STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0633

G. William Carlson as Trustee of Bernice G. Carlson Charitable Uni-Trust No. 1
and as Trustee of the Bernice G. Carlson Uni-Trust No. 2
under Uni-Trust Agreements Dated March 8, 1999,
Appellant,

vs.

Larry K. Houk, P.A., et al.,
Respondents,

Estate of Janet L. Carlson, et al.,
Defendants.

Filed November 17, 2014
Affirmed
Cleary, Chief Judge

Ramsey County District Court
File No. 62-CV-13-6902

Bonnie M. Fleming, The Law Office of Bonnie M. Fleming, P.A., Minneapolis, Minnesota (for appellant)

Richard J. Thomas, Bryon G. Ascheman, Corinne Ivanca, Burke & Thomas, PLLP, Arden Hills, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Cleary, Chief Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

CLEARY, Chief Judge

Appellant, in his capacity as trustee, appeals from the district court order granting respondents' motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e) based on its conclusion that appellant's claims were barred by the six-year statute of limitations applicable to legal-malpractice actions. Appellant argues that (1) the continuous-representation doctrine should apply to toll the statute of limitations; and (2) the district court erred by determining that appellant could not establish that respondent Larry Houk's representation of appellant extended long enough to prevent appellant's claims from being barred by the statute of limitations. Because we conclude that the continuous-representation doctrine does not apply on the facts of appellant's claims, we affirm.

FACTS

In 1999, appellant G. William Carlson and his mother, Bernice G. Carlson, retained respondent Larry Houk to provide estate-planning and charitable-giving advice. Pursuant to that representation, respondent drafted documents creating two trusts for Bernice G. Carlson. Appellant alleges that respondent provided negligent advice on multiple occasions from 1999 until September 13, 2006, which resulted in significant tax penalties, a protracted dispute with the IRS, and related damages. At no point was there an explicit termination of respondent's representation of appellant. Appellant asserts that respondent's representation continued at least until the end of September 2007, or potentially until October 29, 2007, when appellant hired his present attorney.

On September 6, 2013, appellant filed the complaint in this case. Respondent moved to dismiss pursuant to Minn. R. Civ. P. 12.02(e), asserting that appellant failed to state a claim upon which relief can be granted because appellant's claims were barred by a six-year statute of limitations. The district court held a hearing and granted respondent's motion. This appeal followed.

D E C I S I O N

Appellant argues that the district court should have applied the continuous-representation doctrine to toll the statute of limitations applicable to his claims. This court applies de novo review to questions of "construction and application of a statute of limitations, including the law governing the accrual of a cause of action." *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013) (quotation omitted).

In Minnesota, the statute of limitations applicable to legal-malpractice claims is six years. Minn. Stat. § 541.05, subd. 1(5) (2012). The statute of limitations begins to run as of the latest accrual date for the cause of action. *See Bonhiver v. Graff*, 311 Minn. 111, 117, 248 N.W.2d 291, 296 (1976) (holding that the cause of action accrued and statute of limitations began to run when "[a]ll of the negligent acts . . . had been committed."). A cause of action for legal malpractice accrues when "some damage" occurs, such that the cause of action would survive a motion to dismiss for failure to state a claim upon which relief could be granted. *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999) (citing *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 152-53, 158 N.W.2d 580, 584 (1968)). "Some damage" occurs on the date that the client

takes action pursuant to an attorney's negligent advice. *See, e.g.*, *Herrmann*, 590 N.W.2d at 643-44 (cause of action accrued when, pursuant to attorney's faulty advice, clients engaged in prohibited transaction resulting in tax liability); *Thiele v. Stich*, 425 N.W.2d 580, 583-84 (Minn. 1988) (cause of action accrued when dissolution decree was entered which lacked terms as a result of attorney's faulty advice); *Grimm v. O'Connor*, 392 N.W.2d 40, 43 (Minn. App. 1986) (cause of action accrued when client first signed the contract for deed that lacked an interest escalation provision as a result of attorney's faulty advice). A legal malpractice cause of action accrues anew each time that the client acts upon negligent advice provided by the attorney. *See Bonhiver*, 311 Minn. at 117, 248 N.W.2d at 296.

In states that have adopted the continuous-representation doctrine, the doctrine either defers accrual of a cause of action or tolls the statute of limitations for legal malpractice until the attorney's representation concerning a particular transaction or subject matter has ended. *Wall v. Lewis*, 393 N.W.2d 758, 762 (N.D. 1986). No published case in Minnesota has ever explicitly applied the continuous-representation doctrine to toll the statute of limitations in a legal-malpractice lawsuit.

We note several policy implications of the continuous-representation doctrine that may explain why Minnesota has remained among the states that have not adopted the doctrine. The doctrine originated in the medical-malpractice context. However, a longer statute of limitations applies to legal-malpractice actions (six years) than medical-malpractice actions (four years, increased in 1999 from two years). Minn. Stat. § 541.05,

subd. 1(5); § 541.076 (2012); 1999 Minn. Laws ch. 23, § 1. This longer statute of limitations already provides significant protection for clients. Specifically, it protects against the possibility that attorneys could abuse their relative advantage in the attorney-client relationship by appearing to represent the client while running out the statute of limitations. This relatively long statute of limitations would also render the continuous-representation doctrine substantially more burdensome to attorneys in Minnesota than in other states that have adopted the continuous-representation doctrine, where shorter statutes of limitation apply.[1]

A second policy matter that concerns us is the tendency of the continuous-representation doctrine to undermine the purposes of imposing a statute of limitations. "The purposes of statutes of limitations are the repose of the defendant and the fair and effective administration of justice." *Dalton*, 280 Minn. at 153 n.2, 158 N.W.2d at 584 n.2. If the continuous-representation doctrine applied, it would indefinitely extend the time frame within which the client could bring suit against the attorney, so long as the attorney's representation as to that matter continued. Such a scenario not only would

[1] For example, Connecticut, Massachusetts, New York, North Dakota, and South Dakota have all adopted the continuous-representation doctrine. *DeLeo v. Nusbaum*, 821 A.2d 744, 749-50 (Conn. 2003); *Murphy v. Smith*, 579 N.E.2d 165, 168 (Mass. 1991); *Shumsky v. Eisenstein*, 750 N.E.2d 67, 70 (N.Y. 2001); *Wall*, 393 N.W.2d at 763; *Williams v. Maulis*, 672 N.W.2d 702, 705 (S.D. 2003). North Dakota has a two-year statute of limitations. N.D. Cen. Code § 28-01-18(3) (2014). South Dakota, Massachusetts, Connecticut and New York all have three-year statutes of limitations. S.D. Codified Laws § 15-2-14.2 (2012); Mass. Gen. Laws ch. 260, § 4 (2014); Conn. Gen. Stat. § 52-577 (2014); N.Y. C.P.L.R. 214 (McKinney 2014).

prevent an attorney from obtaining repose, but would also undermine the integrity of evidence available when a negligence claim is eventually litigated.

A third policy argument weighing against our adoption of the continuous-representation doctrine is that Minnesota has not tended to calculate the statute of limitations similarly in the medical- and legal-malpractice contexts. As noted above, the two types of malpractice actions are governed by different statutes of limitations. Additionally, Minnesota cases treat the issue of the client's knowledge differently in the two contexts. For medical-malpractice cases, the client's knowledge of the physician's negligence and of the injury itself is relevant to whether the statute of limitations continues to run. *See, e.g.*, *Haberle v. Buchwald*, 480 N.W.2d 351, 356 (Minn. App. 1992) (discussing whether an exception to the continuous-treatment rule applied, based on whether patient "actually knew or should have known" of the facts upon which the claim was based). In the legal-malpractice context, Minnesota courts have declined to adopt the discovery rule, and have held that the client's knowledge is only relevant to the accrual of the cause of action or running of the statute of limitations when fraud is present. *See, e.g., Sabes & Richman, Inc. v. Muenzer*, 431 N.W.2d 916, 918 (Minn. App. 1988) ("Ignorance of a cause of action does not toll the accrual of the cause of action absent allegations of continuing negligence, trespass or fraud."). *Dalton*, the authority most often cited for the application of the "some damage" accrual rule in legal-malpractice cases, stated that "malpractice cases involving claims against a physician or clinic . . . are of a class unto themselves" and are not persuasive, beyond the medical-

malpractice context, as to whether a plaintiff's knowledge is relevant to the accrual of a cause of action and statute of limitations. 280 Minn. at 154, 158 N.W.2d at 585.

In addition to policy concerns, the weight of Minnesota case law also informs our decision of whether to apply the continuous-representation doctrine in this case. Although no published Minnesota case has ever specifically declined to adopt the continuous-representation doctrine, Minnesota courts have had ample opportunity to discuss and decide whether to adopt the continuous-representation doctrine. Notably, none have explicitly done so. *Ames & Fischer Co., II, LLP v. McDonald*, 798 N.W.2d 557, 563 (Minn. App. 2011), *review denied* (Minn. July 19, 2011); *Sabes & Richman*, 431 N.W.2d at 918; *Grimm*, 392 N.W.2d at 43. Additionally, one decision, *Ames & Fischer*, appears to conclude that applying the continuous-representation doctrine is inconsistent with the "some damage" rule of accrual of a cause of action. 798 N.W.2d at 559 n.1.

Two published Minnesota cases do appear to apply a variation of the continuous-representation doctrine, despite their recitation of the "some damage" rule. *Anoka Orthopedic Assocs., P.A., v. Mutschler*, 773 F. Supp. 158 (D. Minn. 1991), discussed this anomaly. *Anoka Orthopedic* acknowledged that "no Minnesota court ha[d] explicitly adopted the continuous representation doctrine," but concluded that two Minnesota cases "reached essentially the same result" as would be reached if the continuous-representation doctrine were applied, on facts similar to those in *Anoka Orthopedic*. *Id.* at 169. In *Bonhiver v. Graff*, the Minnesota Supreme Court held that damage to plaintiffs

was ongoing throughout the representation, and thus no particular date could be determined for the date the cause of action accrued. 311 Minn. at 116-17, 248 N.W.2d at 296. In *May v. First National Bank*, the court of appeals could not determine the specific date during the representation that defendant's last possible negligent act had occurred. 427 N.W.2d 285, 288-89 (Minn. App. 1988). Without specifically referencing the continuous-representation doctrine, both cases used the date of the end of representation to calculate when the statute of limitations began to run. *Bonhiver*, 311 Minn. at 116-17, 248 N.W.2d at 296; *May*, 427 N.W.2d at 289.

Likewise, in *Anoka Orthopedic*, the court was "unable to determine when defendants' last act of negligence occurred." 773 F. Supp. at 170. As a result, the *Anoka Orthopedic* court concluded that "the analysis of *May* and *Bonhiver* should be followed to determine when the statute of limitations began to run in the present case," and denied summary judgment on the basis that a material fact existed as to the date of defendants' final negligent act. *Id.* at 169-70.

Anoka Orthopedic, *May*, and *Bonhiver* are unpersuasive, however, for the premise that Minnesota courts should apply the continuous-representation doctrine to all legal-malpractice cases. In *Anoka Orthopedic*, *May*, and *Bonhiver*, the court only used the date of the end of representation after the court determined it was unable to pinpoint the date during the representation when the plaintiffs incurred damage. These cases illustrate that Minnesota courts may apply the continuous-representation doctrine equitably—without contradicting the current Minnesota "some damage" accrual rule—by using the end-of-

representation date as the accrual date in rare situations where no other accrual date is available.

This interpretation does not require us to adopt the continuous-representation doctrine here. Furthermore, it allows Minnesota courts to choose whether to use the end-of-representation date to calculate the statute of limitations, depending upon whether the date of accrual is readily apparent. The federal case *Fletcher v. Zellmer*, 909 F. Supp. 678 (D. Minn. 1995) illustrates this concept. Four years after *Anoka Orthopedic*, in *Fletcher*, the federal district court reflected upon *Anoka Orthopedic*, pointing out that "[n]owhere [in *May*] does the court indicate that it is applying the continuous-representation doctrine," and concluding that Minnesota appellate case law "indicate[s] that the continuous representation doctrine is not controlling in all legal malpractice cases." *Id.* at 684-85. The *Fletcher* court declined to apply the continuous-representation doctrine to the facts before it, because the facts included a discrete damage-accrual date from which the court could readily calculate the statute of limitations. *Id.* at 685.

In *Reid Enterprises, Inc. v. Deloitte & Touche, L.L.P.*, the court of appeals echoed the analysis in *Fletcher*, stating that "Minnesota has not yet recognized the tolling of the limitations statute by continuous representation *in situations such as this*." No. C8-99-1801, 2000 WL 665684, at *3 (Minn. App. May 23, 2000) (emphasis added), *review denied* (Minn. July 25, 2000). In *Reid Enterprises*, the "situation[] such as this" was, like *Fletcher*, a scenario where the damage caused by the malpractice could be traced to a specific date. *Id.* Thus, *Reid Enterprises* provides persuasive support for the

interpretation that Minnesota may have applied and adopted a version of the continuous-representation doctrine, but certainly not in situations where the accrual date is readily discernible.

The case law upon which appellant relies is unpersuasive for the premise that we should adopt the continuous-representation doctrine for all legal-malpractice cases. Appellant's most persuasive case is *Schuster v. Magee*, No. C1-92-501, 1992 WL 213566 (Minn. App. Sept. 8, 1992). In *Schuster*, the appellate panel affirmed the trial court's decision to apply the continuous-representation doctrine. *Id.* at *2. *Schuster* appears to be an outlier: among the seven Minnesota appellate cases—published and unpublished—that mention the continuous-representation doctrine, *Schuster* is the only opinion that favorably discusses the doctrine.[2]

Furthermore, in applying the continuous-representation doctrine, *Schuster* seems to have strayed significantly from applicable Minnesota precedent. To describe the proper application for the doctrine, *Schuster* cited to *Wall*, 393 N.W.2d 758 (N.D. 1986), the case in which North Dakota adopted the continuous-representation doctrine, as well as *Swang v. Hauser*, 288 Minn. 306, 180 N.W.2d 187 (1970), a Minnesota medical-malpractice case that applied the continuous-treatment doctrine. *Schuster*, 1992 WL

[2] The other six cases are *Ames & Fischer Co., II, LLP*, 798 N.W.2d at 559 n.1; *Sabes & Richman*, 431 N.W.2d at 918; *Devereaux v. Stroup*, A07-0103, 2008 WL 73712, at *5 (Minn. App. Jan. 8, 2008); *Shapiro v. Stern*, No. C2-01-1214, 2002 WL 47039, at *2 (Minn. App. Jan. 15, 2002); *Reid Enterprises*, 2000 WL 665684, at *3; *Hellman v. Hertogs*, No. C6-97-1467, 1998 WL 8461, at *4 (Minn. App. Jan. 13, 1998). We note that five of these appellate cases, including *Schuster*, are unpublished and thus are not precedential authority.

213566, at *2. The *Schuster* court did not make any distinction between the medical- and legal-malpractice contexts, nor did it mention the fact that the continuous-representation doctrine had never been adopted in Minnesota. Because *Schuster* fails to discuss Minnesota precedent applicable to legal-malpractice actions, *Schuster* is not a highly persuasive authority for applying the continuous-representation doctrine in the legal-malpractice context.

We conclude that the continuous-representation doctrine does not apply to the facts of this case. Appellant's case presents a scenario more similar to the facts in *Fletcher* and *Reid Enterprises* than *Anoka Orthopedic*, *May*, or *Bonhiver*. As the district court stated, appellant's case includes "clear facts upon which the some damage rule can be applied." Appellant's complaint describes multiple discrete instances in which appellant incurred damages as a result of respondent's faulty advice, all of which can be tied to a specific date. The latest date to which respondent's faulty advice can be tied is September 13, 2006.[3] This is an appropriate date from which to calculate the accrual of a cause of action and the running of the statute of limitations under the "some damage" rule. *See Bonhiver*, 311 Minn. at 117, 248 N.W.2d at 296 (applying the some-damage rule to the last point where damage could have occurred). According to this calculation of when the six-year statute of limitations began to run, the statute of limitations expired September 13, 2012. Appellant did not file his complaint in this matter until September

[3] Respondent conceded for the purpose of its motion to dismiss that this date was the very last date that appellant could have been acting upon allegedly negligent advice provided by respondent.

6, 2013. By that point his claims against respondent were barred by the statute of limitations applicable to legal-malpractice actions.

Appellant's second contention is that the district court erred by determining that appellant could not establish that respondent's representation of appellant lasted to a date within six years of the filing of appellant's claim. Even if the doctrine of continuous representation applied here, we agree with the district court that appellant's claims are time-barred. We conclude that the district court did not err in dismissing appellant's claims pursuant to respondent's rule 12.02(e) motion.

Affirmed.