2002. It is not the preparation of the 2000 tax years prior to their due date of April 15, 2001 that constituted the breach, because at that point the right to make the 754 Elections was still available.⁶⁰ Larsens point to one sentence in Boesen's report in which Boesen found fault in Larsens not making the 754 Elections with the initial tax returns. But Larsens ask this court to ignore what Fischers contend in their complaint is Larsens' breach, and to ignore Boesen's opinion (supported by the tax code) that

Larsens' negligence wasn't their original preparation of the tax returns without the Elections. It was their failure to ensure that the 754 Elections were timely made. It took both the failure to make the Elections with the tax returns and the failure to timely make the Elections by the 12 month automatic extension date for Larsens to have breached their obligations and caused damages to the Fischers. The failures to timely make the Elections

⁵⁸ L.A.27.

⁵⁹ L.A.271, ¶14.

⁶⁰ L.A.271, ¶ 14; L.A.272-73, ¶26.

for either tax year for the three partnerships were distinct and separate negligent acts.⁶¹

Had Larsens made 754 Elections by April 15, 2002, it would not have mattered that they did not make the Elections with the tax returns that they prepared by April 15, 2001.⁶² Because amending the return was an acceptable method for making a timely 754 Election, the cost of preparing the amended return is not “damages.” The amending of the prior return does not correct a previous error, it is merely a prescribed method for making the 754 Election at a later date.

Moreover, had Fischers brought an action against the Larsens on April 16, 2001, and alleged that Larsens had breached their duty to timely make the 754 Elections for the 2000 tax year, that claim would not have survived a Rule 12 motion to dismiss. At that point, and up and until April 15, 2002, Larsens still could have made the 754 Elections for the 2000 tax year, so there was not yet a breach by the Larsens.⁶³ The breach didn’t occur until – at the earliest – the ability to make the 754 Elections as a matter of right for tax year 2000 expired, on April 16, 2002.

Since prior to April 16, 2002, a Rule 12 motion to dismiss would have been granted based on lack of a breach by Larsens, Fischers’ causes of action for tax year 2001 therefore could not have accrued until April 16, 2002, at the earliest.

⁶¹ L.A.271, ¶14.

⁶² L.A.272-73, ¶26.

⁶³ L.A.272-73, ¶26.

2. There Was No Damage until April 16, 2002 at the Earliest.⁶⁴

And Boesen's calculation of damages back to year 2000 does not make the date of accrual any earlier. "Some damage" caused by the breach can not occur until at or after the breach. As the Minnesota Supreme Court has explained,

Damages are not the only element that must be satisfied in order to state a [] malpractice claim. *See Herrmann*, 590 N.W.2d at 643 n.12. The plaintiff must be able to establish all elements of the claim. *See id.*

Noske, 670 N.W. at 743 n.1. Since Larsens did not breach their duties to the Fischers until April 16, 2002, at the earliest, "some damage" caused by that breach could not occur until April 16, 2002, at the earliest either. April 16, 2002, is therefore the earliest date of accrual for the breaches relating to the 2000 tax year.

Because a timely-filed 754 Election relates back to the date of the Qualifying Transfer, the calculation of damages relates back to that date, if, and only if, the 754 Election is negligently missed, but the damages do not accrue until the breach occurs. This can be illustrated by an analogous example.

A taxpayer is required to pay estimated income taxes throughout the year. If she has underpaid her estimated tax, she incurs a penalty from the due date of the estimated tax payment which occur quarterly throughout the year. Income tax withholding from an employee's paycheck is deemed paid ratably throughout the year, even if the withholding is taken out of the last check. So the employee can avoid a penalty by increasing her

⁶⁴ L.A.273, ¶¶28-31.

withholding out of the last paycheck to cover their estimated tax payments. The amount withheld from the final check will be spread back ratably throughout the year.⁶⁵

Assume that the employee hires an accountant in December of 2002 to review her estimated tax situation before her final paycheck, and advise her on the amount of tax to withhold from the final check, and that the accountant incorrectly calculates the withholding amount. As a consequence, the employee client underpays her estimated tax liability in December 2002 for the year 2002. The penalty she is later obligated to pay is calculated from when the estimated tax was due, during the entire calendar year 2002 and prior to the negligent act.

Accordingly, the client has damages that relate to the payment of a penalty for taxes due in 2002, but the breach and damages caused by that breach didn't occur until the negligent advice regarding the amount of withholding occurred in December, 2002. The client couldn't sue the accountant for the error until it was made in December, 2002, but the damage relates to all of 2002, a time period that precedes the negligent event. The cause of action therefore accrues in December, 2002, not earlier.⁶⁶

The same thing happens here when Boesen calculates damages caused by the failures to timely make the 754 Elections for tax year 2000. The failures to timely make the Elections, and therefore the breaches, did not occur until April 16, 2002, for tax year 2000. However, when the Elections weren't timely made, tax consequences relating to tax year 2000 occurred. But since the breaches and damages caused by those breaches

⁶⁵ L.A.273, ¶29.

⁶⁶ L.A.273, ¶30.

didn't occur until April 16, 2002, the causes of action don't accrue until then. Fischers would have been unable to sue for negligence until the due date for the 754 Elections had passed.⁶⁷

Since there are no breaches or damages relating to tax year 2000 until April 16, 2002, at the earliest, all of Fischers' claims are timely-asserted as a matter of law.

B. There Is No Breach by Larsens or Damage to Fischers relating to the Failures to make the 754 Elections for tax year 2001 until April 16, 2003, at the Earliest.

1. There Was No Breach until April 16, 2003, at the Earliest.

As with tax year 2000, for tax year 2001, Larsens' breaches were their failures to timely make the 754 Elections -- by no earlier than April 16, 2003.⁶⁸

2. There Was No Damage until April 16, 2003, at the Earliest.

And, as with tax year 2000, Boesen's calculation of damages back to year 2001 does not make the date of accrual any earlier. Since the breach occurred on April 16, 2003, at the earliest, "some damage" caused by that breach could not occur until April 16, 2003, at the earliest either.

3. The Failures to Timely Make the Elections by April 15, 2003, for Tax Year 2001 Were Independent Negligent Acts.

The sales and transfers on April 30 and May 1, 2001, created a new, independent opportunity to make the 754 Elections for tax year 2001 by April 15, 2003. Larsens were not precluded from making the 754 Elections for tax year 2001 by their failures to make the Elections for tax year 2000. Larsens attempt to contend that their decision to not

⁶⁷ L.A.273, ¶31.

make the Elections for all three entities for tax year 2001 was the same (negligent) decision they made when they didn't timely make the Elections for tax year 2000. But Larsens' own testimony establishes that it wasn't the same analysis that they engaged in for both tax years when they negligently failed to timely make the Elections.

For example and without limitation, Larsens' analysis and decision for tax year 2001 for FMP was necessarily different than their analysis and decision for the previous tax year. Larsens contend that they didn't make the Election for FMP for tax year 2000 because the Fischers had communicated their intent to liquidate the FMP assets as quickly as possible and to dissolve the FMP partnership in the near future.

This explanation may have justified Larsens waiting past the April 15, 2001, due date for the 2000 tax return to determine whether to make the 754 Election, because the Election was not yet due. But this supposed basis for not making the Elections for tax year 2000 for FMP was no longer present by the time that Larsens didn't timely make the Elections for tax year 2001.

FMP did not sell any assets in either 2001 or 2002, and as of April 15, 2003, FMP still had approximately 85% of its assets that it had in 2000, and was still an ongoing entity.⁶⁹ Accordingly, by April 15, 2002, and certainly no later than April 15, 2003, Larsens should have realized that the basis for not making the Elections with the first set of 2000 tax returns was no longer present.⁷⁰ Larsens should therefore have made the 754

⁶⁸ L.A.271, ¶14; L.A.273, 27.

⁶⁹ R.A.18, ¶5.

⁷⁰ L.A.272, ¶22.

Elections by: 1) making the Elections for tax year 2000 by April 15, 2002, and/or 2) making Elections for the 2001 tax year by April 15, 2003.⁷¹

Larsens' justification for not timely making the Elections for 2001 could not have been based on the supposed plan to immediately sell FMP assets because by the April 15, 2003, deadline, Larsens knew that those assets hadn't been sold. Larsens' negligent decisions for tax year 2001 were therefore necessarily different and distinct from those negligent decisions relating to tax year 2000. They are independently actionable and subject to their own, separate dates of accrual and six year statute of limitations. And as already addressed, neither the breaches nor the damages relating to the breaches for tax year 2001 occurred until April 16, 2003, making all of Fischers' claims against Larsens relating to tax year 2001 timely as a matter of law.

Larsens also attempt to contend that Fischers' experts support their contention that the negligent acts for tax year 2001 were the same as those for tax year 2000 by pointing to Tom Woessner's opinion that McDonald should have recommended that the Elections be made for both tax years.⁷² This argument is easily dismissed based on a review of Boesens' and Woessner's opinions. Boesen opined that:

There were two separate and distinct events that allowed for the 754 elections to be made: Math Fischer died on July 22, 2000, which allowed for the election to be made for that tax year as a matter of right up and until April 15, 2002. On May 1, 2001, there were transfers of partnership interests that allowed the election to be made for tax year 2001, as a matter of right, up and until April 15, 2003. The failures to make the elections by

⁷¹ L.A.272, ¶¶22-23.

⁷² Larsens' Brief, p. 24.

those dates for either tax year were two distinct and separate negligent acts, each of which caused the damages described in my Report.⁷³

Woessner concurred with Boesen that the failures for the 2001 tax year were distinct negligent acts, separate from those relating to tax year 2000,⁷⁴ and Boesen further opined that there were separate damages for the failures relating to the 2001 tax year:

I prepared another report that calculates the amount of damages that Fischers suffered as a result of Defendants' failures to make the 754 Elections for tax year 2001 only.... In [my] Report, I accept that Defendants failed to timely make the 754 Elections for tax year 2000. I then calculate the damages caused by just the independent failures to timely make the Elections for tax year 2001. Those independent and distinct damages total approximately \$1.93 million.⁷⁵

Accordingly, the expert testimony, which neither Larsens nor McDonald refuted, establishes that there are separate acts of negligence, with separate damages, for tax year 2001. And, of course, there are separate accrual dates (April 16, 2003) for those separate acts of negligence.

Moreover, even if Larsens engaged in the same incorrect and negligent analysis for both tax years for all three entities, the claims relating to the 2001 tax year are still distinct and subject to their own dates of accrual and statute of limitations. A simple example demonstrates why the accrual dates for the negligence claims relating to the 2001 tax year must be separated and distinguished from those relating to tax year 2000.

As of April 16, 2002, Larsens' failures to timely make the Elections for tax year 2000 were actionable. Suppose that Fischers changed accounting firms on April 17,

⁷³ L.A.81, ¶6; L.A.271-73, ¶¶13-27.

⁷⁴ L.A.99-100.

⁷⁵ L.A.274, ¶¶34, 35.

2002, and that the second firm did not timely make the Elections for tax year 2001 by April 15, 2003. As of April 16, 2003, the failures to timely make the Elections for tax year 2001 would have been actionable against the second firm.

If on April 17, 2003, Fischers brought an action against the second firm based on the failure to timely make the Elections for tax year 2001, that firm couldn't successfully bring a Rule 12 motion to dismiss and escape responsibility by contending that only the Larsens were negligent when they failed to timely make the Elections for the previous tax year. The second firm would have to defend the negligence claim relating to tax year 2001 on the merits.

The same result is required here, where the accountants remained the same and engaged in separate acts of negligence for two subsequent tax years. This example illustrates that the decision to make the 754 Elections in 2000 and 2001 were independent acts even though the 754 Elections, had they been made for the 2000 Qualifying Transfer, would have remained in place for the 2001 Qualifying Transfer.

Since there were independent acts of negligence by Larsens relating to tax year 2001 that were separate from those relating to tax year 2000, and those causes of action didn't accrue until April 16, 2003, at the earliest, those claims are timely-asserted as a matter of law. This result is required regardless of the court's ruling regarding whether the claims for tax year 2000 accrued prior to April 4, 2002. *See Devereaux v. Stroup*, 2008 WL 73712 (Minn. Ct. App.) (unpublished) (holding that, pursuant to the "some damage" rule, when attorney engaged in separate acts of negligence in 1987 and 2002,

and claims were brought in 2005, the 1987 claim was time-barred and the 2002 claim was timely).⁷⁶

C. Minnesota Supreme Court Precedent Mandates Dismissal of Larsens' Statute of Limitations Defense.

Two Minnesota Supreme Court cases, *Antone* and *Herrmann*, also defeat Larsens' argument and support Fischers' position that Larsens' statute of limitations defense should be dismissed – as to all of Fischers' claims for both tax years.

In *Antone*, the attorney's alleged negligence was his failure to appropriately draft an antenuptial agreement to protect any appreciation in client Antone's premarital property in the event of a divorce. As a result of the attorney's negligence, after Antone was married and divorced, his ex-wife was able to make a claim to the appreciation in the premarital property.

There were at least four events that could have been the one that triggered the statute of limitations on Antone's claim against his attorney: 1) when the antenuptial agreement was negligently drafted prior to marriage; 2) when Antone was married; 3) when Antone paid attorney's fees during his divorce relating to the appreciation issue, or 4) when he paid his ex-wife part of the appreciation pursuant to the divorce decree.

The court ruled that the action accrued not when the agreement was negligently drafted, but rather when Antone was married, since the "consequences were both immediate and irremediable as of the date of the marriage." The Court noted that when

⁷⁶ L.A.264-67.

Antone married, he “passed a point of no return... and... did so without the legal shield he retained [his attorney] to provide.” *Id.* At 337.

Application of the *Antone* court’s analysis compels the conclusion that the date of accrual for Larsens’ breaches relating to the 2000 tax year can be no earlier than April 16, 2002, and no earlier than April 16, 2003, for the 2001 tax year. The preparation of the 2000 and 2001 tax returns without the 754 elections were *not* “point[s] of no return.” They were not even the breaches by Larsens – their breaches were their failures to timely make the 754 Elections by April 15, 2002, and April 15, 2003.

And the expiration of the automatic extension period – April 16, 2002, for the 2000 tax year, and April 16, 2003, for the 2001 tax year – are the earliest dates that Larsens can argue are similar to the date of marriage/ accrual in *Antone*. It was not until the Larsens failed to timely make the Elections that the consequences of those failures could possibly be characterized as “immediate and irremediable,” and it was not until then that it can be argued that Fischers “passed a point of no return.” *Antone* therefore compels a finding that claims relating to Larsens’ breaches relating to the 2000 tax year did not accrue until at least April 16, 2002, and those relating to their breaches for the 2001 tax year did not accrue until at least April 16, 2003.

Similarly, in *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641 (Minn. 1999), the plaintiffs sued their attorneys for not advising them that certain transactions with the employee benefit pension plan that the defendant law firm prepared were prohibited. The law firm prepared the plan in 1986. The clients engaged in the prohibited transactions in 1987, and immediately became liable for significant excise

taxes and interest. The clients discovered their injury in 1993 and brought an action in 1996. The Minnesota Supreme Court held that “some damage” occurred not when the plan was negligently drafted in 1986, but rather in 1987 when the client engaged in the prohibited transactions and became “immediately liable” under 26 U.S.C. § 4975 for the excise tax and interest. *Id.* at 643-44.

Application of the *Herrmann* analysis also compels a finding that April 16, 2002, and April 16, 2003, are the earliest dates that Fischers’ claims relating to the 2000 and 2001 tax year accrued. In *Herrmann*, the clients’ engaging in the prohibited transactions in 1987 is comparable to the expiration of the automatic extension periods here. In both circumstances, the occurrence of those events is what triggered the actual liability for additional taxes.

And here, the date that Fischers became “immediately liable” for additional taxes for the 2000 and 2001 tax years can be no earlier than April 16, 2002, and April 16, 2003, respectively. Accordingly, pursuant to *Herrmann*, Larsens did not breach their duties, and Fischers did not incur “some damage” relating to those breaches, until at least April 16, 2002, and April 16, 2003.

And the unpublished *Reid*⁷⁷ case cited by Larsens does not support a finding of “some damage” prior to April 4, 2002, either. In that case, plaintiff Reid owned three automobile dealerships, and violated the LIFO conformity rule, which requires that automobile dealers electing to use LIFO for tax purposes must also use it for credit

⁷⁷ *Reid Enterprises, Inc. v. Deloitte & Touche, LLP*, 2000 WL 665684 (Minn. App. May 23, 2000) (L.A.327-33).

purposes. Reid had elected to use the LIFO inventory accounting method for its three dealerships in 1981, 1983, and 1986. Once it made those elections, it was required to use LIFO on its tax returns and on its 12th period monthly reports.

But Reid didn't follow the rule – it used FIFO accounting on its 12 period monthly reports, and LIFO on its tax returns. The last time that the FIFO accounting method was used, in violation of the rule, was on the 12th period monthly reports for 1991, provided in January, 1992. The court stated that the cause of action against the accounting firm accrued “in the 1980s, and certainly no later than January 1992.” The court cited *Hermann* and found that by no later than January, 1992, the “penalty for [the accountants’] prior alleged negligence had attached and was irreversible.”

So, again, the accrual date was based on when the damage to the plaintiff was “irreversible.” Here, the negligence by Larsens and the damages to the Fischers didn't become “irreversible” until April 16, 2002, and April 16, 2003, at the earliest because the original time periods to file the 754 Elections had not lapsed until those dates. The causes of action therefore did not accrue until those dates pursuant to *Reid*.

Larsens also contend that since they didn't make the Elections with the original tax returns, there would have been an attendant cost to amending the returns so that the Elections were made by April 15, 2002, and April 15, 2003, and that those potential costs to amend the tax returns constitute “some damage” that starts the running of the statute of limitations. But the potential cost to amend the returns is not “some damage” as a matter of law, for at least four reasons.

First, the damages for the breaches can not occur prior to the breaches. As addressed, Larsens didn't breach their duties for tax year 2000 until April 16, 2002, so "some damage" caused by those breaches couldn't occur earlier than that date. Second, those expenses were never incurred in this case because the Elections were not made with amended tax returns. Fischers only incurred expenses related to analyzing the damages caused by the failures to make the Elections, and those expenses weren't necessarily incurred to correct the Defendants' mistakes because the mistakes were never corrected.⁷⁸ And Fischers' decision to incur those expenses wasn't even made until 2007,⁷⁹ so those damages didn't occur until well after April 4, 2002.

Third, the hypothetical cost to amend the returns is not "some damage" because if those costs were incurred, they would have been incurred if Larsens *were performing their obligations, not breaching them*. The cost to amend the returns would have been incurred because Larsens were timely making the Elections pursuant to the second, perfectly acceptable and timely method for making the 754 Elections: with an amended tax return. Larsens would not have committed a breach, and therefore the cost to amend the returns is not "some damage" caused by a breach by Larsens. It is just a potential ancillary cost to the performance that Larsens did not engage in back in 2002 and 2003. It is therefore irrelevant to the determination of when Fischers first suffered damages as a result of Larsens' breaches.

⁷⁸ R.A.19, ¶10.

⁷⁹ R.A.19, ¶10; R.A.28.

Fourth, even if the court accepts Appellants' arguments that the negligence occurred when the original tax returns were filed, both *Antone* and *Herrmann* still mandate rejection of the argument that the hypothetical cost to amend the tax returns is "some damage" that triggers the statute of limitations. That same type of hypothetical expense was determined to *not* constitute "some damage" to determine the dates of accrual in *Antone*.

In *Antone*, there would have been a cost (attorney's fees) to amend the negligently-drafted antenuptial agreement between when the antenuptial agreement was drafted and prior to Antone's marriage. That hypothetical cost is the same type of hypothetical cost (to amend the tax returns) that Appellants contend constitutes "some damage" and therefore the date of accrual in this case. But the *Antone* court found that the date of accrual was the date of marriage, not the date of the original negligent drafting of the antenuptial agreement or any date prior to marriage.

Accordingly, pursuant to *Antone*, a hypothetical cost to correct a mistake, prior to that mistake resulting in "irremediable" or "irreversible" damages to the plaintiff, is not "some damage" that triggers the accrual date. *Antone* therefore necessarily defeats Appellants' contention that the hypothetical cost to amend the tax returns is the "some damage" that triggers the accrual dates in this case.

D. Larsens' New Appellate Arguments are Also Without Merit.

In their appellate brief, Larsens argue that Fischers' causes of action accrued not after the due date for the 2000 tax returns (April 16, 2001), but rather "upon the

preparation of the 2000 returns in early 2001.”⁸⁰ Larsens realize that even their argument that the preparation of the original tax returns constitutes both breach and “some damage” doesn’t result in dismissal of the independent claims against them relating to the 2001 tax year since the 2001 tax returns weren’t even due until April 15, 2002. Since Fischers’ claims can not be time-barred unless they accrue prior to April 4, 2002, Larsens are attempting to argue that the dates on the 2000 tax returns are the dates of accrual for the causes of action against them.

But this argument is without merit and should be rejected, for at least five reasons. First, the Larsens did not properly make this argument to the trial court and therefore can not raise it now for the first time on appeal. *Brodsky v. Brodsky*, 733 N.W2d 471, 478 (Minn. Ct. App. 2007). When Larsens brought their summary judgment motion, they argued that Fischers’ claims against them accrued on April 16, 2001, the day after the 2000 tax returns were due.⁸¹ Larsens did not make the argument that the dates on the tax returns were the dates of accrual until it submitted its reply memorandum in support of its motion for summary judgment.⁸²

But the reply memorandum could not legitimately add that argument since the reply memorandum is to address only “new” matters raised in Fischers’ opposition memorandum. *See* Minn. Gen. Rule of Practice 115.03(c). Since the argument was not properly before the district court, it is not the proper subject of review by this court.

⁸⁰ Larsens’ Brief, p. 16.

⁸¹ R.A.29-39.

⁸² R.A.80-81, 80 n.3.

Brodsky, 733 N.W.2d at 478. The argument should therefore be dismissed on this basis alone.

Second, Larsens have testified that the dates on the tax returns don't even establish when the tax returns were filed with the IRS because several events occurred after the dates on the returns and before the returns were actually filed.⁸³ Third, and more importantly, the filing of the 2000 tax returns in 2001 without the 754 Elections were not Larsens' negligent acts; it was their failures to timely make the 754 Elections for tax year 2000, which breaches did not occur until April 16, 2002, at the earliest. And since damages caused by a breach can not occur as a matter of law until the breach occurs, the "some damage" caused by Larsens' breach for tax year 2000 did not occur until April 16, 2002, either.

Fourth, this argument simply ignores the failures for the 2001 tax year, which constitute separate acts of negligence and therefore independent causes of action. Even under Larsens' new theory, those independent causes of action could not have accrued until 2002. Accordingly, the dates on the tax returns are irrelevant to whether Fischers' claims accrue prior to April 4, 2002. Fifth and finally, this argument ignores the *Antone* and *Herrmann* holdings that require the damages to be "irremediable" and "irreversible" before the cause of action accrues.

In sum, application of the "some damage" rule of accrual compels a finding that the accrual for the claims against Larsens relating to the 2000 tax year can be no earlier than April 16, 2002, and those relating to tax year 2001 can be no earlier than April 16,

2003. Since Fischers brought their claims against Larsens on April 4, 2008, less than six years after the earliest potential accrual date, all their claims are timely as a matter of law. The district court's March 31, 2010, Order should be affirmed and Larsens' statute of limitations defense should be dismissed.

III. IF THIS COURT DOES NOT APPLY THE CONTINUOUS REPRESENTATION DOCTRINE, THE DISTRICT COURT'S ORDER REGARDING MCDONALD SHOULD BE AFFIRMED.

A claim for legal malpractice requires that Fischers prove the same two elements as their claims for accounting malpractice: 1) McDonald breached his duty of reasonable care owed to Fischers, and 2) Fischers were damaged by that breach. *Antone*, 720 N.W.2d at 336.

McDonald also unsuccessfully attempted at the district court level to characterize his breach not as Fischers allege, but rather as McDonald's failures to recommend that the 754 Elections be made prior to Larsens' original filing of the 2000 tax returns. McDonald attempted to redefine his breach to this alleged conduct, and then contend that "some damage" occurred by the due date for the original 2000 tax returns -- April 15, 2001.

But Fischers' claims aren't that McDonald's negligence occurred when the tax returns were originally filed without the 754 Elections. Rather, Fischers claim that McDonald was negligent when he failed to timely recommend that the 754 Elections be made. In their complaint against McDonald, Fischers allege:

⁸³ L.A.235, p. 154, ll. 2-11; L.A.236, p. 158, l.3 – p. 159, l.10.

64. On information and belief, McDonald breached his duty of reasonable care by 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.
65. 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 Fischer Marketplace, Ames and Fischer, and FSA for the tax returns that had already been filed for the 2000 and 2001 tax years.
66. McDonald's breaches of the standard of care that he owed to all or some of the Plaintiffs caused all or some of the Plaintiffs damages.⁸⁴

These allegations are supported by expert testimony. In Fischers' expert report, Tom Woessner opines that:

1. McDonald owed a duty to his clients to review and recommend to the Fischers and/or the Larsens that Fischers should make an election under Internal Revenue Code Section 754 for Fischer Marketplace LLP (FMP), Ames & Fischer Co. II, LLP (AFC), and Fischer Sand & Aggregate Co, LLP (FSA) for tax years 2000 and 2001, by April 15, 2002, for tax year 2000, and by April 15, 2003, for tax year 2001.
2. The opportunity to recommend the election was presented on two separate and distinct occasions. The election could have been made by April 15, 2002, for the 2000 tax year for all three entities, and it could have independently been made by April 15, 2003, for the 2001 tax year for all three entities.
3. By not making such a recommendation for either tax year, McDonald deviated from the standard of care owed to his clients.
4. Such deviation caused harm to the Fischers by causing the owners of the three entities to incur unnecessary income taxes. There are distinct damages caused by the two independent failures to recommend the election for tax year 2000 by April 15, 2002, and by

⁸⁴ L.A.14.

the failure to recommend the election for tax year 2001 by April 15, 2003. I concur with the damage calculations provided by Thomas M. Boesen of the Simma Flottesmesch & Orenstein, Ltd. firm.⁸⁵

And in his Answer, McDonald contends not that he made his mistakes prior to the filing of the 2000 tax returns for the three partnerships, but rather that he simply never owed the Fischers any duty whatsoever *at any time* that might have required him to recommend that the 754 Elections be made for any of the three partnerships, for either tax year.⁸⁶ This defense prohibits McDonald from simultaneously arguing the contrary position (for statute of limitations purposes only) that he breached his duties by no later than the occurrence of events (filing of tax returns) that he contends he had no obligation to even provide advice to his clients regarding because that advice fell outside the scope of his representation.

Accordingly, as set forth in Fischers' complaint, their expert's report, and McDonald's Answer, McDonald's breaches for his failures to recommend that the 754 Elections be timely made occurred no earlier than when the ability to timely make the 754 Elections for the tax years had passed. And the damages that were caused by those breaches also occurred no earlier than that same date. For the same reasons already addressed with respect to the Larsens, for the 2001 tax year, that date of accrual is no earlier than April 16, 2003.

The court recognized this date of accrual when, in its March 31, 2010, Order, it ruled that "it wasn't until April 16, 2003 for tax year 2001 that the damages were

⁸⁵ L.A.92-93.

⁸⁶ R.A.12, ¶IX; R.A.14, ¶XXII.

‘immediate and irremedial,’ and that by missing that deadline, Defendants passed a ‘point of no return.’”

A. The Court’s Order is Correct That There Are No Breaches by McDonald or Damage to Fischers relating to tax year 2001 until April 16, 2003, at the Earliest.

The analysis for when Fischers’ claims accrued against McDonald for tax year 2001 is substantially similar to the analysis described above regarding the claims against the Larsens for tax year 2001. McDonald didn’t breach his obligations, and Fischers didn’t incur “some damage” from McDonald’s breaches, until April 16, 2003, at the earliest. Fischers’ independent claims relating to tax year 2001 therefore did not accrue until at least April 16, 2003, and are timely-asserted.

1. There Was No Breach until April 16, 2003, at the Earliest.⁸⁷

Had Fischers brought an action against the McDonald on April 16, 2002, and alleged that McDonald had breached his duties to recommend that the 754 Elections be made for the 2001 tax year, that claim would not have survived a Rule 12 motion to dismiss. At that point, and up and until April 15, 2003, the 754 Elections still could have been made for the 2001 tax year, so there was not yet a breach by McDonald.

Accordingly, as the district court held in its December 31, 2009, Order, the “breach did not occur until” one day after the expiration of the automatic extension period – April 16, 2003.

2. There Was No Damage until April 16, 2003, at the Earliest.

And Boesen's calculation of damages back to year 2001 does not make the date of accrual any earlier. Since the breaches occurred on April 16, 2003, at the earliest, "some damage" caused by those breaches could not occur until April 16, 2003, at the earliest either. And the example, set forth at pp. 30-31 above,⁸⁸ illustrates how the damages can relate back to a date prior to the breach, but the date that there is both breach and damages caused by that breach (the accrual date) does not relate back to the first date for the damages calculation.

Since there are no breaches or damages relating to tax year 2001 until April 16, 2003, at the earliest, Fischers' claims relating to tax year 2001 are timely-asserted as a matter of law.

3. McDonald's Failures to Timely Recommend that the 754 Elections be made by April 15, 2003, for Tax Year 2001 Were Independent Negligent Acts.

The sales and transfers on April 30 and May 1, 2001, created a new, independent opportunity to make the 754 Elections for tax year 2001 by April 15, 2003. Defendants were not precluded from recommending and making the 754 Elections for tax year 2001 by their failures to recommend and make the Elections for tax year 2000. As the court noted in its December 31 Order:

In tax years 2000 and 2001 two independent events allowed the Larsens to make 754 elections under the IRS Code for three different Fischer partnerships for either tax year, which would have provided tax benefits to the owners of each partnership.

⁸⁷ L.A.92-93, 99-101.

⁸⁸ L.A.273, ¶¶28-31.

And the court's analysis on this issue is correct. As set forth at pp. 32-36 above, McDonald's failures to recommend that the 754 Elections be timely made by April 15, 2003, for tax year 2001 were distinct acts of negligence, with independent damages. The claims relating to tax year 2001 therefore had the independent accrual date of April 16, 2003.

Since there were independent acts of negligence by McDonald relating to tax year 2001 that were separate from those relating to tax year 2000, and those causes of action didn't accrue until April 16, 2003, at the earliest, those claims are timely-asserted as a matter of law. This result is required regardless of the court's ruling regarding whether the claims for tax year 2000 accrued prior to April 10, 2003. *See Devereaux*.⁸⁹

B. Minnesota Supreme Court Precedent Mandates Dismissal of McDonald's Statute of Limitations Defense as to Tax Year 2001.

As described at pp. 37-40 above, *Antone* and *Hermann* defeat McDonald's argument and support the district court's ruling that McDonald's statute of limitations defense should be dismissed for Fischers' independent claims relating to the 2001 tax year.

McDonald again contends that since he didn't recommend that the Elections be made with the original 2001 tax returns, there would have been an attendant cost to amending the returns so that the Elections were made by April 15, 2003, and that those potential costs to amend the tax returns constitute "some damage" that starts the running

⁸⁹ L.A.264-67.

of the statute of limitations. But the argument is without merit, for the same reasons described at pp. 40-42 above.

Moreover, it fails to recognize the distinctive roles that McDonald and Larsens played with respect to the alleged negligence. Larsens prepared the tax returns and failed to timely make the 754 Elections. McDonald didn't prepare the returns; he failed to provide advice to timely make the 754 Elections. McDonald's role of advisor rather than preparer makes it more difficult for him to establish that his breaches occurred, as a matter of law, no later than the due dates for the original tax returns that he didn't prepare.

McDonald's argument is also based on the faulty premise that a professional has an obligation and duty to take an action to protect a client's interest not before the client suffers an injury, but rather *at the first available opportunity*. McDonald's argument is that a professional engages in negligence when the first chance to perform is missed, even if the client is still protected by later performance by the professional. This argument puts professionals in an untenable position of not being able to address an issue before the client is damaged, and is unsupported by the "some damage" requirement described in *Antone* and *Herrmann*.

In sum, application of the "some damage" rule of accrual confirms the court's finding in its December 31 Order that the accrual date for Fischers' claims relating to the 2001 tax year can be no earlier than April 16, 2003. Since Fischers brought their claims against McDonald on April 10, 2009, less than six years later, their independent claims relating to tax year 2001 are timely-asserted as a matter of law.

C. McDonald's Arguments Are All Without Merit.

1. *Leisure Dynamics*⁹⁰ Does Not Aid McDonald's Argument.

McDonald argues that *Leisure Dynamics* supports his argument that Fischers' claims for the 2001 tax year accrued on or before April 16, 2002.⁹¹ McDonald argues that *Leisure Dynamics* is relevant because it establishes the "rule" that "even though a party can take steps to entirely correct the problem, the cause of action accrues when the initial damage occurs."⁹² But the facts and issue addressed in *Leisure Dynamics* are too dissimilar for that case to even be instructive, let alone helpful to McDonald, in at least three material respects.

First, it addresses when a seller's cause of action against a buyer for unpaid sales tax accrues, not when a cause of action for legal, or even professional, malpractice, accrues. Second, the accrual of the cause of action was governed by the UCC, and occurred when there was a "breach," not when there was "some damage" caused by that breach. The court was therefore not even applying the "some damage" rule.

Third, the basis for the court's finding of the date of accrual was when the sales tax was due, which it was undisputed was "at the time of sale." Here, the damages to Fischers were not "irremediable," as required by the Minnesota Supreme Court, until no earlier than April 16, 2003. *Leisure Dynamics* does not, therefore, aid McDonald's argument that Fischers' claims against him for tax year 2001 accrued earlier than April 16, 2003.

⁹⁰ *Leisure Dynamics v. Falstaff Brewing Corp.*, 298 N.W.2d 33 (Minn. 1980).

⁹¹ McDonald's Brief, pp. 13-14.

2. Georgia Law Supports the District Court's Conclusion and Does Not Aid McDonald's Argument.

McDonald also points to *Leon Jones Feed & Grain, Inc. v. General Business Services, Inc.* 333 S.E.2d 861 (Ga. Ct. App. 1985) as purported support for his argument. But in *Leon Jones*, the defendant, GBS, was a corporation, not an attorney, and it was undisputed that the corporation's negligence was failure to advise the client, Jones, of Georgia sales tax exemptions available to Jones. Jones unnecessarily paid sales tax in reliance on GBS's advice, and the court ruled that "each time Jones paid the sales tax in reliance on GBS's advice a cause of action accrued in favor of Jones and the four-year statute of limitation began to run." The court then concluded that the "statute of limitation would have run on any advice given in 1976 in 1980, 1975 in 1979 and so on."

If Georgia law on negligence claims against corporations is relevant, then it is further support for affirming the district court, not reversing it. Even if this court allowed McDonald to dictate that his breaches occurred after the April 15, 2002, due date for the 2001 tax returns, Fischers' claims are still timely pursuant to the holding in *Leon Jones*. Fischers specifically allege, in paragraph 65 of their complaint, that McDonald should have recommended that the 754 Elections be made for the tax returns that had *already been filed for the 2000 and 2001 tax years.*⁹² In other words, Fischers allege that McDonald should have recommended that the 754 Elections be made in 2003 with amended 2001 tax returns by April 15, 2003. Boesen's report calculates damages after the April 15, 2003, due date for the 754 Elections for the 2001 tax year.

⁹² McDonald's Brief, p. 14.

Accordingly, pursuant to Georgia law and *Leon Jones*, Fischers have independent claims based on McDonald's failures to recommend amending the returns between April 16, 2002 and April 15, 2003, and those independent claims accrued no earlier than April 16, 2003. As the *Leon Jones* court stated, the statute of limitations "would have run on any advice given [in 2003] in [2009], and so on." *Leon Jones* therefore supports the district court's conclusion that Fishers' claims relating to tax year 2001 are timely because they did not accrue until April 16, 2003, and the statute of limitations did not run until April 16, 2009.

3. Ohio Law Actually Supports Fischers' Argument that All of Their Claims Against McDonald are Timely-Asserted.

McDonald also cites *Bagley v. Hall*, 1992 WL 132454 (Oh. Ct. App. June 11, 1992) in purported support of its position.⁹⁴ But *Bagley* is in unpublished decision in Ohio, so its analysis is irrelevant. And if this court applies Ohio law to Fischers' claims against McDonald, then it must rule that all of Fischers' claims are timely-asserted.

Under Ohio law,

An action for legal malpractice accrues either (1) when there is a cognizable event by which the plaintiff discovers or should discover the injury underlying the claim and is put on notice of the need to pursue potential remedies against the attorney; or (2) when the attorney-client relationship for the transaction in question ends, whichever occurs later.

New Concept Housing v. United Department Stores, 2009 WL 1362347, *7 (Oh. Ct. App. 1 Dist. May 15, 2009). Ohio law essentially applies the discovery rule and the continuous representation doctrine, and the date of accrual is whichever date of accrual is

⁹³ L.A.14.

later. Here, both dates would be in 2007, and all of Fischers' claims against McDonald would be timely-asserted.

4. McDonald's Arguments Regarding the Hypothetical Cost to Amend the Tax Returns Constituting "Some Damage" are as Unavailing as Larsens'.

McDonald's final argument is that the hypothetical cost to amend the tax returns is "some damage" that requires that the court find that Fischers' claims relating to tax year 2001 accrued prior to April 16, 2003.⁹⁵ But this argument is without merit for the reasons set forth at pp. 40-42.

And although McDonald cites cases from other jurisdictions, he does nothing to address the fact that under Minnesota law, pursuant to *Antone*, a hypothetical cost to amend a negligently-prepared document does not constitute "some damage" that commences the running of the statute of limitations. The *Antone* holding defeats McDonald's argument, and holds that "some damage" doesn't occur until the client passes a "point of no return" and the client's actual damages are "irremediable." Here, that point – and date – is no earlier than April 16, 2003, for tax year 2001.

IV. THE DISTRICT COURT'S ORDERS APPLYING THE "SOME DAMAGE" RULE SHOULD NOT BE REVERSED BECAUSE THE LEGAL QUESTION CERTIFIED BY THE DISTRICT COURT IS NOT "DOUBTFUL."

As Fischers argued with their September 20, 2010, motion to dismiss two appeals (incorporated herein by reference), the legal question that the district court certified does not present a "doubtful" question. This is an additional reason why the district court

⁹⁴ McDonald's Brief, p. 18.

should not be reversed on its determinations of the accrual dates under the “some damage” rule.

V. THE CONTINUOUS REPRESENTATION DOCTRINE IS AN INDEPENDENT BASIS FOR RULING THAT FISCHERS’ CLAIMS ARE ALL TIMELY-ASSERTED AS A MATTER OF LAW.

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).⁹⁶ 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). The doctrine can be applied to accounting malpractice claims. *See Bonhiver v. Graff*, 248 N.W.2d 291, 296-97 (Minn. 1976) (applying the doctrine to determine that accounting malpractice claim accrued as of the last date of service by the accountants when claim was for accountants’ negligent failure to detect embezzlement).

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

⁹⁵ McDonald’s Brief, pp 19-21.

different entities for two different tax years, and their failures and breaches spanned the time period of at least 2002 and 2003.⁹⁷ (Larsens were actually still contemplating trying to make the 754 Elections in 2007).⁹⁸ The continuous representation doctrine should therefore be applied, which results in Fischers' claims against Larsens not accruing until at least April 5, 2002.

Appellants contend that *Antone* and *Herrmann* preclude application of the continuous representation doctrine. But the plaintiffs in those cases did not even argue that the doctrine should apply, and whether it could or should apply was therefore not part of the Court's review.

And in neither case was there even evidence that there was continuous representation by the defendant attorney that would allow the plaintiff to make the argument. In *Antone*, the attorney did not do any work for the client other than draft the antenuptial agreement. In *Herrmann*, the defendant attorney and law firm ("McMenomy") didn't even engage in continuous representation of the plaintiffs. McMenomy's negligence was failure to advise the clients that certain transactions that took place in 1987 with an employee benefit plan that McMenomy drafted in 1986 would result in excise taxes to the clients. The clients and the plaintiffs were Al Herrmann and Al Herrmann Construction, Inc. (collectively "Herrmann").⁹⁹

⁹⁶ L.A.261-63.

⁹⁷ L.A.271-73, ¶¶15-27.

⁹⁸ L.S.A.489.

⁹⁹ L.A.334, ¶¶1 and 2.

But the legal representation that McMenemy engaged in after the 1987 date of accrual was not on the same subject matter or even for the same client(s). After 1987, McMenemy represented a different company called Bridlewide, which was a joint venture or partnership that wasn't even a plaintiff in the malpractice action.¹⁰⁰ And the scope of the representation was also different after 1987 – McMenemy represented Bridlewide with respect to financing and development agreements for real property in 1988, and represented Bridlewide in a condemnation matter in 1989.¹⁰¹ There was therefore no continuous representation of Herrmann after 1987 that would have provided the basis for Herrmann to even make the argument that the claims didn't accrue until the representation by McMenemy ended.

Moreover, both representations at issue in those cases were discrete and related to a single scope of representation. They stand in stark contrast to the approximately 20 years of services that Larsens continually performed for the Fischers, which didn't end until 2007. Neither *Herrmann* nor *Antone* therefore suggest that the doctrine can't or shouldn't be applied to Fischers' claims against Larsens.

Larsens contend that the unpublished Minnesota court of appeals decision from 2000, *Reid*¹⁰² prohibits application of the continuous representation doctrine. But in *Reid*, the court found that Reid could have commenced its lawsuit anytime after 1982 and survived a motion to dismiss. Since Reid didn't bring its claim until June 23, 1998, its claims were time-barred. In reaching its holding, the court decided not to apply the

¹⁰⁰ L.A.334-35, ¶¶3 and 4.

¹⁰¹ L.A.335, ¶¶5 and 6.

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 1982, it did not find that the accountants engaged in continuous breaches during the performance of their services for Reid until 1996.

But here, there are “continuous and repeated breaches” by Larsens in 2002 and 2003.¹⁰³ 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.¹⁰⁴

The continuous representation doctrine should therefore be applied, and when it is, all of Fischers’ claims against Larsens do not accrue until after April 4, 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.

During McDonald’s representation of the Fischers for 45 years, 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 (2000-2007). The continuous representation doctrine should

¹⁰² L.A.327-333.

¹⁰³ L.A.271-73, ¶¶15-27.

therefore be applied, which results in Fischers' claims against McDonald not accruing until 2007 when McDonald's "last professional service was performed." *See 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 (8th Cir. 1997) (discussing the doctrine but finding it not applicable to specifics of legal malpractice claims asserted in the action).¹⁰⁵

When the continuous representation doctrine is applied to Fischers' claims against McDonald, all of Fischers' claims against McDonald, including those independent claims relating to tax year 2000, do not accrue until after April 10, 2003, and are all timely-asserted. McDonald's statute of limitations defense should therefore be dismissed as to all of Fischers' claims.

CONCLUSION

If this court does not apply the continuous representation doctrine to either Larsens or McDonald, then the district court's orders should be affirmed because the district court correctly applied the "some damage" rule to Fischers' claims. And pursuant to the

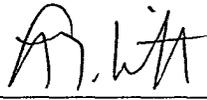
¹⁰⁴ L.A.271-72, ¶¶15-20.

¹⁰⁵ Other jurisdictions have also adopted the doctrine. *See* M.A.135, n.44.

continuous representation doctrine, all of Fischers' claims against Larsens and McDonald are timely-asserted as a matter of law.

Dated: November 15, 2010.

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

By: 

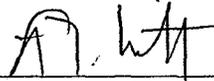
Steven J. Weintraut (#251975)
Kristin L. Kingsbury (#346664)

Suite 1300
100 Washington Avenue South
Minneapolis, MN 55401
(612) 337-6100
(612) 339-6591 - Facsimile

ATTORNEYS FOR RESPONDENTS

CERTIFICATION

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 5(d)(7)(B), for a brief produced with a proportional font. The length of this brief is 16,081 words. This brief was prepared using Microsoft Word, Version 2003.



Steven J. Weintraut