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NO. 65919-7-I

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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JOHN MURPHEY, a Washington Resident, and MURPHEY AND  
WESTCOTT d/b/a J&L Enterprises,

Appellants,

vs.

CHARLES D. GRASS, CPA & ASSOCIATES, P.S.,  
a Professional Corporation,

Respondent.

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**RESPONDENT'S BRIEF ON APPEAL**

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2011 JUN 23 10:00 AM  
COURT OF APPEALS  
DIVISION I

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## I. INTRODUCTION

Charles D. Grass, CPA & Associates, P.S. (“Grass”), the respondent, respectfully requests this Court affirm the rulings of the trial court. This lawsuit was brought by John Murphey and Murphey and Westcott d/b/a J&L Enterprises (collectively “Murphey”) against their accountant, Grass, for breach of contract<sup>1</sup> and breach of fiduciary duty. Grass was hired to perform bookkeeping and accounting functions for Murphey. Murphey acknowledges discovering Grass’s alleged professional malpractice in 2005; subsequently firing Grass on December 28, 2005; and hiring a new CPA and incurring fees and costs as a result of Grass’s alleged malpractice in early 2006. On November 4, 2009 – more than three years after discovering Grass’s negligence and incurring expenses to respond to it – Murphey brought a lawsuit against Grass for this alleged malpractice.<sup>2</sup> The trial court dismissed all claims against Grass on summary judgment, holding that Murphey’s claims were barred by the statute of limitations.

## II. STATEMENT OF ISSUE

In Washington, the statute of limitations for an accountant malpractice claim begins to accrue as soon as the aggrieved party knows

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<sup>1</sup> Murphey admits that he and Grass did not have a contract that would trigger a six year statute of limitations. All claims against Grass are subject to a three year statute of limitations. (CP 50.)

<sup>2</sup> Murphey acknowledges that all malpractice claims related to alleged errors in reporting federal taxes are barred by the statute of limitations. (CP 43.)

or should know of its alleged injury. Because Murphey discovered in 2005 or early 2006 that he had been damaged by Grass's errors, yet waited more than three years before filing this lawsuit, it was proper for the trial court to dismiss Murphey's claims against Grass.

### III. STATEMENT OF CASE

#### A. Factual Background

In 1997, Murphey retained Grass to prepare payroll and tax returns for himself, as well as his business<sup>3</sup>. (CP 27.) By 2000, Murphey's business had grown considerably, and Grass was responsible for additional accounting and bookkeeping functions, including processing incoming mail, payment to vendors, management of bank accounts, payment of federal and state taxes, and processing payroll. (*Id.*)

In 2004, the Washington Department of Revenue conducted an audit of Murphey's payment of excise taxes. (CP 38.) During the audit, the State requested numerous documents related to Murphey's payment of sales tax at purchase. (*Id.*) Murphey alleged that Grass was not able to substantiate their returns with documentation. (*Id.*) Murphey also alleged that he learned at that time that Grass did not file or prepare Murphey's federal tax returns in a timely manner. (CP 39.)

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<sup>3</sup> Grass denies Murphey's claims, and asserts that any difficulties Murphey encountered were the result of Murphey's own conduct, including failure to provide Grass with necessary information. For purposes of this appeal, only, Grass will not contest the facts recited in Murphey's Complaint and Appellant's Brief in a tax appeal related to the alleged failings of Grass, filed with the Washington Board of Tax Appeals on September 29, 2009.

In mid-2005 Murphey questioned Grass's accounting and bookkeeping services. (CP 29.) Murphey also became aware of an assessment for unpaid 941 taxes levied by the IRS. (*Id.*) Murphey alleged that Grass informed him that the assessment was for approximately \$21,000 and that he was negotiating with the IRS to establish a payment plan. (CP 28.) Murphey asserted that he learned, however, that the lien was approximately \$100,000 because Grass had not negotiated a payment schedule. (CP 37.) In July 2005, Murphey tried to obtain a line of credit for J&L Enterprises, only to learn that tax liens had been levied against J&L Enterprises. (CP 28.) When Murphey inquired into this situation, Murphey alleged that Grass informed him that the liens were in error, that Grass had been keeping accurate bookkeeping, and that the liens were in fact for a bankrupt company that conducted business under J&L Enterprises. (*Id.*)

At this point, Murphey began to suspect that Grass was not properly managing his bookkeeping affairs; customer invoices were not sent on time and many vendors were being over or underpaid. (*Id.*) Murphey also alleged he discovered that Grass was paying his account before payroll and taxes were paid. (*Id.*)

Upon learning of Grass's alleged mismanagement, Murphey terminated his company's and his personal business relationship with Grass. (*Id.*) Murphey's attorney notified Grass on December 28, 2005 to cease providing services, and that a malpractice claim would be presented once all damages were assessed. (CP 48.) Murphey alleged that upon

realizing that Grass's office failed to maintain proper bookkeeping and committed numerous errors in reporting state and federal taxes, Murphey was forced to hire a new accounting firm to audit and organize his books. (CP 29.)

The Department of Revenue audited J&L Enterprises for the tax periods January 1, 2000 through October 31, 2002 and issued an assessment for \$114,417, including a 5% assessment penalty of \$4,514. (*Id.*) Murphey received the auditor's assessment of additional taxes on June 1, 2006. (CP 104.) The Department of Revenue also audited Murphey individually for the tax periods January 1, 2000 through March 31, 2004 and issued an assessment of \$70,340, including a 5% penalty of \$2,296 and a delinquency penalty of \$11,479. (*Id.*) Murphey learned of the auditor's assessment of additional taxes on February 28, 2006. (CP 111.) Murphey appealed all penalties; the Appeals Division for the Department of Revenue ("Tax Appeals Court") issued its decision on February 13, 2009. (CP 43.)

#### **IV. LEGAL ARGUMENT AND ANALYSIS**

##### **A. Standard for Review**

The Court of Appeals reviews orders on summary judgment *de novo*, engaging in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *Sea-Pac Co., Inc. v. United Food & Comm. Workers Local Union*, 103 Wn.2d 800, 699 P.2d 217 (1985). Summary judgment is appropriate if the "pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Summary judgment may be entered if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

The dismissal of Murphey’s claims on summary judgment was the appropriate result in this case. The evidence established Murphey knew of damage caused by Grass’s accounting errors in 2005 or early 2006, yet waited until November 4, 2009 before commencing this lawsuit. The trial court correctly dismissed Murphey’s claims against Grass.

**B. The Trial Court Properly Dismissed Murphey’s Claims Because This Lawsuit Was Filed More Than Three Years After Discovering Damage From Grass’s Accounting Errors.**

Murphey acknowledged discovering Grass’s alleged malpractice in 2005; subsequently firing Grass on December 28, 2005; and hiring a new CPA and incurring fees and costs to audit and organize his books as a result of Grass’s alleged malpractice in early 2006. These affirmative acts demonstrate both that Murphey *was* damaged by Grass’s alleged malpractice, and that Murphey *knew* he had been damaged by Grass’s alleged malpractice, yet waited almost four years before commencing this lawsuit. Murphey’s appeal to the Tax Appeals Court does not toll the statute of limitations, nor render his damages speculative until the Tax

Appeals Court makes its ruling. Consequently, Murphey's lawsuit for Grass's alleged malpractice was barred by the statute of limitations and properly dismissed by the trial court.

**1. Murphey Waited More Than Three Years After Discovering Grass's Alleged Malpractice To File Suit.**

Washington, has extended the discovery rule to various actions for professional malpractice, *i.e.*, a cause of action does not accrue for purposes of the statute of limitations until a client discovers or in the exercise of reasonable diligence should have discovered an injury. *Peters v. Simmons*, 87 Wn.2d 400, 405, 552 P.2d 1053 (1976). Under Washington's discovery rule, a cause of action does not accrue and the statute of limitations does not begin to run until a party knew or should have known the essential elements of the cause of action – duty, breach, causation and injury. *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268 (2005) (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002)). Washington's discovery rule applies to professional malpractice claims against accountants. *Hunter v. Knight*, 18 Wn. App. 640, 643-44, 571 P.2d 212 (1977). Under the discovery rule, a party has three years to file a claim for accounting malpractice after learning of its accountant's alleged misconduct and damage caused by it.

Murphey candidly admits that he discovered Grass's alleged errors and the harm caused by them in 2005 or early 2006, yet waited until November 4, 2009 to commence this lawsuit. Murphey set forth the dates when Grass's alleged malpractice, and its harm, was discovered in his

Complaint, his Brief before the Board of Tax Appeals, and his Opposition to Grass's Motion for Summary Judgment:

- In 2004, the Washington State Department of Revenue conducted an audit of Murphey's payment of excise taxes. (CP 38.)
- In mid-2005, Murphey learned of an assessment for unpaid taxes levied by the IRS. (CP 28.)
- In July 2005, Murphey became aware of additional tax liens levied against J&L Enterprises when he attempted to obtain a line of credit for J&L Enterprises. (*Id.*)
- In 2005, Murphey learned that Grass was not properly managing his bookkeeping affairs because customer invoices were not being sent on time, and many vendors were either being over or underpaid. Additionally, he discovered that Grass was paying his account before payroll and taxes were paid. (*Id.*)
- When Murphey "realized the gravity of Grass's mismanagement of the bookkeeping and breaching of his fiduciary duty, Murphey ceased his relationship and his company's relationship with Grass." (*Id.*)
- Murphey terminated his relationship with Grass on December 28, 2005. (CP 48.)
- Upon realizing that Grass's office failed to maintain proper bookkeeping and committed numerous errors in reporting

state and federal taxes, Murphey obtained a new CPA firm to audit and organize his books. (CP 29.)

- The Department of Revenue audited J&L Enterprises for the tax periods January 1, 2000 through October 31, 2002 and issued an assessment for \$114,417, including a 5% assessment penalty of \$4,514. (CP 29.) Murphey received the auditor's assessment of additional taxes on June 1, 2006. (CP 104.)
- The Department of Revenue also audited Murphey individually for the tax periods January 1, 2000 through March 31, 2004 and issued an assessment of \$70,340, including a 5% penalty of \$2,296 and a delinquency penalty of \$11,479. (CP 29.) Murphey learned of the auditor's assessment of additional taxes on February 28, 2006. (CP 111.)

**2. The Limitations Period For A Professional Malpractice Claim Begins to Run Upon Discovery Of The Injury.**

Murphey argues that he had not suffered any “damages” until the Tax Appeals Court made its final ruling against Murphey; and that, since the Tax Appeals Court did not issue its ruling until February 2009, Murphey’s claims did not accrue until that date. (CP 43.)<sup>4</sup> “[I]f a party

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<sup>4</sup> Murphey relies on *International Engine Parts, Inc. v. Feddersen and Co.* to support his argument that the statute of limitations begins when the Tax Appeals Court issued its ruling. Murphey’s reliance on *Feddersen* is mistaken. The *Feddersen* court held it was not until the IRS issued its assessment against International Engine Parts -

administratively appeals a notice of an assessment by the Department, the assessment is not due and owing – and therefore, no damages have arisen – until the Department issues its final determination . . . .” Murphey’s Op. Br. at 5.

Murphey’s argument confuses the concept of “damage” and “damages”. The Washington Court of Appeals, Division III, considered a factually similar argument in *Huff v. Roach*, 125 Wn. App. 724, 106 P.3d 268 (2005). In *Huff*, the plaintiffs sued their former attorney for malpractice after they discovered the attorney missed the statute of limitations. *Id.* at 727. However, instead of bringing a malpractice action against their former attorney when they discovered this malpractice, they hired a new attorney to litigate their underlying claims. *Id.* The plaintiffs claimed that their malpractice claim did not accrue until they suffered “damages” – and argued that did not occur until the court dismissed their lawsuit seven years later because it was barred by the statute of limitations – instead of when the plaintiffs first discovered their attorney failed to commence the lawsuit within the statute of limitations. *Id.*

The Court of Appeals rejected this argument, holding that malpractice refers to legal negligence, and that the elements of negligence

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making it subject to legal appeal - that the statute of limitations commenced. *Feddersen*, 9 Cal. 4th 606, 622, 888 P.2d 1279 (1995). If this Court adopts the *Feddersen* analysis, then the statute of limitations commenced when the Department of Revenue issued its final assessments on February 28, 2006 and June 1, 2006, making the assessments subject to appeal. These dates also fall outside the three year statute of limitations for commencing this action.

are duty, breach, causation and injury. *Huff*, 125 Wn. App. at 729 (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002)). The court addressed the confusion between “damage” and “damages”: “The ‘injury’ element of negligence refers to ‘damage,’ as opposed to ‘damages’. ‘Damages’ are the monetary value of the injury or damage proximately caused by the breach of alleged duty.” *Id.*

Frequently, recitations of the negligence elements inaptly refer to “damages” as an element of negligence rather than damage or injury. Although “injury” and “damages” are often used interchangeably, an important difference exists in meaning. In the legal malpractice context, injury is the invasion of another’s legal interest, while damages are the monetary value of those injuries.

*Id.* at 729-30.

The *Huff* rationale applies here. Murphey *knew* he had been damaged when he fired Grass – he had to hire a new accountant to audit and organize his books, and received and was required to respond to the Department of Revenue’s and IRS’s assessment for unpaid taxes. While Murphey’s appeal to the Tax Appeals Court offered the potential to modify the amount of his “damages”, Murphey knew he had been “damaged” in 2005, or no later than early 2006.

### **3. Uncertainty About The Amount Of Damages Does Not Toll The Three Year Statute of Limitations For Malpractice Claims.**

Murphey contends that his damages were speculative until the conclusion of the administrative appeal process because the Department

may determine that the taxpayer owes zero.<sup>5</sup> This Court has previously rejected an analogous argument involving an attorney malpractice claim. *Janicki Logging & Construction Co. v. Schwabe, Williamson & Wyatt*, 109 Wn. App. 655, 37 P.3d 309 (2001). This Court considered the plaintiffs' proposed exception regarding the commencement of the statute of limitations – akin to the exception proposed here – and unanimously declined to adopt it.

In *Janicki Logging*, Janicki filed a breach of contract claim against the United States Forest Service in 1990. *Janicki Logging*, 109 Wn. App. at 658. Dissatisfied with the Forest Service's award, Janicki appealed the administrative decision by filing an original action in the United States Court of Claims and filed a concurrent suit on the same claim in the United States District Court. *Id.* The defendant law firm, Schwabe, Williamson & Wyatt ("Schwabe"), missed the one-year deadline for filing the Court of Claims suit, which resulted in dismissal of that claim.<sup>6</sup> *Id.* Schwabe continued to represent Janicki through a series of appeals until 1997, when the Ninth Circuit Court of Appeals upheld the Court of

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<sup>5</sup> Murphey has nowhere suggested that he would not have had a claim against Grass if the Department reduced the assessment to zero. Even if the Department had made such a determination, Murphey had sustained damage related to hiring a new accountant to audit and organize his books and had incurred expenses for responding to the assessment, including legal and accounting fees. In addition, Murphey had sustained damage with regard to federal taxes – claims for which remained in the Complaint when it was dismissed, although Murphey acknowledges that they were time barred.

<sup>6</sup> The District Court claim was subsequently dismissed for lack of subject matter jurisdiction. *Janicki Logging*, 109 Wn. App. at 658.

Claims' original dismissal for failing to timely commence the lawsuit. *Id.* at 658-59.

On June 1, 2000, Janicki filed a malpractice claim against Schwabe. *Id.* at 659. Schwabe filed a motion to dismiss under CR 12(b)(6) alleging that claim was barred by the statute of limitations. *Id.* The trial court agreed with Schwabe, and dismissed Janicki's claim. *Id.*

In its appeal before this Court, Janicki first argued that the statute of limitations on its malpractice claim did not begin to run until all appeals were exhausted. *Janicki Logging*, 109 Wn. App. at 660. Janicki reasoned that it could not have known it was damaged before that time, since any damage was purely speculative. *Id.* This Court disagreed, holding that, "as a matter of law, Janicki was on notice that it had been damaged when the Court of Claims dismissed its case." *Id.*

This Court viewed its holding as consistent with a prior rule adopted in *Richardson*. *Janicki Logging*, 109 Wn. App. at 660 (citing *Richardson v. Denerd*, 59 Wn. App. 92, 95-96, 795 P.2d 1192 (1990)). In *Richardson*, the Court held "as a matter of law, that upon an entry of an adverse judgment at trial a client is charged with knowledge, or at least put on notice, that his or her attorney may have committed malpractice in connection with the representation." *Id.* (quoting *Richardson*, 59 Wn. App. at 98; see also *Quinn v. Connelly*, 63 Wn. App. 733, 739, 821 P.2d 1256 (1992) (citing *Richardson* as having rejected tolling pending appeal)).

Janicki argued that, unlike the criminal defendant in *Richardson*, Janicki did not incur any actual injury until the original dismissal was affirmed on appeal. *Id.* at 660. This Court declined to adopt Janicki's proposed rule that any appeal in a civil matter delays the discovery rule. *Id.* This Court stressed that the facts as pleaded were susceptible of but one conclusion: "Janicki knew or should have known when its claim was dismissed as untimely that its lawyers missed a deadline, leaving in place a judgment that denied Janicki the relief it sought." *Id.* at 661-62; *see Richardson*, 59 Wn. App. at 95.

Murphey, just as the plaintiff in *Janicki Logging*, argues his injury was entirely speculative until the Tax Appeals Court issued its ruling on February 13, 2009. While Murphey's *damages* may have been uncertain in amount, the fact of *damage* was known. This Court's holding in *Janicki* establishes that uncertainty as to the amount of damages does not toll the statute of limitations. Murphey knew he had been damaged by Grass's accounting errors when the Department of Revenue issued its assessment, just as Janicki knew it had been damaged when the Court of Claims dismissed its claim. Accordingly, it was proper for the trial court to dismiss Murphey's claims against Grass and the trial court's ruling should be affirmed.

**C. Murphey Confuses Losing A Substantive Right With Suffering Damage.**

Murphey claims that the statute of limitations did not begin to run until he lost a substantive right, and that he did not lose a substantive right until the Department affirmed the assessment.

In Murphey's case its damage, the substantive right it lost, was the assessment of underpaid tax, penalties, and interest. Murphey had knowledge that it had lost its substantive right in February 2009. Prior to that point in time Murphey's alleged injury were [sic] speculative because the Department had yet to conclude the administrative appeal.

Murphey's Op. Br. at 11 (emphasis in original). Murphey claims that the knowledge of Grass's negligent act leading up to the Tax Appeals' decision is immaterial because no damage occurred until the loss of a substantive right, which did not occur until the Tax Appeals Court issued its decision upholding the Department of Revenue's tax assessment. Murphey relies on *Johnson v. Reehorn* in support of this argument. This argument again confuses the concept of "damage" and "damages", and ignores Murphey's knowledge of damage in 2005 and 2006. This argument also ignores Murphey's federal tax-related malpractice claims, which were included in the Complaint when it was dismissed and which Murphey acknowledges were time barred by the statute of limitations. In addition, as demonstrated below, this case is distinguishable from *Reehorn*.

Johnson was appointed the personal representative of his father's estate. *Reehorn v. Johnson*, 56 Wn. App. 692, 693, 784 P.2d 1301 (1990).

Johnson hired Mullen, an attorney, to probate the estate and Reehorn, a certified public accountant, to prepare the tax returns. *Id.* Shortly before the federal tax return was due, Mullen called Johnson and advised him that the returns might be filed late. *Id.* Mullen advised Johnson that the consequence of late filing would only be a \$100-\$200 penalty. *Id.* at 694. The tax returns were not mailed until July 23, 1982, 11 days after they were due. *Id.*

On September 6, 1982, the IRS assessed a \$115.20 penalty for late filing. *Reehorn*, 56 Wn. App. at 694. Approximately a year later, by letter dated October 19, 1983, Reehorn advised Johnson that the late filing of the state return disqualified the “special use valuation” upon which the estate was relying for computation of the federal estate tax. *Id.* On September 25, 1986, Johnson filed a complaint on behalf of the estate against Mullen and Reehorn. *Id.* Reehorn subsequently moved for summary judgment on grounds that the complaint was filed after the statute of limitations had run. *Id.* The trial court granted summary judgment, finding that the estate had notice of the late filing and that it had been damaged to the extent of \$115.20 in 1982. *Id.* at 695.

This Court was asked to decide whether Johnson discovered or should have discovered his cause of action at the time he learned of the IRS assessment of the \$115.20 penalty. *Reehorn*, 56 Wn. App. at 696. Reehorn alleged that the estate had knowledge of all elements of the malpractice claim; it knew that Mullen and Reehorn had filed the return late and the estate had suffered damage by being assessed the penalty. *Id.*

In reversing the trial court, this Court found that the penalty of \$115.20 imposed for the late filing was the *full extent of the consequences so far as the imposition of the penalties was concerned*. *Id.* at 697. At that point, no substantive rights were directly affected.

The cause of action asserted against Reehorn is based on the failure to protect the estate against the loss of the special use valuation. Since this amounts to a loss of valuable substantive right, *it is logically and legally a damage separate and distinct from the mere imposition of a penalty for late filing*. The assessment of the penalty for late filing was not a consequence of the alleged negligent failure to secure the special use valuation.

*Id.* at 697-98 (emphasis added).

This Court's analysis in *Reehorn* supports the conclusion that Murphey's claim is time barred. Murphey's federal and state tax problems, and need to hire an accountant to audit and organize his books due to Grass's alleged negligence, are not logically or legally "damage separate and distinct" from his claim here. Murphey was issued an assessment by the Department of Revenue, which Murphey alleges occurred because of Grass's negligence. The Tax Appeals Court's decision to affirm that tax assessment was not damage separate and distinct from the Department of Revenue's underlying assessment; it was affirmation that the underlying assessment was correct.

**D. The Statute Of Limitations Commenced on All Claims When Murphey Discovered Grass's Accounting Errors.**

Murphey acknowledges missing the statute of limitations on the federal tax-related claims, and does not appear to dispute that the statute of

limitations has run on claims related to the need to hire a new accountant to audit his books because of Grass's alleged negligence. Murphey appears to argue that he can segment his damage so that, although the statute has run as to some damage elements, his claim related to the Department of Revenue's assessment has nevertheless not run. (CP 43.) "Rather, Murphey's claims are based upon the fact that filing federal tax returns entails duties and performance separate and distinct from that require [sic] to file state tax returns." Murphey's Op. Br. at 21. However, all of Murphey's claims arise from Grass's alleged failure to meet the standard of care for accountants in handling his accounting responsibilities. He cannot so easily segregate his claims; the date Murphey learned he had been "damaged" is the same for all of them.

A cause of action does not accrue and the statute of limitations does not begin to run until a party knew or should have known the essential elements of the cause of action – duty, breach, causation and damage. *Huff*, 125 Wn. App. at 729 (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002)). "The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action." *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992).

Murphey's allegation that his damage from the negligent filing of state tax returns has not run, but that his claim arising from the negligent filing of federal tax returns or from the need to hire a new accountant, has run, is problematic – especially as Murphey's claims for negligent filing of federal tax returns remained in the Complaint when summary judgment

was granted. Murphey's letter to Grass stating he was willing to amend his Complaint to clarify that he would not be seeking to recover for any claims related to the federal tax matters does not impact this analysis. (CP 43.) No amended Complaint was ever filed; the federal tax-related claims were among those dismissed on summary judgment. Grass's alleged negligence resulted in all these claims; the culmination of all these events allowed Murphey to bring a lawsuit against Grass for breach of fiduciary duty; the harm allegedly resulting cannot be carved into disparate pieces.

The Complaint recognizes that Murphey's claims arise together, and specifically alleges how Grass breached his fiduciary duty:

When Defendants agreed to maintain Plaintiffs' records, file tax state and federal taxes on their behalf, and maintain the accounting of Plaintiffs' bank accounts, Defendants entered into a fiduciary relationship with Plaintiffs.

When Defendants failed to maintain Plaintiffs' records, failed to file accurate or timely state and federal returns on Plaintiffs' behalf, and failed to maintain Plaintiffs' accounts so that they could pay their liabilities, Defendants breached its fiduciary duty to Plaintiffs.

As a result of Defendants' breach, Plaintiffs have suffered damages as outlined below.

(CP 40.) Murphey now argues that his claim for improperly filing state tax returns, improperly filing federal tax returns, and not maintaining Murphey's accounts so that Murphey was required to hire a new accountant all have separate accrual dates for the statute of limitations. They do not. These events, cumulatively, triggered Murphey's breach of fiduciary duty claim against Grass – just as alleged in the Complaint. A

party cannot cherry pick among different aspects of damage in order to trigger or toll the statute of limitations.

**E. Washington Courts Have Consistently Refused To Extend The Statute of Limitations In Malpractice Claims.**

Washington courts have considered the impact its strict policy interpreting the statute of limitations will have on a party's right to bring a claim, yet repeatedly refused to read an exception into the statute of limitations. Murphey claims that requiring a party to commence its malpractice lawsuit before its underlying lawsuit is resolved would result in speculative, piecemeal litigation. In *Huff*, the court was asked to read an exception into the statute of limitations for this very same reason. *See Huff*, 125 Wn. App. at 732. The *Huff* court looked at various other jurisdictions for guidance.

Some jurisdictions appear to follow the rule urged by the Huffs, and effectively toll the statute of limitations until the underlying claim is concluded. *See Wagner v. Sellinger*, 847 A.2d 1151, 1156 (D.C. App. 2004) (holding in a legal malpractice case, the statute of limitations is not triggered by a potential injury until the underlying lawsuit is resolved); *Lucey v. Law Offices of Pretzel Stouferr*, 301 Ill. App. 3d 349, 355, 234 Ill. Dec. 612 (1998) (holding, "Illinois courts have frequently . . . recognized a cause of action for legal malpractice will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which plaintiff has become entangled due to the purportedly negligent advice of his attorney.") . . . .

*Id.* at 270-71.

Not persuaded, the Court of Appeals declined to modify its policy regarding stale claims. “Adopting the Huffs’ proposed exception would conflict with Washington’s policy favoring the statute of limitations shielding defendants from stale claims.” *Id.* at 731-32 (quoting *Crisman v. Crisman*, 85 Wn. App. 15, 18, 931 P.2d 163 (1997)). “When plaintiffs sleep on their rights, evidence may be lost and witnesses’ memories may fade.” *Id.* at 732. Any proposal to toll the statute of limitations is in conflict with these policies. *Id.* (citing *Janicki Logging*, 109 Wn. App. at 662.)) “As such, this court recognizes the need to balance the unfairness of cutting off stale claims when the plaintiff would probably not have known he had been injured until the limitations period had run, against assumptions that stale claims are more likely to be spurious and supported by untrustworthy evidence.” *Id.*; see also *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 222, 543 P.2d 338 (1975).

The *Huff* court reasoned that under the proposed exception, the limitations period could be indefinitely extended simply by filing a time-barred action and waiting until an adverse judgment was rendered before filing a negligence suit. *Id.* at 732. The *Huff* court concluded that it will not generally read an exception into statutes of limitation which has not been embodied in the statute, however reasonable such exception may seem. *Id.*; see also *O’Neil v. Estate of Murtha*, 89 Wn. App. 67, 73-74, 947 P.2d 1252 (1997).

Washington courts have considered Murphey’s proposal to lengthen the statute of limitations for malpractice claims, and conclusively

denied such an extension. Murphey knew of his malpractice claim against Grass in 2005 or early 2006, but did not file his claim against Grass within three years; as such, it was proper for the trial court to dismiss his claims.

#### V. CONCLUSION

The trial court did not err when it held Murphey's claims were barred by the three year statute of limitations. Murphey acknowledged discovering Grass's alleged professional malpractice in 2005; subsequently firing Grass on December 28, 2005; and hiring a new CPA and incurring fees and costs as a result of Grass's alleged malpractice in early 2006, yet waited until November 4, 2009 to commence this lawsuit. Accordingly, Grass respectfully requests that this Court affirm the trial court's ruling and dismiss Murphey's claims.

DATED this 22<sup>nd</sup> day of February, 2011.

BETTS, PATTERSON & MINES, P.S.

By   
Christopher W. Tompkins, WSBA #11686  
Lori W. Hurl, WSBA #40647  
Attorneys for Respondents

## VI. APPENDICES

- A. *International Engine Parts, Inc. v. Feddersen and Co.*  
9 Cal. 4th 606, 888 P.2d 1279 (1995)
- B. *Wagner v. Sellinger*  
847 A.2d 1151 (D.C. App. 2004)
- C. *Lucey v. Law Offices of Pretzel Stouferr*  
301 Ill. App. 3d 349, 234 Ill. Dec. 612 (1998)

CERTIFICATE OF SERVICE

I certify that on the 22nd day of February, 2011, I caused a true and correct copy of Respondent's Brief on Appeal to be served on the following in the manner indicated below:

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# **APPENDIX A**

**International Engine Parts, Inc.**

**v.**

**Feddersen and Co.**

**9 Cal. 4th 606, 888 P.2d 1279 (1995)**

9 Cal.4th 606, 888 P.2d 1279, 38 Cal.Rptr.2d 150, 63 USLW 2590

**View National Reporter System version**

Briefs and Other Related Documents

Judges and Attorneys

Supreme Court of California  
INTERNATIONAL ENGINE PARTS, INC., et al., Plaintiffs and Appellants,  
v.  
FEDDERSEN AND COMPANY, Defendant and Respondent.

No. S037753.

Mar 2, 1995.

SUMMARY

The trial court granted defendant accounting company summary judgment, in an action by a corporation and its subsidiary for professional negligence, on the ground that plaintiffs' action was barred by the two-year statute of limitations of Code Civ. Proc., § 339, subd. 1. Plaintiffs had hired defendant to prepare tax returns, and, for the years 1983 and 1984, defendant failed to file documents that were necessary for the subsidiary to retain a certain advantageous tax status. In 1986, the Internal Revenue Service (IRS) advised plaintiffs that the failure to provide the documents would result in loss of the subsidiary's status, and, in June 1987, the IRS issued a preliminary report indicating it intended to disqualify the subsidiary from its status and impose tax deficiencies against both corporations. The IRS imposed the deficiencies on May 16, 1988, and plaintiffs filed their action on May 15, 1990. (Superior Court of Los Angeles County, No. BC001309, Eric E. Younger, Judge.) The Court of Appeal, Second Dist., Div. Four, No. B061861, affirmed the trial court's grant of summary judgment, concluding that plaintiffs suffered actual harm, thereby triggering the statute of limitations, either in 1986, when the apparent tax liability resulted in a reduction in plaintiff subsidiary's line of bank credit, or in 1987, when the IRS prepared the preliminary report.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the matter for further proceedings. The court held the statute of limitations in an accountant malpractice case alleging the negligent preparation of tax returns commences when the tax deficiency is assessed by the IRS. Thus, plaintiffs' action was timely. An action for professional negligence accrues when the plaintiff discovers the negligent act and has suffered actual harm therefrom. The disposition of the underlying case is the point of actual harm; it is not deferred until the point of "irremediable damage," i.e., when the appeal process has been completed or the accountant's malpractice cannot be remedied. In this case, the preliminary report was merely the determination of tax liability, and harm to plaintiffs was still contingent on a finalization of the IRS's audit process. The deficiency assessment served as a finalization of the audit process and the commencement of actual injury, because it was the trigger that allowed the IRS to collect amounts due. (Opinion by Lucas, C. J., with Arabian, Baxter, George and Werdegar, JJ., concurring. Separate concurring opinion by Mosk, J. Separate concurring and dissenting opinion by Kennard, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a , 1b) Accountants § 5--Actions--Professional Negligence--Limitation of Actions--Accrual--Suffering Actual Harm--When Actual Harm Occurs.

The statute of limitations in an accountant malpractice action by a corporation and its subsidiary, alleging the negligent preparation of tax returns, commences when the tax deficiency is assessed by

the Internal Revenue Service (IRS). Thus, plaintiff corporations' professional negligence action against the accounting company accrued on May 16, 1988, when the IRS assessed tax deficiencies against plaintiffs, rather than in June 1987, when the IRS issued a preliminary report indicating it intended to impose tax deficiencies; and plaintiffs' action, filed May 15, 1990, was timely under the two-year statute of limitations of Code Civ. Proc., § 339, subd. 1. An action for professional negligence accrues when the plaintiff discovers the negligent act and has suffered actual harm therefrom. The disposition of the underlying case is the point of actual harm; it is not deferred until the point of "irremediable damage," i.e., when the appeal process has been completed or the accountant's malpractice cannot be remedied. In this case, the preliminary report was merely the determination of tax liability, and harm to plaintiffs was still contingent on a finalization of the IRS's audit process. The deficiency assessment served as a finalization of the audit process and the commencement of actual injury, because it was the trigger that allowed the IRS to collect amounts due.

[Application of statute of limitations to actions for breach of duty in performing services of public accountant, note, 7 A.L.R.5th 852. See also 3 **Witkin**, Cal. Procedure (3d ed. 1985) Actions, § 447.]

(2) Limitation of Actions § 83--Questions of Law and Fact--Facts Not in Dispute.

Where the relevant facts are not in dispute, the application of the statute of limitations may be decided as a matter of law.

(3) Federal Taxation § 2--Income Tax--Procedures--Finality of IRS Determination.

In federal income tax proceedings, the preliminary findings of the Internal Revenue Service (IRS) tax examiner are proposed findings that are subject to negotiation prior to any determination of tax deficiency. However, once a deficiency is assessed, either by the taxpayer's consent to a deficiency assessment or by receipt of a final deficiency notice pursuant to the Internal Revenue Code, the matter is final as to the IRS and is subject to legal appeal in federal tax court.

#### COUNSEL

Thomas Kallay for Plaintiffs and Appellants.

Garrett & Tully, Stephen J. Tully and Kevin S. Lacey for Defendant and Respondent.

Pettit & Martin and Robert L. Maines as Amici Curiae on behalf of Defendant and Respondent.

#### LUCAS, C. J.

We granted review to resolve a narrow, but recurring, issue as to when *actual injury*, caused by an accountant's negligent filing of tax returns, occurs so as to commence the running of the two-year statute of limitations period of Code of Civil Procedure section 339, subdivision 1 (hereafter section 339, subdivision 1). A cause of action for accountant malpractice under section 339, subdivision 1, specifically accrues "on discovery of the loss or damage suffered by the aggrieved party," but until the client suffers damage or actual injury from the negligence, a cause of action for professional negligence cannot be established. (*Schrader v. Scott* (1992) 8 Cal.App.4th 1679, 1684 [11 Cal.Rptr.2d 433] [hereafter *Schrader*].) Some Court of Appeal decisions hold that actual injury in accountant malpractice cases occurs on final tax deficiency assessment. (See e.g., *Moonie v. Lynch* (1967) 256 Cal.App.2d 361 [64 Cal.Rptr. 55] [hereafter *Moonie*].) The Court of Appeal herein employed a different measure, holding that actual harm occurs when the client learns, on receipt of a preliminary Internal Revenue Service (IRS) audit report, that the accountant's negligence *may* lead to imposition of tax deficiencies.

As we explain, IRS procedures support a rule commencing the limitations period of section 339, subdivision 1, at the time the IRS actually *assesses* the tax deficiency. (*Moonie, supra*, 256 Cal.App.2d at p. 364.) Prior to the penalty assessment, the preliminary findings of the auditor as noted in the \*609 audit report are merely *proposed* findings, subject to review and negotiation. We are persuaded by decisions of the Court of Appeal, the majority of sister state jurisdictions, and the federal circuit courts, that actual harm occurs on the date the tax deficiency is assessed. Accordingly, we will reverse the Court of Appeal's judgment herein.

### Facts

The relevant facts are not in dispute. Plaintiff International Engine Parts, Inc. (IEP), hired defendant Feddersen and Company (Feddersen) to perform accounting services in 1969 or 1970 for IEP. After IEP's subsidiary, plaintiff I.E.P.O., Inc. (IEPO), was incorporated in 1974, Feddersen prepared IEPO's 1983 and 1984 income tax returns. IEPO relied on Feddersen's advice in signing and filing those returns.

IEPO, an export company, was incorporated as a "domestic international stock corporation" (DISC). IEPO's DISC status gave the company certain tax benefits in the form of deferred income so long as it satisfied the requisite requirements of the Internal Revenue Code. (Int.Rev. Code, § 991 et seq.) Among the requirements for maintenance of DISC status were the proper documentation of loans made by the exporter IEPO to the producer IEP ("producer loans"), and intercompany pricing agreements. Feddersen failed to provide the necessary documentation for the 1983 and 1984 tax returns.

In 1984, the IRS audited IEP's income tax returns. Sometime prior to May 1985, IRS Agent Carol Binner audited the DISC status of IEPO. In connection with the audit, Feddersen informed IEPO President Elmo Iadevaia, that his firm "just forgot or missed" the required document filing and Feddersen agreed to continue representing IEP and IEPO in the hope that it could mitigate the extent of its alleged oversight.

In 1986, Binner advised Iadevaia that because Feddersen failed to provide the proper documentation relating to "producer loans" for 1983 and 1984, it would be disqualified by the IRS as a DISC. Several people involved in IEP, IEPO, and related entities, including plaintiffs' controller and tax expert, Russ Piti, also advised Iadevaia that they believed Feddersen was responsible for the missed filing, and that Feddersen was directly responsible for the disqualification of DISC status during the course of the IRS audit. Iadevaia discussed these comments with company attorneys.

Soon thereafter, Feddersen informed IEPO that the company's federal tax liability for the years 1983 and 1984 could be in the range of \$300,000. In \*610 response to this information, Iadevaia authorized a company attorney to write a letter, dated July 14, 1986, withdrawing a settlement offer in unconnected litigation then pending against IEPO. The pertinent portion of that letter stated: "I have just been advised by Elmo Iadevaia that he is compelled to withdraw his offer of settlement set forth in my letter to you of June 16, 1986. He has now learned that the Internal Revenue Service, as a result of [its] audit, has decided to disqualify IEPO as a DISC corporation for the tax year 1983. The effect of this is the loss of the forgiveness of the accumulated earnings and creates a tax liability for IEPO in excess of \$300,000." At the same time, the bank in charge of handling the company's accounts reduced its line of credit from \$600,000 to \$400,000 so that if a tax assessment was made against IEPO, the company could meet its liability to the IRS.

The IRS issued a preliminary audit report to Feddersen in June 1987. The report indicated the IRS planned to disqualify IEPO as a DISC and impose tax deficiencies, interest, and penalties against IEP and IEPO for the years 1983 and 1984. The amounts were calculated and set forth in the report, which was then forwarded to Iadevaia. Feddersen, on behalf of IEP and IEPO, requested and was granted "Special Consent to Extend Time to Assess Tax" relating to the finalization of the audit because another related entity, ASCO, recently had been audited and was expecting a refund of \$250,000. IEP and IEPO needed this refund to help meet the anticipated IRS assessment. The audit was finalized on May 16, 1988, when the deficiency was assessed and taxes and penalties were imposed.

IEP, IEPO, and the Iadevaias filed the present action against Feddersen for accountant malpractice on May 15, 1990. This filing occurred four years after the companies were first advised by IRS agent Binner that IEPO probably would be disqualified as a DISC for failure to file the proper documentation relating to producer loans, nearly three years after the preliminary audit report was prepared, and one day short of two years after the tax deficiency was assessed. Feddersen sought summary judgment on the ground that the action was barred by the two-year limitations period of section 339, subdivision 1, because actual injury due to Feddersen's malpractice occurred no later than 1986,

when IEPO was forced to withdraw its settlement offer in the unrelated lawsuit based on the disqualification of DISC status, and when the company's bank reduced its line of credit by \$200,000 as a direct result of the predicted tax liability. Feddersen also claimed that IEP's and IEPO's payment of attorney fees for representation throughout the audit amounted to actual injury that commenced the running of the statute of limitations under section 339, subdivision 1. \*611

IEP and IEPO opposed summary judgment, arguing that actual harm occurred, and the limitations period of section 339, subdivision 1, should commence, when the deficiency was assessed on May 16, 1988, because the IRS could not have assessed tax deficiencies before that time. IEP and IEPO asserted that any estimate of taxes due prior to that date was purely speculative and subject to modification.

The trial court granted summary judgment for Feddersen and the Court of Appeal affirmed, concluding that the fact that federal tax law would not allow the IRS to issue a binding tax assessment to IEP and IEPO until the deficiency was assessed had no legal effect in determining when the corporations first suffered the actual injury resulting from Feddersen's alleged malpractice. The court held that plaintiffs suffered actual harm in 1986, when their line of credit was cut by \$200,000, or, at the latest, in June 1987, when the IRS issued the preliminary audit report. Either way, the court concluded, the action was time-barred by section 339, subdivision 1.

(1a) The dispositive issue in this appeal, therefore, is whether actual harm occurred prior to June 1987, when IEP and IEPO had sufficient information to put the companies on notice that Feddersen's negligence in failing to file proper DISC documentation in preparing IEPO's 1983 and 1984 tax returns would probably disqualify the company for DISC status, or on May 16, 1988, when the IRS assessed the deficiency and penalties in the form of additional taxes and interest levied on the companies. Feddersen claims that in addition to notice of its alleged negligence, the fees paid to it for work on the audit, the "nominal fees" paid to IEP and IEPO attorneys, and the impairment to cash flow from the reduction of IEPO's credit line together constituted actual injury which arose well before May 16, 1988. By contrast, IEP and IEPO assert that until the tax deficiency was assessed in 1988, no actual harm occurred because the IRS could not assess or collect any taxes or penalties prior to that date. IEP and IEPO readily admit they knew the IRS was auditing their returns for tax deficiencies, but they observe that before a deficiency is assessed, there can be no finding that the costs associated with the audit are due to the accountant's alleged malpractice; those costs may be incurred for the purpose of responding to a routine audit by the IRS.

#### Discussion

We consider the issues following the grant of a summary judgment motion. (2) Because the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law. (\*612 *McKeown v. First Interstate Bank* (1987) 194 Cal.App.3d 1225, 1228 [240 Cal.Rptr. 127] [hereafter *McKeown*].)

##### 1. IRS Deficiency Assessment Procedures

In order to better understand why the limitations period necessarily commences no earlier than the date of deficiency assessment in cases involving the negligent filing of tax returns, it is helpful to review IRS procedures for examination of tax returns and assessment of tax deficiencies.

Once a federal tax return is selected for audit, the examination is performed by an IRS examiner. At the conclusion of the examination, the taxpayer is sent a report of the examiner's findings, indicating any proposed deficiency assessments. If the taxpayer agrees with the findings of the examiner, he or she will sign the appropriate forms (form No. 4549 and/or form No. 870) acknowledging the tax liability. (*Holland v. C.I.R.* (4th Cir. 1980) 622 F.2d 95, 96.) If the taxpayer signs the agreement form, he or she immediately (1) waives the required statutory notice of deficiency pursuant to Internal Revenue Code section 6212 (the 90-day letter), (2) waives the corresponding prohibition on collection for 90 days under Internal Revenue Code section 6213, and (3) is thereafter precluded from litigating the proposed deficiency in tax court. (Int.Rev. Code, §§ 6212, 6213; *Mills v. Garlow* (Wyo. 1989) 768 P.2d 554, 556 [hereafter *Mills*]; see also *Robinson v. United States* (3d Cir. 1990) 920 F.2d 1157, 1158 [explaining that notice is pivotal in IRS assessment procedures because it serves as prerequisite to valid tax assessment].) If the taxpayer does not agree

with the examiner's proposed findings, the findings will be reviewed in the district office, and the taxpayer will be sent a "30-day letter" instructing that the taxpayer has 30 days to file a protest. (*Mills, supra*, 768 P.2d at p. 557.) "If the taxpayer fails to respond within the thirty days, a notice of deficiency will be issued. [Citation.] If the taxpayer timely files a protest, he [or she] will be accorded an appeals office conference.... If a settlement is reached, the taxpayer will again be requested to sign the agreement form .... A determination by the appeals office, however, is final insofar as the taxpayer's appeal rights within the IRS [are concerned], and if the taxpayer continues to disagree, the statutory notice of deficiency will be sent giving the taxpayer ninety days to file a petition in the Tax Court before collection actions are begun." (*Ibid.*)

(3) Thus, the preliminary findings of the tax examiner are *proposed* findings that are subject to negotiation prior to any determination of tax deficiency. (*Mills, supra*, 786 P.2d at p. 557.) Once a deficiency is assessed, \*613 however, either by the taxpayer's consent to deficiency assessment, or by receipt of a final deficiency notice pursuant to Internal Revenue Code section 6212 et seq., the matter is final as to the IRS and subject to legal appeal in federal tax court. (*Ibid.*)

(1b) In the present case, the IRS assessed the deficiency on May 16, 1988. On this same day, IEP and IEPO signed forms No. 4549 and No. 870, acknowledging the deficiency assessment and agreeing to pay the taxes and penalties due. Issuance of a statutory notice of deficiency pursuant to Internal Revenue Code section 6212 was therefore not required. Against this background, we consider the issue raised by the parties.

## 2. Commencement of Statute of Limitations

Section 339, subdivision 1, provides that "[a]n action upon a contract, obligation or liability not founded upon an instrument in writing, except as provided in Section 2725 of the Commercial Code or subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder." Although the statute does not specifically require actual injury to commence its limitations period, cases interpreting the statute have inferred such a requirement in professional malpractice actions. The actual injury requirement for accountant malpractice cases was foreshadowed in *Moonie, supra*, 256 Cal.App.2d 361, in which the plaintiff sued his accountant for negligence following a deficiency assessment by the IRS.

The *Moonie* court phrased the issue as whether "the statute of limitations in an action for alleged malpractice by an accountant start[ed] to run from the alleged negligent act, from discovery of the negligence, or from the date when defendant was notified of the income tax penalty assessment" following receipt of the notice of final deficiency assessment from the IRS. (*Moonie, supra*, 256 Cal.App.2d at p. 361.) The court concluded that "[the taxpayer] at all times was liable for the deficiency but the deficiency in itself did not cause injury for which he could recover against [the accountant]. It was the assessment of the penalty due to [the accountant's] alleged negligence which gave [the taxpayer] a cause of action against [the accountant]." (*Id.*, at p. 364.)

The express requirement of *actual injury*, in addition to *discovery* of negligence, to commence the running of the limitations period under section 339, subdivision 1, was not adopted by the courts until four years after \*614 *Moonie* was decided. <sup>FN1</sup> The rule was first imposed in 1971 in companion cases discussing the statute of limitations in attorney malpractice actions, which were then governed by section 339, subdivision 1. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176 [98 Cal.Rptr. 837, 491 P.2d 421] [hereafter *Neel*]; *Budd v. Nixen* (1971) 6 Cal.3d 195 [98 Cal.Rptr. 849, 491 P.2d 433] [hereafter *Budd*].)

FN1 More recent cases applying the "discovery plus actual injury" rule in accountant malpractice cases, where the accountant has negligently filed a tax return, have explained the *Moonie* holding: "The client's cause of action accrued when he learned of the accountant's negligence through the notice that a penalty was to be assessed against

him. [Citation.] The client suffered ... 'appreciable harm,' when he became *liable* for a tax penalty ...." (*Schrader, supra*, 8 Cal.App.4th at p. 1687, italics added.)

The *Neel* court held that the statute of limitations for professional malpractice under section 339, subdivision 1, commences on discovery of the cause of action. (*Neel, supra*, 6 Cal.3d at pp. 187-188.) The *Budd* court reviewed the statute of limitations for professional malpractice in the context of a client suing his attorney for the failure to assert an important defense in an answer to a breach of contract action. The court held that in addition to discovery of the negligent conduct, a client must prove he or she was actually damaged by the negligence in order to assert a cause of action for negligence. (6 Cal.3d at p. 201.) The *Budd* court's requirement of damage in addition to discovery of the malpractice was based on the reasoning that "[i]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. (See *Developments in the Law-Statute of Limitations* (1950) 63 Harv.L.Rev. 1177, 1201.) The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm-not yet realized-does not suffice to create a cause of action for negligence. [Citations.] Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd, supra*, 6 Cal.3d at p. 200, fn. omitted.) The *Budd* court emphasized, therefore, that the focus of the limitations period for legal malpractice actions should be on the fact of damage giving rise to the professional liability, not the amount of inchoate monetary damages that may have been incurred after the initial discovery of the malpractice. (*Budd, supra*, 6 Cal.3d at pp. 200-201.)

After determining that both discovery and appreciable harm are required to commence the statute of limitations in a professional malpractice action, the *Budd* court remanded the case for a determination of whether the plaintiff suffered appreciable damage when he incurred attorney fees at the time of the trial in the contract action, or not until the date of formal entry of judgment in that action. The *Budd* court observed: "[The] plaintiff maintains \*615 that he did not suffer damage until the formal entry of judgment in the [contract] suit against him. In that event, since judgment was not entered until November 4, 1965, plaintiff's action in the present case would not be barred by the statute of limitations. If plaintiff's action in tort had not earlier accrued, it at least matured on entry of judgment because he clearly then became obligated to pay a considerable sum to the broker or to post a bond on appeal." (6 Cal.3d at p. 202.)

Following the *Budd* decision, the Legislature codified the "discovery plus actual injury" rule in Code of Civil Procedure section 340.6, the statute of limitations that governs attorney malpractice actions. Thereafter, in *Laird v. Blacker* (1992) 2 Cal.4th 606, 612 [7 Cal.Rptr.2d 550, 828 P.2d 691] (hereafter *Laird*), we resolved a conflict in the Courts of Appeal over whether the statute of limitations in attorney malpractice actions commences on final judgment in the underlying action on which the malpractice action is based, or whether the limitations period is tolled until the appeal of right is resolved.

In agreeing with Feddersen's assertion that actual injury occurred when IEP and IEPO were first notified by the IRS that IEPO might be disqualified as a DISC, the Court of Appeal reasoned that IEP and IEPO ignored the discovery and actual injury rule imposed by the above case law interpreting section 339, subdivision 1, and sought, by implication, to revive the law of "irremediable damage," whereby a cause of action would not accrue until a final disposition or judgment had been rendered. The Court of Appeal specifically noted that we recently rejected the "irremediable damage" rule in *Laird, supra*, 2 Cal.4th 606. Both Feddersen and the Court of Appeal, however, misread *Laird* and its progeny and confuse final notice of deficiency assessment with "irremediability."

In *Laird*, the plaintiff's claim against her former attorney was based on dismissal of her underlying action for failure to timely prosecute the action. The plaintiff argued that the statute of limitations for attorney malpractice (Code Civ. Proc., § 340.6) should not commence on final judgment of the underlying action, but should be tolled until *all* appellate review has been exhausted and the result "irremediable." A majority of this court disagreed, and held that the applicable statute of limitations commenced when the plaintiffs had knowledge of the "fact" of damage-i.e., when the underlying action was dismissed as a result of the attorney's negligence, and not, as plaintiff argued, on finality of a subsequent appeal. (*Laird, supra*, 2 Cal.4th at p. 615.)

In rejecting the plaintiff's assertion that actual injury did not occur until completion of the appeal, or the time the malpractice became "irremediable," \*616 we observed in *Laird* that such an interpretation of the statute would mean that the requisite limitations period would be tolled until the negligent attorney's error could be remedied or when the appellate process had been exhausted. We pointed out that the discovery and actual injury rule implicitly rejected "irremediable damage" as the point to commence the limitations period because actual injury usually occurred before the harm became irremediable in the sense that an appeal or other appellate process was finalized. (*Laird, supra*, 2 Cal.4th at pp. 615-617.) Thus we clearly distinguished between the concepts of actual injury and irremediable harm.

Our rejection in *Laird* of the "irremediable damage" rule was recently followed in *Schrader, supra*, 8 Cal.App.4th 1679, in which the defendant accountants argued the plaintiffs' cause of action for professional negligence accrued no later than the day the plaintiffs received the statutory notice of deficiency assessment from the IRS. The *Schrader* plaintiffs asserted the statute was tolled while they pursued administrative appellate remedies. (*Id.*, at p. 1681.)

The *Schrader* court rejected the plaintiffs' contention and instead applied *Laird's* reasoning to conclude section 339, subdivision 1, is not tolled while the taxpayer pursues administrative appellate remedies. (*Schrader, supra*, 8 Cal.App.4th at pp. 1686-1687.) In so doing, the *Schrader* court observed that the plaintiffs' argument had been "fatally undercut by the holding in *Laird v. Blacker*." (*Schrader, supra*, 8 Cal.App.4th at p. 1685.) The court pointed out that *Laird* specifically disapproved the line of cases holding that the commencement of the statute of limitations was tolled until the appellate process had been exhausted, or when a plaintiff's damages became "irremediable." (*Schrader, supra*, 8 Cal.App.4th at p.1684; *Laird, supra*, 2 Cal.4th at pp. 616-617.)

The focus of the *Schrader* case, therefore, was on rejection of "irremediable damage" as the point to commence the statute of limitations. Feddersen and the Court of Appeal, however, read *Schrader* as supporting their assertion that equating the date of deficiency assessment with the date of actual injury erroneously focuses on the point when actual injury is "irremediable," whereas the focus of determining when actual injury occurred should be on the date the client received notice of the injury.

*Schrader*, however, is of no assistance to Feddersen. The court did not discuss whether actual injury was sustained prior to the notice of deficiency as a result of the costs incurred in hiring other professionals to assist in the audit, or at the time the deficiency was assessed by the IRS. Although the \*617 *Schrader* court noted that the plaintiffs *discovered* their cause of action in 1986 when they "concluded that the defendants had been negligent" in their tax advice (8 Cal.App.4th at p. 1682), the court did not discuss the point of *actual injury* except to note that defendants had argued that actual injury occurred no later than the date the plaintiffs received a notice of final adjustment and deficiency assessment from the IRS. (*Ibid.*)

It appears that Feddersen and the Court of Appeal confused the *determination* of tax liability with *finalization* of the audit process, at which point the tax deficiency is actually assessed. The deficiency assessment serves as a *finalization* of the audit process and the commencement of actual injury because it is the trigger that allows the IRS to collect amounts due and the point at which the accountant's alleged negligence has caused harm to the taxpayer. Contrary to both Feddersen and the Court of Appeal, the date of deficiency assessment is not the point of "irremediability" in the *Laird* sense because it is not the equivalent to a final judgment. Indeed, the taxpayer has 90 days from receipt of the notice of deficiency to file a petition for redetermination of the deficiency. (*Int.Rev. Code*, § 6213(a).)

Alternatively, Feddersen and the Court of Appeal also rely on *McKeown, supra*, 194 Cal.App.3d 1225, as authority to conclude that plaintiff's payment of professional fees to Feddersen and company lawyers throughout the audit process amounted to actual injury under section 339, subdivision 1. Our reading of *McKeown* compels a different interpretation.

In *McKeown, supra*, 194 Cal.App.3d 1225, the taxpayer plaintiffs received a statutory notice of deficiency for taxes owed following an audit of the plaintiffs' corporation. One month later, the

plaintiffs paid the defendant, their attorney, a \$1,000 retainer to represent them in a tax court appeal challenging the deficiency notice. The plaintiffs did not file their lawsuit against their accountant until 1982, nearly five years after receipt of the deficiency notice. (*Id.*, at p. 1228.)

The trial court in *McKeown* granted the defendant's summary judgment motion on statute of limitations grounds and the Court of Appeal affirmed, concluding that the plaintiffs had suffered actual injury at least as early as January 1977 when they paid attorney fees for representation in the tax court appeal following notice of deficiency assessment. (*McKeown, supra*, 194 Cal.App.3d at p. 1230.) The *McKeown* court rejected the McKeowns' argument that they had not suffered actual injury until the tax court judgment became final. (See *Schrader, supra*, 8 Cal.App.4th at p. 1686.) As observed in *Schrader, supra*, 8 Cal.App.4th 1686, "[a]lthough the court in *McKeown* \*618 did not disapprove of the 'irremediable injury' test, its holding that the plaintiffs suffered 'irremediable injury' once they acted on the erroneous tax advice is fully in keeping with the holding in *Laird v. Blacker* ... to the extent that the *McKeown* court concluded that the possibility of seeking administrative review from an unfavorable IRS ruling and even challenging an adverse administrative decision in a proper judicial forum, i.e., Tax Court or United States District Court, did not negate the fact of actual (and irremediable) injury to plaintiffs caused by their acting on such faulty advice."

"The court in *McKeown* distinguished the McKeowns' situation from cases in which attorney errors during the course of litigation conceivably could be corrected by subsequent motion or appeal, in which cases the error became irremediable only when the adverse determination had become final, or the remedial motion had been denied. [Citation.] [The *McKeown* court] noted that in the McKeowns' case, the bank's allegedly erroneous advice could not be remedied by the tax court litigation. [Citation.] This portion of the *McKeown* case, of course, is now no longer good law, given the holding in *Laird v. Blacker* [citation]." (*Schrader, supra*, 8 Cal.App.4th at p. 1687, fn. omitted.)

Thus, contrary to the Court of Appeal and Feddersen, *McKeown* simply held that section 339, subdivision 1, was not tolled until the tax court judgment became final. Indeed, as plaintiffs point out, the *McKeown* court impliedly held that the action for accountant malpractice accrued when the plaintiffs were notified of the tax deficiency by the IRS. As the court reasoned: "The taxpayer to whom a notice of deficiency is sent is put to the choice of paying the deficiency, incurring the expense of petitioning for redetermination, or facing collection by the government. (Int. Rev. Code, § 6213(a) & (c).) [The plaintiffs] had at that point suffered [actual] harm." (*McKeown, supra*, 194 Cal.App.3d at p. 1229, fn. omitted.)

Feddersen also relies on *Yandell v. Baker* (1968) 258 Cal.App.2d 308 [65 Cal.Rptr. 606], in support of its assertion that the statute of limitations commenced either in 1983 and 1984, when Feddersen filed the tax returns in question, in 1986, when IRS Agent Binner first informed IEPO that it might be subject to a deficiency assessment based on the negligent preparation of its 1983 and 1984 returns, or, at the latest, in June 1987, when the proposed audit report was sent to IEP and IEPO.

Indeed, the *Yandell* court held that the statute of limitations under former section 339, subdivision 1, commenced "from the time of the negligent act \*619 rather than from the time of discovery of the injury." (*Yandell v. Baker, supra*, 258 Cal.App.2d at p. 311.) Thus, the court held: "Once ... [the] assets were distributed, the liability for payment of ordinary income rates, rather than capital gains rates, arose and the damage was done—even though the amount of damage or liability could not be determined until the [IRS] acted later." (*Id.*, at p. 314.)

*Yandell*, however, was decided before this court determined that a cause of action for professional malpractice does not accrue until discovery of the negligent act. In fact, we specifically disapproved its holding. (*Neel, supra*, 6 Cal.3d at p. 190, fn. 29.) As the *Schrader* court observed, *Yandell* "was decided before the California Supreme Court held that a cause of action for malpractice does not accrue until the plaintiff knows, or should know, of the negligent act. [Citation]. Therefore, the emphasis in *Yandell* on the date of the negligent act ... is now, after *Neel*, simply irrelevant; what is relevant is the date by which the plaintiff should know or have known of the injury caused by the negligent act and when he or she had sustained appreciable and actual damage." (*Schrader, supra*, 8 Cal.App.4th at p. 1686, fn. 2.)

We have recently held that it is the disposition of a case that triggers the running of the statute of limitations in professional negligence suits. (*ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245 [36 Cal.Rptr.2d 552, 885 P.2d 965] [hereafter *ITT*].) Although neither *Budd* nor *Laird* addressed the limitations question in the context of a second, underlying action pending at the time the statute of limitations period expired for professional malpractice, we applied the reasoning of *Budd* and *Laird* to transactional legal malpractice cases in which litigation is frequently the result of the legal malpractice. In *ITT*, we held that until bankruptcy litigation concerning the effectiveness of loan documents is settled, the question whether the attorney has actually committed malpractice has not been resolved. (*ITT, supra*, 9 Cal.4th at pp. 257-258.) The court observed in *ITT* that the question whether the plaintiff suffered actual injury as a result of the attorney's preparation of the loan documents is contingent on the outcome of the adversary proceeding. (*Id.*, at p. 258.) Therefore, *ITT* concluded, the statute of limitations starts to run once the adversary proceeding is complete. (*Ibid.*) Here, the assessment of the tax deficiency is the equivalent of the settlement in *ITT*, because the question whether the taxpayer suffered actual injury as a result of the accountant's allegedly negligent preparation of the tax returns is contingent on the outcome of the audit.

Thus, the reasoning of *Laird* and *ITT* apply with equal force in cases involving the negligent filing of tax returns, where the alleged malpractice is \*620 not discovered until the time of the audit, and the malpractice tort is not complete until the audit is finalized. The taxpayer's tax returns may have been selected for audit for a number of reasons, some unrelated to the alleged accountant malpractice. Indeed, "actual injury" represents a legal term of art which recognizes that an inchoate or potential injury cannot give rise to a professional malpractice action until there has been an actual determination that the accountant's alleged negligence is related to the deficiency assessment. Once the audit process is finalized, however, the harm caused by the accountant's negligence is no longer contingent and the taxpayer's cause of action in tort for alleged malpractice against the accountant accrues under section 339, subdivision 1.

Therefore, in the present case, actual injury occurred when the IRS issued its penalty tax assessment on May 16, 1988, rather than when IEPO withdrew its settlement offer in an unrelated lawsuit, or when the company's bank reduced its line of credit by \$200,000 in anticipation of IEPO's potential tax liability. Although these two latter events may represent palpable harm caused by the malpractice of the accountant, they are based on a *tentative* assessment of *potential liability* only. Although Feddersen's alleged negligence may have been "discovered" during the audit, such potential liability could not amount to actual harm until the date of the deficiency tax assessment or finality of the audit process.

The foregoing rule both conserves judicial resources and avoids forcing the client to sue the allegedly negligent accountant for malpractice while the audit is pending. It also avoids requiring the client to allege facts in the negligence action that could be used against him or her in the audit, without first allowing the accountant to correct the error (or mitigate the consequences thereof) during the audit process. (See *Ackerman v. Price Waterhouse* (1992) 156 Misc.2d 865 [591 N.Y.S.2d 936, 941], *affd.*, 198 A.D.2d 1 [604 N.Y.S.2d 721] ["general rule that statute of limitations for accountant malpractice does not begin to run until a tax deficiency is assessed protects federal tax preparers from the prejudice of needless litigation expense on suits which must later be abandoned because no damage ensued, after occasioning an entirely wasted investment of court resources".])

### 3. Other-state Cases

Authority from other jurisdictions favors a rule whereby the limitations period for the tort of accountant malpractice regarding tax advice does not commence until the taxing authority assesses a deficiency. (See e.g., *Mills, supra*, 768 P.2d at p. 556; *Thomas v. Cleary* (Alaska 1989) \*621 768 P.2d 1090, 1093-1094; *Strieb v. Viegel* (1985) 109 Idaho 174 [706 P.2d 63, 67]; *Chisholm v. Scott* (1974) 86 N.M. 707 [526 P.2d 1300, 1301-1302]; *Sladky v. Lomax* (1988) 43 Ohio App.3d 4 [538 N.E.2d 1089, 1090]; *Atkins v. Crosland* (Tex. 1967) 417 S.W.2d 150, 153 [26 A.L.R.3d 1431].) The general rule in these cases is that "the statute [of limitations for accountant malpractice] does not begin to run until a tax deficiency is assessed because there is no injury to the plaintiff prior to that time; i.e., there is not a completed tort until the IRS assesses a deficiency." (*Mills, supra*, 768 P.2d at p. 556.)

As Feddersen observes, some authority from other jurisdictions holds that the statute of limitations starts to run on the first indication that the accountant's mistake in preparing the tax return may lead to adverse action by the IRS. (See, e.g., *Ackerman v. Price Waterhouse* (1994) 84 N.Y.2d 535 [620 N.Y.S.2d 318] [accountant malpractice action accrues upon client's receipt of accountant's skill and advice]; *Klosure v. Johnson, Grant & Co.* (1988) 229 Neb. 369 [427 N.W.2d 44] [two-year statute of limitations for accountant malpractice commences when plaintiff told by accountant that company did not qualify for DISC status under Internal Revenue Code]; *Harvey v. Dixie Graphics* (La. 1991) 580 So.2d 518 [taxpayer sustained actual injury under accountant malpractice statute of limitations when he learned during IRS audit that IRS disagreed with taxpayer's accountants].)

We are not persuaded. These cases would commence the limitations period when actual injury is still speculative and deficiency assessment uncertain, defeating the purpose of California's "discovery plus actual injury rule." Moreover, as the *Mills* court observed, the goal of a statute of limitations is to prevent stale claims. By using the date of deficiency assessment or notice of deficiency assessment, as the date of actual injury, we further this goal. As set forth above, the IRS must assess a tax deficiency within three years from the date of the tax return, unless the parties agree to extend the assessment period. Most taxpayers are likely to contact the accountant who prepared the returns in question for assistance in the audit process. If the taxpayer were required to file suit against the accountant at this time, the effort to clarify any mistakes in filing would be frustrated. (*Mills, supra*, 768 P.2d at pp. 557, 558.)

The use of the date of deficiency assessment to mark the date of actual injury in accountant malpractice cases provides the parties with a bright line that, once crossed, commences the limitations period under section 339, subdivision 1, and therefore provides certainty in terms of the statute's application. Obviously, in some cases injury will be clear before the notice of deficiency is given to the taxpayer. But uniformity in application serves a \*622 more important function when interpreting statutes of limitation than does the identification of the precise point at which some harm might be said to have occurred, even if negative collateral consequences might arise from the *tentative* assessment of additional tax liability.

#### Conclusion

We conclude that the statute of limitations in an accountant malpractice case alleging the negligent preparation of tax returns commences when the tax deficiency is assessed by the IRS. In the present case, the IRS presented IEP and IEPO with its final deficiency assessment on May 16, 1988. Accordingly, the two-year statute of limitations provided in section 339, subdivision 1, began to run at that time, and this suit, filed on May 15, 1990, was timely. We conclude, therefore, that the Court of Appeal judgment should be reversed and remanded for further proceedings consistent with this holding.

Because we determine that the statute of limitations commences on the date of deficiency assessment, we do not address IEP's alternative argument that the statute should be tolled during the "continuous representation" of the accountant. We believe any broadening of the continuous representation rule should come from the Legislature. We also deny Feddersen's request to strike IEP's reply brief and have chosen instead to exercise our discretion to disregard any defects and consider the brief to the extent it was properly prepared. (See Cal. Rules of Court, rule 18.)

The judgment of the Court of Appeal is reversed.

Arabian, J., Baxter, J., George, J., and Werdegar, J., concurred.

#### MOSK, J.

I concur in the result, holding that the claim of accountant malpractice was timely.

I concur in the reasoning only under compulsion of *Laird v. Blacker* (1992) 2 Cal.4th 606 [7 Cal.Rptr.2d 550, 828 P.2d 691], on which the majority rely in concluding that the statute of limitations began running on the date of the deficiency assessment against plaintiff.

I continue, however, to prefer the views expressed in my dissent in *Laird v. Blacker, supra*, 2 Cal.4th at pages 621-628. As explained therein, to force malpractice plaintiffs to file their actions before they know the outcome of the case on which their claim is based does not promote judicial economy. The status of the malpractice claim is uncertain until administrative and \*623 judicial procedures for review are exhausted. Obviously, if the client should ultimately prevail in the underlying suit, the malpractice claim may well become moot for lack of damages.

Thus I believe that "actual injury" under Code of Civil Procedure section 339, subdivision 1, should not be deemed to occur until the taxpayer has exhausted administrative and judicial remedies and has suffered irremediable damage. As the majority observe, the date of the deficiency assessment against this plaintiff was not the point of "irremediability" because it is not equivalent to a final judgment; the taxpayer has 90 days from receipt of the notice of deficiency to file a petition for redetermination of the deficiency and may seek further administrative and judicial review. In the present case, plaintiff did not seek review. Accordingly, I would hold that the statute of limitations began running only when the deficiency became final.

#### **KENNARD, J.,**

Concurring and Dissenting.-How long after discovering a costly mistake in a federal income tax return may the taxpayer wait to bring a malpractice action against the accountant who prepared the return? For actions asserting malpractice by professionals other than attorneys or health care providers, Code of Civil Procedure section 339, subdivision 1, provides a two-year limitations period. In *Budd v. Nixen* (1971) 6 Cal.3d 195, 201 [98 Cal.Rptr. 849, 491 P.2d 433] (hereafter *Budd*), this court decided that the two-year limitations period for professional malpractice actions begins to run upon discovery of the malpractice and the occurrence of "[a]ny appreciable and actual harm."

The majority holds that an accountant's negligence in the preparation of a federal income tax return causes "appreciable and actual harm" only when the Internal Revenue Service (IRS) assesses a tax deficiency.

The majority is wrong. Under *Budd, supra*, 6 Cal.3d 195, the term "appreciable and actual harm" includes any nontrivial monetary loss or expense proximately caused by a professional's negligence. This is consistent with the Legislature's determination in Civil Code section 3333 that the measure of damages in negligence cases is "the amount which will compensate for all the detriment proximately caused" by the negligence. As applied to the situation in which an accountant's negligent preparation of a tax return results in an IRS audit, *Budd* and Civil Code section 3333 both compel the conclusion that any nontrivial costs that the client-taxpayer incurs to respond to the audit, including accounting and legal fees, constitute appreciable and actual harm attributable to the accountant's malpractice. In dismissing such costs as irrelevant or insignificant, the majority errs. \*624

Nevertheless, I agree with the majority that the action under review here is not barred by the statute of limitations. In professional malpractice actions, the limitations period does not begin to run while the professional continues to represent the client in the matter at issue, even after the client has both discovered the negligence and suffered appreciable and actual harm. Because the record here shows that the defendant accountants represented the plaintiff clients in the IRS audit of the plaintiffs' tax returns, and that this representation continued until less than two years before plaintiffs filed suit, the action is timely.

#### I

In 1974, Feddersen and Company (Feddersen), an accounting firm, assisted plaintiff International Engine Parts, Inc. in setting up plaintiff I.E.P.O., Inc. (IEPO) as a "domestic international stock corporation" (DISC) to qualify for certain tax benefits. Feddersen prepared plaintiffs' 1983 and 1984 tax returns, in which plaintiffs claimed the DISC tax benefits. In 1984, the IRS began an audit of plaintiffs' returns, looking specifically at the DISC status of IEPO. Plaintiffs retained Feddersen to represent them during the audit.

In 1986, the IRS informed plaintiffs that it would disqualify IEPO as a DISC because the tax returns did not include the proper documentation of "producer loans" and inter-company pricing

agreements. When plaintiffs raised the matter with Feddersen, Feddersen admitted that its accountants had "just forgot it or missed it." Feddersen advised plaintiffs that the resulting tax liability could be in the range of \$300,000. Plaintiffs also consulted their attorneys on the matter, thereby incurring legal fees.

In June 1987, the IRS sent Feddersen its audit report stating that it would disqualify IEPO as a DISC and impose a tax deficiency, interest, and penalties for the tax years 1983 and 1984. Feddersen forwarded the report to plaintiffs. Plaintiffs requested and obtained extensions of time to finalize the audit because plaintiffs anticipated a refund from the audit of a separate but related entity and hoped to use the refund to partly offset the deficiency. On May 16, 1988, the audit was finalized, and the deficiency was formally assessed, when plaintiffs and the IRS signed the appropriate forms.

On May 15, 1990, plaintiffs filed this malpractice action against Feddersen. The trial court granted summary judgment for Feddersen on the basis that the action was barred by the two-year statute of limitations in Code of Civil Procedure section 339, subdivision 1. Plaintiffs appealed and the Court of Appeal affirmed. That court rejected plaintiffs' contention that there was **\*625** no actual damage until plaintiffs signed the documents finalizing the audit and accepting the deficiency assessment. The court reasoned that actual damage had occurred when Feddersen failed to document the producer loans and inter-company pricing agreements (documents that must be generated at the time the transactions occur) or, at the latest, when plaintiffs paid Feddersen to represent them in the audit and paid fees to their attorneys to advise them on the audit problem.

This court granted plaintiffs' petition for review.

## II

If the lost DISC tax benefits and the interest and penalties imposed by the IRS for underpayment of taxes were the only damages that Feddersen's negligence caused plaintiffs to suffer, I would agree with the majority that plaintiffs incurred appreciable and actual harm only when the IRS assessed the deficiency. For the reasons stated by the majority, assessment of tax deficiency is an appropriate point in time to mark the occurrence of those injuries for statute of limitations purposes. But the majority is wrong when it dismisses as unimportant or irrelevant the many other species of damage that may result from an accountant's negligence in the preparation of a business's income tax return and that often precede the deficiency assessment.

The majority here makes essentially the same mistake as in ITT Small Business Finance Corp. v. Niles (1994) 9 Cal.4th 245 [36 Cal.Rptr.2d 552, 885 P.2d 965] (hereafter *ITT*). In that case, the corporate plaintiff had alleged that its attorney's negligence in preparing loan documents had required it to engage in litigation with third parties. A majority of this court held that the limitations period began to run only when the third party litigation terminated adverse to the plaintiff corporation by settlement. As I explained in my dissent, this holding cannot be reconciled with Budd, supra, 6 Cal.3d 195, or with the plain meaning of the statute (Code Civ. Proc., § 340.6) that codified the holding of *Budd* for legal malpractice actions. (ITT, supra, 9 Cal.4th 245, 258-262 (dis. opn. of Kennard, J.).)

Attempting to rationalize its holding in *ITT, supra*, 9 Cal.4th 245, the majority now states that in attorney malpractice cases, "the question whether the attorney has actually committed malpractice has not been resolved" until the third party litigation terminates in a manner adverse to the client by judgment, settlement, or dismissal. (Maj. opn., *ante*, at p. 619.) The majority further declares that "the question whether the plaintiff [client] suffered actual injury as a result of the attorney's [malpractice] is contingent on the outcome of the [third party] proceeding." (*Ibid.*) This explanation is problematic for several reasons. **\*626**

First, if the majority means that the third party proceeding will "resolve" the issues of malpractice and actual injury by operation of collateral estoppel, the majority is wrong. The doctrine of collateral estoppel, under which a determination of issues in one action precludes relitigation of the same issues in later actions, cannot be invoked against one who was not a party (or in privity with a party) to the earlier proceeding. (Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital (1994) 8 Cal.4th 100, 118 [32 Cal.Rptr.2d 263, 876 P.2d 1062] [stating that "a judgment cannot bind one who was not a party thereto"]; see 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 298, p. 737.) Thus,

litigation between a client and a third party cannot "resolve" the issue of malpractice by an attorney or accountant (or the issue of actual injury) by operation of the doctrine of collateral estoppel unless the client's attorney or accountant was a party to the earlier action, a situation that seldom occurs and did not occur in *ITT, supra*, 9 Cal.4th 245.

Second, it is unlikely that the issue of malpractice—that is, whether the attorney or accountant exercised the skill, knowledge, and care ordinarily possessed and exercised by members of these professions (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 998 [35 Cal.Rptr.2d 685, 884 P.2d 142])—will actually be litigated or decided in a third party suit. Collateral estoppel applies only if the issue decided in the earlier action was "identical" to the issue presented in the later action. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813 [122 P.2d 892]; *Bear Creek Planning Com. v. Title Ins. & Trust Co.* (1985) 164 Cal.App.3d 1227, 1242 [211 Cal.Rptr. 172].)

Third, a judgment in a third party action may not "resolve" issues even as between the client and the third party because the judgment may be reversed on appeal.

Finally, and perhaps most importantly, the malpractice of an attorney or accountant may severely damage the client even when the third party litigation terminates in the client's favor. As I have stated, "it defies common sense to hold, as the majority does, that a client has not sustained 'actual injury' even though the client has paid thousands, perhaps hundreds of thousands, of dollars [in litigation costs] because the attorney's malpractice has compelled the client to prosecute or defend third party litigation." (*ITT, supra*, 9 Cal.4th 245, 259 (dis. opn. of Kennard, J.).)

For example, an accountant's negligent preparation of a business's tax returns may trigger a full-scale audit by the IRS. In the end, the IRS may assess no deficiency because the accountant made mistakes in the government's favor that offset mistakes in the client's favor. Does this mean the \*627 client has suffered no injury? Not at all. In responding to the audit, the client may have incurred massive expenses, including legal fees, accountant fees, and the time expended by the client's own employees. In addition, the audit may disclose the permanent loss of tax benefits that should have been but, because of the accountant's negligence, were not claimed in the client's return. Thus, I cannot agree that the issue of actual harm is "contingent on the outcome of the audit." (Maj. opn., *ante*, at p. 619.)

The error in the majority's analysis is further illustrated by examination of the case law allowing recovery of attorney fees incurred in third party litigation caused by the "tort of another." This court has stated the rule in these terms: "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred. [Citations.]" (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620 [30 Cal.Rptr. 821, 381 P.2d 645]; see also, *Rest.2d Torts*, § 914, subd. (2).) The "tort of another" rule does not require that the claimant be unsuccessful in the third party litigation. On the contrary, courts applying the rule have upheld damage awards for attorney fees incurred in third party litigation that terminated in favor of the party claiming those fees. (E.g., *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 909-910 [274 Cal.Rptr. 186]; *Slaughter v. Legal Process & Courier Service* (1984) 162 Cal.App.3d 1236, 1251-1252 [209 Cal.Rptr. 189]; *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 871 [141 Cal.Rptr. 200]; *Nilson-Newey & Co. v. Ballou* (6th Cir. 1988) 839 F.2d 1171, 1177; see also *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 303 [98 Cal.Rptr. 547] [stating that plaintiff's lack of success in the third party action was "of no legal importance".])

Here, a trier of fact might find, were the matter fully litigated, that Feddersen's negligence in the preparation of plaintiffs' tax returns triggered the IRS audit or at least made that audit longer or more costly than it otherwise would have been. Even if plaintiffs had somehow prevailed in the audit, and the IRS had assessed no deficiency, the audit-related costs, to the extent they are directly attributable to the malpractice, should be recoverable under the "tort of another" rule.

For all these reasons, I would hold that plaintiffs suffered appreciable and actual harm for

purposes of the statute of limitations when they incurred any nontrivial audit-related costs as a result of Feddersen's negligence in preparing plaintiffs' tax returns. To the extent the majority holds otherwise, I respectfully disagree. \*628

### III

Nevertheless, the majority reaches the correct result in this case when it holds that plaintiffs' action against Feddersen is not barred by the statute of limitations. The result is correct because of the "continuous representation" or "continuing relationship" rule, under which the statute of limitations on a cause of action for professional malpractice does not begin to run while the professional continues to render services to the injured client in relation to the matter at issue.

As I shall explain, California courts developed the "continuous representation" rule in medical malpractice actions as a corollary to the "discovery" rule, which precludes the running of a statute of limitations while the plaintiff is justifiably ignorant of the injury and its negligent cause. The "continuous representation" rule has been applied in actions alleging negligence by accountants and attorneys, and the Legislature has expressly approved and adopted it in Code of Civil Procedure section 340.6, subdivision (a)(2), which governs actions for legal malpractice. In its statutory form, the rule has assumed significance independent of its origins as an aspect of the "discovery" rule, so that the statute of limitations for attorney malpractice will not run during the period of continuing professional representation even when the client is fully aware of both the attorney's negligence and the resulting harm. Consistent with the policy underlying the rule as the Legislature has embraced it, I would hold that in a negligence action against an accountant, the statute of limitations does not begin to run while the accountant continues to represent the client in relation to the matter at issue.

#### A. Medical Malpractice Cases

In California, both the "discovery" rule and the "continuous representation" rule may be traced to this court's landmark decision in Huysman v. Kirsch (1936) 6 Cal.2d 302 [57 P.2d 908]. There, a patient sued a surgeon for damages resulting from the surgeon's negligence in leaving a rubber drainage tube in the patient's body. The surgeon left the tube in the patient's body during an operation performed on January 3, 1931, and did not remove it until September 26, 1932. (*Id.* at p. 305.) The patient filed suit against the surgeon on January 7, 1933. The trial court dismissed the action, ruling that the one-year limitations period for personal injury actions began to run on the date of the plaintiff's injury, that the plaintiff had been injured on the date of the first operation (Jan. 3, 1931), and consequently that the action was barred by the statute of limitations. (*Ibid.*) \*629

Noting that in the workers' compensation arena courts had adopted the principle that "the statute of limitations should not run against an injured employee's right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause," this court concluded that the same principle should govern actions for medical malpractice. (Huysman v. Kirsch, supra, 6 Cal.2d 302, 312.) Accordingly, this court reversed the trial court's judgment.

The rationale of the "continuous representation" rule appears in a part of the Huysman opinion quoting these words from an earlier Ohio decision: "Indeed, it would be inconsistent to say, that the plaintiff might sue for her injuries while the surgeon was still in charge of the case and advising and assuring her that proper patience would witness a complete recovery. It would be trifling with the law and the courts to exact compliance with such a rule, in order to have a standing in court for the vindication of her rights. It would impose upon her an improper burden to hold, that in order to prevent the statute from running against her right of action, she must sue while she was following the advice of the surgeon and upon which she all the time relied." (Huysman v. Kirsch, supra, 6 Cal.2d 302, 309, quoting Gillette v. Tucker (1902) 67 Ohio St. 106 [65 N.E. 865, 871].)

Later cases viewed the continuing doctor-patient relationship primarily as a justification for the patient's failure to investigate facts that would otherwise have alerted the patient to the possibility of the doctor's negligence. (See, e.g., Stafford v. Schultz (1954) 42 Cal.2d 767, 778 [270 P.2d 1] [stating that "the fiduciary relationship of physician and patient excused plaintiff from greater diligence in determining the cause of his injury"]; Myers v. Stevenson (1954) 125 Cal.App.2d 399, 401-402 [270 P.2d 885] [stating that the plaintiff is "not ordinarily put on notice of the negligent

conduct of the physician upon whose skill, judgment and advice he continues to rely”.) Although I have found no case directly so holding, some decisions contain dictum stating that the statute of limitations begins to run on a medical malpractice claim once the patient acquires actual knowledge of both the injury and its negligent cause even though the patient elects to continue treatment with the same doctor. (See *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 97 [132 Cal.Rptr. 657, 553 P.2d 1129]; *Mock v. Santa Monica Hospital* (1960) 187 Cal.App.2d 57, 64 [9 Cal.Rptr. 555].)

In 1970, the Legislature established a special limitations provision for medical malpractice-Code of Civil Procedure section 340.5. (Stats. 1970, ch. 360, § 1, p. 772.) Under this provision, the patient is generally required to commence the malpractice action within four years after the date of **\*630** injury, or one year after the date of discovery, whichever occurs first. (*Ibid.*) Although the Legislature did not expressly codify the “continuous representation” rule, courts in medical malpractice actions still use the rule to determine the date of which the patient will be deemed to have discovered the injury. (See, e.g., *Gray v. Reeves* (1977) 76 Cal.App.3d 567, 577, fn. 3 [142 Cal.Rptr. 716].)

#### B. Legal Malpractice Cases

After developing the “discovery” and “continuous representation” rules for medical malpractice actions, courts eventually applied them also to actions alleging attorney malpractice. The leading case is *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176 [98 Cal.Rptr. 837, 491 P.2d 421] (hereafter *Neel*), in which this court established that in legal malpractice actions the statute of limitations does not begin to run until the client has discovered, or through the exercise of diligence should have discovered, both the attorney’s negligent act and the resulting damage. (*Id.* at p. 190.) In a footnote, we discussed the significance of a continuing attorney-client relationship in determining when the statute of limitations begins to run, concluding that if the client had not yet discovered the facts essential to the cause of action, termination of the attorney-client relationship would not commence the running of the limitations period. (*Id.* at p. 189, fn. 26.) We did not discuss the converse situation, in which discovery of the cause of action precedes termination of the attorney-client relationship.

As it had done for medical malpractice actions, the Legislature in 1977 enacted a special statute of limitations provision for attorney malpractice actions-Code of Civil Procedure section 340.6. (Stats. 1977, ch. 863, § 1, p. 2608.) Under this provision, the client is generally required to commence the legal malpractice action within one year after the plaintiff’s discovery of facts constituting the wrongful act, or within four years after the wrongful act, whichever occurs first. Unlike the provision for medical malpractice actions, however, Code of Civil Procedure section 340.6 expressly addresses the “continuing relationship” issue, providing that “the period [of limitation] shall be tolled during the time that ... [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred ....”

This court has explained that the Legislature’s purpose in adopting the “continuous representation” rule in attorney malpractice cases was “to ‘avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to **\*631** prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.’ (Sen. Com. on Judiciary, 2d reading analysis of Assem. Bill No. 298 (1977-1978 Reg. Sess.) as amended May 17, 1977.)” (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691].)

The Courts of Appeal have stated that the “continuous representation” rule as embodied in Code of Civil Procedure section 340.6, subdivision (a)(2), is “substantially similar” to a rule fashioned by the state courts of New York. (*Gurkewitz v. Haberman* (1982) 137 Cal.App.3d 328, 333 [187 Cal.Rptr. 14]; accord, *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1171 [16 Cal.Rptr.2d 837]; *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 847-848 [236 Cal.Rptr. 696].) Under this view, the existence of the attorney-client relationship is more than just an excuse for the client’s failure to investigate evidence of legal practice. Tolling the limitations period while the attorney continues to represent the client serves also to afford the attorney an opportunity to rectify mistakes the attorney has made and to mitigate the client’s losses without jeopardizing the client’s right to recover damages from the attorney for any harm that is caused by the attorney’s malpractice and ultimately remains

unremedied.

### C. Accountant Malpractice Cases

The "discovery" rule of *Huysman v. Kirsch, supra*, 6 Cal.2d 302, was extended to accountants in *Moonie v. Lynch* (1967) 256 Cal.App.2d 361, 365-366 [64 Cal.Rptr. 55]. (See also, *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 848 [176 Cal.Rptr. 239].) The rule of "continuous representation" has likewise been applied to actions for accountant malpractice. (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co., supra*, 122 Cal.App.3d 834, 854-856.) The only question is whether the rule to be applied in such cases is the "continuous representation" rule as codified by the Legislature for legal malpractice cases or the somewhat more limited rule that the courts developed in medical malpractice cases.

I would apply the rule in the form that the Legislature has adopted. As this court stressed in *Neel, supra*, 6 Cal.3d 176, professional malpractice actions -whether involving doctors, lawyers, accountants, or stockbrokers-have much in common. All professionals are legally obligated to possess and employ the special knowledge and skills of their profession; a layperson who employs any professional is frequently not in a position to judge the quality of the professional's work and thus may not immediately detect malpractice, \*632 not only because the layperson lacks the professional's skill and knowledge, but also because the professional frequently works out of the client's view; and, finally, all professionals are under a fiduciary duty to fully disclose to their clients facts materially affecting the clients' interests. (*Id.* at pp. 187-189.) Because of these similarities among the professions, the rules governing the running of the statute of limitations for the various professions should be alike unless there is a particular justification for different treatment. (See *id.* at p. 189; see also *Baright v. Willis* (1984) 151 Cal.App.3d 303, 311-313 [198 Cal.Rptr. 510] [citing medical malpractice precedents to resolve a statute of limitations problem in a legal malpractice case].)

The statutory form of the "continuous representation" rule is appropriate for accountant malpractice cases. Accountants no less than attorneys should be afforded an opportunity to correct their mistakes and to mitigate the client's damages without the client being compelled by the running of the statute of limitations to bring a malpractice action. Accountants no less than attorneys should be prevented from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired. Therefore, the articulation of the rule in the attorney malpractice statute should guide our construction of Code of Civil Procedure section 339, subdivision 1, as it applies to actions against an accountant for negligence in the preparation of an income tax return. <sup>FN1</sup> In this case, I would hold that the limitations period did not begin to run while Feddersen continued to represent plaintiffs in the IRS audit of plaintiffs' tax returns.

FN1 The New York courts have so concluded, extending the "continuous representation" rule developed in the context of doctor and attorney malpractice cases to malpractice cases against accountants. (*Zwecker v. Kulberg* (1994) 209 A.D.2d 514 [618 N.Y.S.2d 840, 841]; *Wilkin v. Dana R. Pickup & Co.* (1973) 74 Misc.2d 1025 [347 N.Y.S.2d 122, 124-125].)

### Conclusion

Attempting to articulate a "bright line" rule for the accrual of professional malpractice actions, the majority has instead fashioned a judicial straightjacket, into which it forces all manner of cases, no matter how poor the fit. The determination of the point of "appreciable and actual" harm is essentially a factual question, as this court acknowledged in *Budd*. The situations calling for application of the rule are simply too variable to allow the majority, by adoption of one or many "bright line" rules, to eliminate all triable issues of fact and thereby permit summary disposition by demurrer or summary judgment.

Nevertheless, the majority is correct that the plaintiffs' action here was timely. Even though plaintiffs discovered the accountant's negligence, and \*633 incurred appreciable and actual harm as a result of that negligence, the limitations period did not begin to run while the accountants continued

to represent plaintiffs in the IRS audit of plaintiffs' tax returns.

Respondent's petition for a rehearing was denied April 13, 1995. Kennard, J., was of the opinion that the petition should be granted. \*634

Cal. 1995.

International Engine Parts, Inc. v. Feddersen and Co.

9 Cal.4th 606, 888 P.2d 1279, 38 Cal.Rptr.2d 150, 63 USLW 2590

[Briefs and Other Related Documents \(Back to top\)](#)

- [1994 WL 16034683 \(Appellate Brief\)](#) Brief on the Merits of Amicus Curiae California Society of Certified Public Accountants (Jul. 21, 1994)  [Original Image of this Document \(PDF\)](#)
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[Judges](#) | [Attorneys](#)

Judges

- **Baxter, Hon. Marvin R.**

State of California Supreme Court  
California

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- **George, Hon. Ronald M.**

State of California Supreme Court  
California

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- **Kennard, Hon. Joyce L.**

State of California Supreme Court  
California

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- **Mosk, Hon. Stanley**

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- **Werdegar, Hon. Kathryn Mickle**

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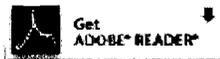
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# **APPENDIX B**

**Wagner  
v.  
Sellinger**

**847 A.2d 1151 (D.C. App. 2004)**

 [West Reporter Image \(PDF\)](#)

847 A.2d 1151

Judges and Attorneys

District of Columbia Court of Appeals.  
Irene WAGNER and Estate of Francis Wagner, Appellants,  
v.  
John J. SELLINGER, et al., Appellees.

No. 99-CV-788.  
Argued Jan. 22, 2004.  
Decided April 29, 2004.

**Background:** Client brought legal malpractice action against attorney and law firm, relating to defendants' representation of her in her underlying medical malpractice action against hospital and surgeons who performed bilateral laminectomy and fusion operation. The Superior Court, Mildred M. Edwards, J., disqualified client's current attorney, and later granted summary judgment for defendants, based on statute of limitations. Client appealed.

**Holding:** The Court of Appeals, Ferren, Senior Judge, held that the legal malpractice claim had not yet accrued, for limitations purposes, on the day client terminated attorney's representation.

Reversed and remanded.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

- ↳ [170B Federal Courts](#)
  - ↳ [170BXI Courts of District of Columbia](#)
    - ↳ [170BXI\(C\) Appellate Jurisdiction and Procedure](#)
      - ↳ [170Bk1066 k. Scope of Review. Most Cited Cases](#)

The appellate court reviews de novo the trial court's grant of summary judgment.

[2]  [KeyCite Citing References for this Headnote](#)

- ↳ [241 Limitation of Actions](#)
  - ↳ [241II Computation of Period of Limitation](#)
    - ↳ [241II\(F\) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action](#)
      - ↳ [241k95 Ignorance of Cause of Action](#)
        - ↳ [241k95\(10\) Professional Negligence or Malpractice](#)
          - ↳ [241k95\(10.1\) k. In General. Most Cited Cases](#)

The discovery rule provides that, for limitations purposes, a professional malpractice claim does not accrue until a plaintiff knows, or by the exercise of reasonable diligence should know, of: (1) an injury; (2) its cause; and (3) some evidence of wrongdoing.

[3]  [KeyCite Citing References for this Headnote](#)

- ↳ [241 Limitation of Actions](#)

- ↳ [241II](#) Computation of Period of Limitation
  - ↳ [241II\(F\)](#) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
    - ↳ [241k95](#) Ignorance of Cause of Action
      - ↳ [241k95\(10\)](#) Professional Negligence or Malpractice
        - ↳ [241k95\(10.1\)](#) k. In General. [Most Cited Cases](#)

The statute of limitations for a professional malpractice claim will not begin to run until the plaintiff either has actual notice of the cause of action, or, given the obligation to discover the discoverable, has inquiry notice as of the time a reasonable investigation would have led to actual notice.

[4]  [KeyCite Citing References for this Headnote](#)

- ↳ [241](#) Limitation of Actions
  - ↳ [241II](#) Computation of Period of Limitation
    - ↳ [241II\(F\)](#) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
      - ↳ [241k95](#) Ignorance of Cause of Action
        - ↳ [241k95\(10\)](#) Professional Negligence or Malpractice
          - ↳ [241k95\(10.1\)](#) k. In General. [Most Cited Cases](#)

The plaintiff need not be fully informed about the injury, for the statute of limitations to begin running with respect to a professional malpractice claim; she need only have some knowledge of some injury.

[5]  [KeyCite Citing References for this Headnote](#)

- ↳ [241](#) Limitation of Actions
  - ↳ [241II](#) Computation of Period of Limitation
    - ↳ [241II\(F\)](#) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
      - ↳ [241k95](#) Ignorance of Cause of Action
        - ↳ [241k95\(10\)](#) Professional Negligence or Malpractice
          - ↳ [241k95\(10.1\)](#) k. In General. [Most Cited Cases](#)

Knowledge of an injury is deemed sufficient to begin the running of the limitations period for a professional negligence claim if the plaintiff has reason to suspect that the defendant did something wrong, even if the full extent of the wrongdoing is not yet known.

[6]  [KeyCite Citing References for this Headnote](#)

- ↳ [241](#) Limitation of Actions
  - ↳ [241II](#) Computation of Period of Limitation
    - ↳ [241II\(A\)](#) Accrual of Right of Action or Defense
      - ↳ [241k55](#) Torts
        - ↳ [241k55\(3\)](#) k. Negligence in Performance of Professional Services. [Most Cited Cases](#)

Under the "continuous representation rule," a legal malpractice claim will not accrue, for limitations purposes, until the representation is terminated, even though the client's knowledge of an injury might otherwise have triggered the statute of limitations earlier. [D.C. Official Code, 2001 Ed. § 12-301\(8\)](#).

[7]  [KeyCite Citing References for this Headnote](#)

- ↳ [241](#) Limitation of Actions
  - ↳ [241II](#) Computation of Period of Limitation
    - ↳ [241II\(F\)](#) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

- ⇒ [241k95](#) Ignorance of Cause of Action
  - ⇒ [241k95\(10\)](#) Professional Negligence or Malpractice
    - ⇒ [241k95\(10.1\)](#) k. In General. Most Cited Cases

Allowing the statute of limitations, for a professional negligence claim, to commence running based on an attenuated idea of notice of injury, rather than actual knowledge of injury, presupposes notice of an actual injury that has occurred, and not merely a speculative wrong; if there is no injury, even the strongest belief that the defendant has caused the plaintiff real harm will not transmute that belief into a reality, for limitations purposes.

[8]  [KeyCite Citing References for this Headnote](#)

- ⇒ [241](#) Limitation of Actions
  - ⇒ [241II](#) Computation of Period of Limitation
    - ⇒ [241II\(A\)](#) Accrual of Right of Action or Defense
      - ⇒ [241k55](#) Torts
        - ⇒ [241k55\(3\)](#) k. Negligence in Performance of Professional Services. Most Cited Cases

- ⇒ [241](#) Limitation of Actions  [KeyCite Citing References for this Headnote](#)
  - ⇒ [241II](#) Computation of Period of Limitation
    - ⇒ [241II\(F\)](#) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
      - ⇒ [241k95](#) Ignorance of Cause of Action
        - ⇒ [241k95\(10\)](#) Professional Negligence or Malpractice
          - ⇒ [241k95\(10.1\)](#) k. In General. Most Cited Cases

The statute of limitations for a professional negligence claim cannot begin to run until the first day on which discovery will show that the plaintiff had a bona fide professional negligence lawsuit based on injury, meaning a legally cognizable claim that would survive a motion to dismiss; absent injury, there is no lawsuit.

[9]  [KeyCite Citing References for this Headnote](#)

- ⇒ [241](#) Limitation of Actions
  - ⇒ [241II](#) Computation of Period of Limitation
    - ⇒ [241II\(A\)](#) Accrual of Right of Action or Defense
      - ⇒ [241k55](#) Torts
        - ⇒ [241k55\(3\)](#) k. Negligence in Performance of Professional Services. Most Cited Cases

- ⇒ [241](#) Limitation of Actions  [KeyCite Citing References for this Headnote](#)
  - ⇒ [241II](#) Computation of Period of Limitation
    - ⇒ [241II\(F\)](#) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
      - ⇒ [241k95](#) Ignorance of Cause of Action
        - ⇒ [241k95\(10\)](#) Professional Negligence or Malpractice
          - ⇒ [241k95\(11\)](#) k. Attorneys. Most Cited Cases

Client's legal malpractice claim against first attorney who had represented her in underlying medical malpractice action had not yet accrued, for limitations purposes, on the day client terminated attorney's representation because she felt attorney had failed to properly prosecute the medical malpractice claim and had vastly compromised it through inadequate performance, where client had not yet suffered actual injury from the attorney's conduct, and instead had suffered only an uncertain or inchoate injury; the medical malpractice claim had not yet been resolved by trial, settlement, or other means, and client still had hope, however faint, that matters could be turned around, especially if successor counsel could reopen discovery. D.C. Official Code, 2001 Ed. § 12-301(8).

\***1153** Christian Camenisch for appellants.

Pamela A. Bresnahan, with whom Steven R. Becker, Washington, was on the brief for appellees.

Before GLICKMAN and WASHINGTON, Associate Judges, and FERREN, Senior Judge.

FERREN, Senior Judge:

Appellant Irene Wagner (and her late husband) <sup>FN1</sup> brought this case charging legal malpractice by the appellees, John J. Sellinger and the law firm of Paulson, Nace, Norwind & Sellinger, in handling her medical malpractice claim against a hospital and its operating physicians that resulted in her paralysis. The grounds for appeal are the trial court's alleged errors in (1) granting summary judgment for the defendant-appellees on the ground that the statute of limitations had run, and in (2) disqualifying the Wagners' lawyer despite an alleged hardship. Appellees dispute these contentions and argue that Mrs. Wagner must lose in any event because she failed to proffer the expert testimony required to sustain a prima facie case of professional negligence. We rule for Mrs. Wagner on the limitations issue and reverse and remand for further proceedings.

FN1. Francis Wagner died on April 14, 1999.

#### I.

On October 3, 1990, Mrs. Wagner underwent a six-hour bilateral laminectomy and fusion operation at Georgetown University Medical Center ("Georgetown") performed by Dr. Arthur Kobrine and another physician. As a result, she was paralyzed from the waist down. On June 3, 1992, the Wagners retained attorney John J. Sellinger and his law firm, Paulson, Nace, Norwind & Sellinger, to file suit against Georgetown and Dr. Kobrine.<sup>FN2</sup> Sellinger did so on March 24, 1993, demanding ten million dollars. He then deposed each doctor for approximately one hour. Later, in the summer of 1994, Sellinger advised the Wagners to settle for \$175,000. On July 21, 1994, the Wagners terminated their representation by Sellinger and his firm although Sellinger never formally withdrew his appearance.

FN2. Mr. Wagner sued for loss of consortium.

On July 31, 1994, the Wagners retained attorney Christian Camenisch. After reviewing the files in August, he opined that Sellinger's discovery efforts had been inadequate. On September 9, in the hope of uncovering more details of the operation, Camenisch filed a motion requesting an opportunity to depose the surgeons a second time. The court denied the motion on October 28, 1994.

On January 4, 1996, the trial court-relying on the statute of limitations-granted defendants' motions to dismiss the Wagners' claim that they had not given the required informed consent to the operation.<sup>FN3</sup> Seven months later, on August 14, while the defense was presenting its case-in-chief to the jury on the other counts of the complaint, the Wagners learned for the first time that the doctors had used an instrument called a bovie. The Wagners had been proceeding on a theory that Dr. Kobrine had been negligent because he used a three-millimeter rongeur.<sup>FN4</sup> On August 27, 1996, the jury found no liability and, as a result, awarded the Wagners no damages.

FN3. On March 8, 2001, this court affirmed the dismissal against Dr. Kobrine but reversed the judgment in favor of Georgetown, remanding with instructions that Mrs. Wagner's lack of informed consent claim could proceed against the hospital. Wagner v. Georgetown Univ. Med. Ctr., 768 A.2d 546 (D.C.2001).

FN4. See Wagner, 768 A.2d at 564-65.

**\*1154** On August 8, 1997, the Wagners, through Mr. Camenisch, filed a complaint for legal malpractice against Sellinger, and against what by then had become his former law firm, alleging failure to conduct adequate discovery. First and second amended complaints were filed, respectively, on August 15 and September 15, 1997. In the second amended complaint, the Wagners alleged that they had terminated the representation because the defendant attorneys had "not only failed to properly prosecute their claims, they vastly compromised and damaged their causes of action, and thereafter demanded plaintiffs settle for \$175,000 of which less than \$95,000 would have been received by plaintiffs." In her supporting affidavit, Mrs. Wagner stated that "because [she] was so disappointed and disgusted with the efforts of Mr. Sellinger and his law firm in pursuing [her] case, [she] terminated their legal representation."

On February 9, 1998, defendants filed a motion to disqualify Camenisch from further representing the Wagners on the ground that he was a material witness. The trial court granted the motion on March 19, 1998,<sup>FN5</sup> extended discovery deadlines for sixty days, and stayed the litigation for thirty days or until entry of an appearance by new counsel.<sup>FN6</sup>

FN5. Actually, the court inadvertently disqualified defendants' counsel instead of Camenisch. It amended its order to disqualify Camenisch on March 27, 1998.

FN6. Attorney Camenisch represents Mrs. Wagner on appeal because, he explained at oral argument, the trial court's disqualification order did not extend to this court—a question we decline to address.

Over a year later, on April 7, 1999, defendants filed a motion for summary judgment alleging that the Wagners' claims were barred by the three-year statute of limitations and that in any event they could not prove professional negligence because they lacked expert testimony. The trial court granted the motion on the first ground on May 13, 1999, ruling that the cause of action had begun to run the day Mrs. Wagner terminated her relationship with her former counsel, July 21, 1994.

## II.

[1] [2] [3] [4] [5] We review de novo the trial court's grant of summary judgment. *Holland v. Hannan*, 456 A.2d 807, 814 (D.C.1983). In the District of Columbia, the statute of limitations governing a legal malpractice claim is three years. D.C.Code § 12-301(8) (2001); *Weisberg v. Williams, Connolly & Califano*, 390 A.2d 992, 994 (D.C.1978). In such cases, the discovery rule provides that a claim does not accrue until a plaintiff knows, or by the exercise of reasonable diligence should know, of (1) an injury, (2) its cause, and (3) some evidence of wrongdoing. *Bussineau v. President and Dirs. of Georgetown Coll.*, 518 A.2d 423, 435 (D.C.1986). The statute of limitations will not begin to run until the plaintiff either has actual notice of the cause of action or—given the obligation to discover the discoverable—has "inquiry notice" as of the time a reasonable investigation would have led to actual notice. *Diamond v. Davis*, 680 A.2d 364, 372 (D.C.1996) (opinion of Ruiz, J.). Thus, the plaintiff need not be fully informed about the injury for the statute to begin running; she need only have some knowledge of some injury. *Colbert v. Georgetown Univ.*, 641 A.2d 469, 473 (D.C.1994) (en banc) (citing *Knight v. Furlow*, 553 A.2d 1232, 1235 (D.C.1989)). In short, knowledge is deemed sufficient if the plaintiff has reason to suspect that the defendant did something wrong, even if the full extent of the wrongdoing is not yet known. *Morton v. National Med. Enters., Inc.*, 725 A.2d 462, 468-69 (D.C.1999).

**\*1155** [6] As a modification of the discovery rule this court, for policy reasons, has adopted the "continuous representation rule" under which a legal malpractice claim will not accrue until the representation is terminated, even though the client's knowledge might otherwise have triggered the statute earlier. *R.D.H. Communications, Ltd. v. Winston*, 700 A.2d 766, 768 (D.C.1997). Thus, the earliest date the statute of limitations could have begun to run here was July 21, 1994, when Sellinger and his firm were fired.<sup>FN7</sup> And this is the date that appellees contend the statute of limitations began to run—three years, two weeks, and four days before the Wagners filed their lawsuit.

FN7. The Wagners contend that there is a question of fact as to when Sellinger was terminated, suggesting it was later than July 21. That contention has no merit. Mrs. Wagner stated in her second amended complaint that she terminated the relationship "on or about July 21, 1994." She retained Mr. Camenisch on July 31, 1994. Despite Sellinger's failure to withdraw his appearance, the record makes clear that he did not continue to serve as Mrs. Wagner's counsel after July 21, 1994.

[7]  As the case law requires, appellees' contention is premised on Mrs. Wagner's having "inquiry notice" based at least on a "reasonable suspicion" that the appellees had done "something wrong" by July 21, 1994. That said, all of the case-law formulations that allow the statute of limitations to commence running based on an attenuated idea of notice, rather than on actual knowledge, presuppose notice of an actual injury—an injury that has occurred—not merely a speculative wrong. If there is no injury, even the strongest belief that the defendant has caused the plaintiff real harm will not transmute that belief into a reality for limitations purposes.

[8]  This proposition becomes self-evident when one takes time to recognize that a statute of limitations cannot begin to run until the first day on which discovery will show that the plaintiff had a bona fide lawsuit based on injury, meaning a legally cognizable claim that would survive a motion to dismiss. Absent injury, there is no lawsuit. See *Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson*, 381 F.2d 261, 262 (D.C.Cir.1967) (adopting rule that malpractice claim accrues when actual injury occurs, not when acts causing injury occur); accord *Weisberg*, 390 A.2d at 994-95. With this understanding, Mrs. Wagner contends that she was not injured until she lost her medical malpractice trial on August 27, 1996. Accordingly, she says, the statute of limitations did not begin to run until that time, well within the three-year limitations period for her legal malpractice suit filed less than a year later on August 8, 1997.

[9]  So when was Mrs. Wagner injured? Appellees reference her second amended complaint, in which she said that she had terminated all representation by Sellinger and his firm on July 21, 1994 because they had "not only failed to properly prosecute" the Wagners' claims but also had "vastly compromised and damaged their causes of action," and thereafter had demanded that plaintiffs "settle for \$175,000." Mrs. Wagner's affidavit dated March 30, 1998 added that she had "terminated their legal representation" on July 21, 1994 because she and her husband had been "disappointed and disgusted" with their lawyers' efforts. And in a pro se "motion for immediate hearing for continuance of discovery" filed on July 25, 1994, four days after firing their lawyers, the Wagners represented that "prospective counsel" had "cited inadequacy of legal representation thus far in behalf of Plaintiffs..." FN8 Finally, Mrs. \*1156 Wagner's counsel at oral argument on appeal acknowledged that, once Sellinger had tried to force a settlement, "a red flag went up."

FN8. This July 25, 1994 motion was not part of the record originally filed on appeal, but Mrs. Wagner's counsel agreed to supplementing the record with it upon proffer by appellees' counsel.

Appellees rely on these pleadings, if not as hard evidence, at least as admissions of injury as of July 21, 1994—in legal effect an estoppel to claim otherwise. We cannot agree. The statements in the second amended complaint and affidavit, filed respectively in 1997 and 1998, that appellees had "vastly compromised and damaged" the Wagners' claims, as evidenced by the recommended settlement of \$175,000, and that the Wagners had terminated the legal representation out of disappointment and disgust, did not necessarily reflect an injury that accrued as early as July 21, 1994. Nor, in their affidavit of July 24, 1994, did the Wagners' recognition of the "inadequacy of legal representation" necessarily reflect actual, rather than potential, injury. In short, even if actual injury could be established by admission and estoppel—an issue we do not decide—appellees have not pointed to any admission of record that could trigger commencement of the limitations period as early as July 21, 1994.

As we understand the record, the Wagners concluded by July 21, 1994 that they were receiving such poor legal representation from Sellinger and his firm that unless they were replaced the Wagners' claim was likely to fail. Implicitly, however, the Wagners still had hope, however faint, that matters could be turned around, especially if successor counsel could reopen discovery. But even more to the point, had the Wagners sued Sellinger and his firm on July 21, 1994, there was no way to articulate any injury that could yield ascertainable damages. See, e.g., Fort Myers Seafood Packers, 381 F.2d at 262; Knight, 553 A.2d at 1235. No injury allocable to Sellinger's apparent negligence could be ascertained unless and until the Wagners-using competent counsel to resurrect their medical malpractice claim-failed nonetheless to recover damages from the medical defendants, a result that did not occur until late August 1996.

The leading treatise on legal malpractice, after defining an "injury" as the "loss or impairment of a right, remedy, or interest," MALLEN & SMITH, LEGAL MALPRACTICE, § 22.11, at 380 (5th ed.2000), has noted that an attorney's negligent error in the prosecution of a lawsuit "may create only the potential for injury." *Id.* § 22.12, at 396 (5th ed.2000). If that potential is not realized until later-if its occurrence depends on "a contingent or future event"-then the injury is not sustained until the contingent or future event occurs. *Id.* at 396-97. Typically, therefore, a potential-not actual-injury has occurred when a client claims that an attorney has mishandled a lawsuit still in progress by failing to take appropriate discovery or by making some other error that, however egregious, does not conclude the lawsuit. That is to say, until the lawsuit is resolved (either by verdict or ruling in court or by settlement), the injury remains uncertain or inchoate. *Id.* at 409-10. It follows that the statute of limitations has not yet begun to run. See, e.g., Welborn v. Shipman, 608 So.2d 334, 336 (Ala.1992) (although plaintiff in sex discrimination case knew of attorney's failure to present crucial evidence on April 16, 1987, plaintiff suffered no injury from that failure-and thus statute of limitations did not begin to run-until final judgment entered on October 23, 1987); Johnson v. Cornett, 474 N.E.2d 518, 519 (Ind.Ct.App.1985) (for statute of limitations purposes, \*1157 attorney's alleged malpractice did not result in damage until dissolution order in divorce proceeding became final); K.J.B., Inc. v. Drakulich, 107 Nev. 367, 811 P.2d 1305, 1306 (1991) (statute of limitations "does not commence to run against a cause of action for attorney malpractice until the conclusion of the underlying litigation wherein the malpractice allegedly occurred"; until then, "element of injury or damage remains speculative and remote," and "cause of action for professional negligence" is "premature").<sup>FN9</sup>

FN9. In contrast, when an attorney negligently drafts a document, such as a contract or settlement agreement, that fails to protect the client's interests, that negligence typically is completed-the financial loss is certain-before ensuing litigation confirms the inevitable. The legal right or remedy is not in flux as it is when discovery is not complete and an issue is resolvable only by jurors who reasonably could differ on the evidence. In these legal document situations, therefore, the injury is realized at the time of the attorney's error. See, e.g., Arizona Mgmt. Corp. v. Kallof, 142 Ariz. 64, 688 P.2d 710, 713 (Ct.App.1984) (holding client suffered ascertainable damages when settlement agreement was entered into, not when court confirmed the rights were lost); Magnuson v. Lake, 78 Or.App. 620, 717 P.2d 1216, 1219-20 (1986) (holding statute of limitations began to run when plaintiff-client learned attorney negligently drafted contract, not later when plaintiff lost on merits defending contract in lawsuit); Security Bank & Trust Co. v. Fabricating, Inc., 673 S.W.2d 860, 864-65 (Tenn.1983) (holding bondholders injured at time of default, not when lawsuit concluded against grantors); MALLEN & SMITH, LEGAL MALPRACTICE, § 22.12, at 404.

In this case, the full extent of the injury and related wrong-based, apparently, on use of a bovie rather than a rongeur in performing the operation on Mrs. Wagner-was not discovered until trial of the medical malpractice action in August 1996. The Wagners' efforts to reopen discovery in order to cure Sellinger's earlier, allegedly perfunctory efforts were frustrated during the medical malpractice proceeding by the trial court's refusal in October 1994 to allow successor counsel to depose the surgeons again. Thus, even if one could argue-despite the case law cited above-that the Wagners were assuredly injured by that discovery opportunity definitively lost in October 1994, their suit of

August 1997 was comfortably filed within the three-year limitation period.

At oral argument on appeal, counsel for appellees-holding firm for a July 21, 1994 trigger of the limitations period-argued that the Wagners could either have filed their lawsuit within three years of that date and moved for a stay until the medical malpractice case had been resolved at trial, or sought an agreement with Sellinger and his firm tolling the statute of limitations without filing suit. Had both such efforts failed, counsel acknowledged, their position would have been considerably weaker. The problem with this argument, of course, is that it presupposes an injury sufficient to trigger a complaint as of July 21, 1994, a date, as we have seen, that represents at most an uncertain or inchoate injury.

In sum, for lack of a demonstrable injury before the jury verdict was entered against the Wagners on August 27, 1996 in their medical malpractice action, Mrs. Wagner's suit against appellee Sellinger and his firm, filed August 8, 1997,<sup>FN10</sup> came well within the three-year statute of limitations.

FN10. The amended complaints relate back to the date of the original complaint. See Strother v. District of Columbia, 372 A.2d 1291, 1297-98 (D.C.1977) (discussing Super. Ct. Civ. R. 15(c)).

### III.

Appellees contend that, even if the suit is not time barred, affirmance is required because Mrs. Wagner failed to proffer the \***1158** expert testimony necessary to create a prima facie case of negligence. Specifically, they say, Mrs. Wagner failed to designate an expert, with the required expert's report, by the date specified in the scheduling order, and further failed to respond to appellees' expert interrogatories.

The trial court did not rule on this alternative ground. Furthermore, even though we can review the record de novo, the decision whether dismissal, in contrast with some other sanction, is appropriate for failure to proffer expert testimony and respond to interrogatories is quintessentially a discretionary call of the trial court. In this case, moreover, the Wagners' ability to respond to trial court orders was affected during the time frame that concerns us here by difficulties presented to the Wagners by appellees' ultimately successful motion to disqualify their trial counsel. All things considered, therefore, we leave this issue for trial court consideration after remand.

We also decline to rule on the trial court's disqualification of appellant's counsel, attorney Camenisch, on the ground that, as a witness to the alleged legal malpractice that formed the basis for this lawsuit, he could not also serve as trial counsel consistent with the requirements of professional ethics. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1997). Camenisch had defended against disqualification at trial primarily on the grounds that his clients were "penurious" and would suffer "substantial hardship" in seeking new counsel; that the motion was "premature" because discovery, as yet to be conducted, might lead to settlement, not trial; and that the motion to disqualify was a "tactical maneuver" designed to deprive the Wagners of their "counsel of choice." Citing Rule 3.7(a)(3) (permitting lawyer to act as witness at client's trial if "disqualification would work a substantial hardship on the client"), Camenisch urged the trial court to deny the defendants' (appellees') motion.

The trial court, however, granted the motion to disqualify: "Plaintiff's counsel is an obvious witness for early deposition in this litigation and a potentially crucial trial witness.... This litigation is stayed for 30 days or the entry of appearance of new counsel for plaintiff. All scheduling order dates are stayed for 60 days." Camenisch sought reconsideration citing, as additional grounds, constitutional due process and the availability of other witnesses (his co-counsel in the medical malpractice case) who would obviate the need for him to appear on his clients' behalf in this case. The court denied reconsideration without elaboration, adding: "This litigation is stayed to permit plaintiffs reasonable opportunity to obtain new counsel after which any necessary adjustment to the discovery schedule will be considered."

Ordinarily we would review for abuse of discretion. Here, however, because the trial court's merits decision is now reversed and the case is remanded for further proceedings, we are not confident that the circumstances that gave rise to the trial court's disqualification ruling should dictate whether Camenisch ethically can represent appellant hereafter, at least before discovery issues are resolved and trial becomes a certainty. Accordingly, we leave it to the trial court to revisit the disqualification issue in light of all the circumstances at time of remand-a time that may or may not present exigencies permitting an exception to disqualification under Rule 3.7.

For the reasons set forth above, we reverse and remand for further proceedings consistent with this opinion.

*So ordered.*

D.C., 2004.  
Wagner v. Sellinger  
847 A.2d 1151

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Judges and Attorneys ([Back to top](#))

[Judges](#) | [Attorneys](#)

Judges

- **Edwards, Hon. Mildred M.**

District of Columbia Superior Court  
District of Columbia

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Profiler](#)

- **Glickman, Hon. Stephen H.**

District of Columbia Court of Appeals  
District of Columbia

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- **Washington, Hon. Eric T.**

District of Columbia Court of Appeals  
District of Columbia

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

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[Litigation History Report](#) | [Profiler](#)

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[Litigation History Report](#) | [Profiler](#)

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# **APPENDIX C**

**Lucey**

**v.**

**Law Offices of Pretzel Stouferr**

**301 Ill. App. 3d 349, 234 Ill. Dec. 612 (1998)**

 [West Reporter Image \(PDF\)](#)

301 Ill.App.3d 349, 703 N.E.2d 473, 234 Ill.Dec. 612

[Briefs and Other Related Documents](#)  
[Judges and Attorneys](#)

Appellate Court of Illinois,  
First District, Third Division.  
Lawrence H. LUCEY, Plaintiff-Appellant,  
v.

LAW OFFICES OF PRETZEL & STOUFFER, CHARTERED and Theodore G. Gertz, Defendants-Appellees.

No. 1-96-2659.  
Nov. 12, 1998.

Client brought legal malpractice action against law firm, alleging he received inaccurate advice regarding soliciting his former employer's accounts. The Circuit Court, Cook County, Loretta C. Douglas, J., dismissed client's complaint with prejudice on statute of limitation grounds, and client appealed. The Appellate Court, Leavitt, J., held that: (1) client's malpractice action was premature, and (2) trial court's dismissing complaint with prejudice was an abuse of discretion.

Affirmed as modified.

#### West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

[45 Attorney and Client](#)  
[45III Duties and Liabilities of Attorney to Client](#)  
[45k129 Actions for Negligence or Wrongful Acts](#)  
[45k129\(1\) k. In general; limitations. Most Cited Cases](#)

Client's malpractice action against law firm for allegedly providing negligent advice regarding soliciting his former employer's accounts was premature, where there was no adverse judgment, settlement, or dismissal of the underlying action against client due to attorney's purportedly negligent advice, making actionable damages a mere potentiality.

[2]  [KeyCite Citing References for this Headnote](#)

[45 Attorney and Client](#)  
[45III Duties and Liabilities of Attorney to Client](#)  
[45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases](#)  
(Formerly 45k105)

Elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) actual damages.

[3]  [KeyCite Citing References for this Headnote](#)

[45 Attorney and Client](#)  
[45III Duties and Liabilities of Attorney to Client](#)

- ⊖ [45k129 Actions for Negligence or Wrongful Acts](#)
- ⊖ [45k129\(4\) k. Damages and costs. Most Cited Cases](#)

Injuries resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests.

[4]  [KeyCite Citing References for this Headnote](#)

- ⊖ [45 Attorney and Client](#)
- ⊖ [45III Duties and Liabilities of Attorney to Client](#)
- ⊖ [45k129 Actions for Negligence or Wrongful Acts](#)
- ⊖ [45k129\(2\) k. Pleading and evidence. Most Cited Cases](#)

Damages in legal malpractice action must be incurred and are not presumed, and the plaintiff must affirmatively plead and prove that he suffered injuries as a result of the attorney's malpractice.

[5]  [KeyCite Citing References for this Headnote](#)

- ⊖ [45 Attorney and Client](#)
- ⊖ [45III Duties and Liabilities of Attorney to Client](#)
- ⊖ [45k129 Actions for Negligence or Wrongful Acts](#)
- ⊖ [45k129\(4\) k. Damages and costs. Most Cited Cases](#)

Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for legal malpractice yet exists.

[6]  [KeyCite Citing References for this Headnote](#)

- ⊖ [241 Limitation of Actions](#)
- ⊖ [241II Computation of Period of Limitation](#)
- ⊖ [241II\(A\) Accrual of Right of Action or Defense](#)
- ⊖ [241k55 Torts](#)
- ⊖ [241k55\(3\) k. Negligence in performance of professional services. Most Cited Cases](#)

Incurring of additional attorney fees may trigger the running of the statute of limitations for legal malpractice purposes, but only where it is clear, at the time the additional fees are incurred, that the fees are directly attributable to former counsel's neglect, such as through a ruling adverse to the client to that effect. S.H.A. [735 ILCS 5/13-214.3](#).

[7]  [KeyCite Citing References for this Headnote](#)

- ⊖ [45 Attorney and Client](#)
- ⊖ [45III Duties and Liabilities of Attorney to Client](#)
- ⊖ [45k129 Actions for Negligence or Wrongful Acts](#)
- ⊖ [45k129\(4\) k. Damages and costs. Most Cited Cases](#)

Where an attorney's neglect is a direct cause of the legal expenses incurred by the plaintiff, the attorney fees incurred are recoverable as damages.

[8]  [KeyCite Citing References for this Headnote](#)

- ⊖ [45 Attorney and Client](#)
- ⊖ [45III Duties and Liabilities of Attorney to Client](#)
- ⊖ [45k129 Actions for Negligence or Wrongful Acts](#)

☞ [45k129\(4\) k. Damages and costs. Most Cited Cases](#)

Where an attorney's neglect is not a direct cause of the legal expenses incurred by the plaintiff, such as when the plaintiff prevails when sued or loses for reasons other than incorrect legal advice, the attorney fees incurred are generally not actionable as legal malpractice.

[9]  [KeyCite Citing References for this Headnote](#)

☞ [45 Attorney and Client](#)

☞ [45III Duties and Liabilities of Attorney to Client](#)

☞ [45k129 Actions for Negligence or Wrongful Acts](#)

☞ [45k129\(4\) k. Damages and costs. Most Cited Cases](#)

When uncertainty exists as to the very fact of damages, as opposed to the amount of damages, damages are speculative, and no cause of action for legal malpractice can be said to exist.

[10]  [KeyCite Citing References for this Headnote](#)

☞ [45 Attorney and Client](#)

☞ [45III Duties and Liabilities of Attorney to Client](#)

☞ [45k129 Actions for Negligence or Wrongful Acts](#)

☞ [45k129\(3\) k. Trial and judgment. Most Cited Cases](#)

Although the time at which a legal malpractice plaintiff knew or should have known that he has been injured and that his injury was wrongfully caused is normally a question of fact, a court may decide the issue as a matter of law where the facts are undisputed and only one conclusion may be drawn from them.

[11]  [KeyCite Citing References for this Headnote](#)

☞ [307A Pretrial Procedure](#)

☞ [307AIII Dismissal](#)

☞ [307AIII\(B\) Involuntary Dismissal](#)

☞ [307AIII\(B\)6 Proceedings and Effect](#)

☞ [307Ak690 k. Dismissal with or without prejudice. Most Cited Cases](#)

Trial court's dismissing client's premature legal malpractice complaint with prejudice was an abuse of discretion, to extent that it suggested client was precluded from refileing if and when litigation resulting from attorney's purportedly negligent advice was resolved adversely to him.

[12]  [KeyCite Citing References for this Headnote](#)

☞ [241 Limitation of Actions](#)

☞ [241II Computation of Period of Limitation](#)

☞ [241II\(A\) Accrual of Right of Action or Defense](#)

☞ [241k55 Torts](#)

☞ [241k55\(3\) k. Negligence in performance of professional services. Most Cited Cases](#)

Six-year statute of repose on client's cause of action for legal malpractice commenced running on date attorneys allegedly gave him inaccurate advice regarding soliciting his former employer's customers, unless client could successfully assert the previously nonexistent statute of repose cut off his cause of action before he had a reasonable time in which to file. S.H.A. [735 ILCS 5/13-214.3](#).

[13]  [KeyCite Citing References for this Headnote](#)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(3) k. Negligence in performance of professional services. Most Cited Cases

Clients who are injured by attorneys' negligent advice in the course of representation, but may have legal malpractice actions cut off by six-year repose period which runs from the date of the negligent advice, are permitted to seek relief by way of third-party action, and thus are not without a remedy within the statutory framework. S.H.A. 735 ILCS 5/2-406(b), 13-214.3.

[14]  KeyCite Citing References for this Headnote

96 Contribution

96k9 Actions

96k9(3) k. Time for bringing action. Most Cited Cases

208 Indemnity  KeyCite Citing References for this Headnote

208V Actions

208k96 k. Time to sue. Most Cited Cases  
(Formerly 208k15(5))

Actions for contribution and indemnity have their own statute of limitations which preempt all other statutes of limitation and repose, except in medical malpractice cases. S.H.A. 735 ILCS 5/13-204.

**\*\*475 \*350 \*\*\*614** William S. Wigoda, Law Offices of William S. Wigoda, Ltd., Chicago, for Plaintiff-Appellant.

Michael A. Pope and Jeffrey C. Clark, McDermott, Will & Emery, Chicago, for Defendants-Appellees.

**\*351** Justice LEAVITT delivered the opinion of the court:

Plaintiff Lawrence Lucey brought the present action for legal malpractice against defendants Theodore Gertz and the law firm of Pretzel & Stouffer. The trial court dismissed plaintiff's amended complaint with prejudice on the basis that the statute of limitations on the malpractice action had expired. Plaintiff now appeals, arguing the trial court erred in dismissing his complaint and not permitting him to amend his complaint if it was properly dismissed.

Inasmuch as this case was dismissed pursuant to a motion brought under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 1996)), we accept as true all well-pleaded facts in plaintiff's complaint. See Hermitage Corp. v. Contractors Adjustment Co., 166 Ill.2d 72, 85, 209 Ill.Dec. 684, 651 N.E.2d 1132 (1995). Plaintiff's first amended complaint alleged the following. In July 1989, plaintiff was employed by The Chicago Corporation, which was in the business of providing advice and brokerage services to individuals, trusts, and corporations. Michigan Physicians Mutual Liability Company (Michigan Physicians) was a client of The Chicago Corporation, and plaintiff was responsible for this account. As an integral part of his duties at The Chicago Corporation, plaintiff would on occasion attend investment committee meetings of Michigan Physicians and counsel the investment committee regarding the company's portfolio. Michigan Physicians requested plaintiff attend its investment committee meeting scheduled for July 16, 1989.

That same month, plaintiff contemplated resigning from The Chicago Corporation and starting his own firm. On July 19, 1989, plaintiff sought legal advice from Theodore Gertz and the law firm of Pretzel & Stouffer regarding the propriety of soliciting clients prior to his resignation. Specifically, plaintiff wanted to know whether he could attend an upcoming Michigan Physicians meeting and what information he would be entitled to disclose at that meeting regarding his decision to resign from The

Chicago Corporation and start his own firm. Gertz advised plaintiff he could attend the meeting if he did so in his individual capacity and not as an employee of The Chicago Corporation. Gertz suggested plaintiff pay his own expenses to attend the meeting. He further advised plaintiff to inform The Chicago Corporation, prior to attending the meeting, he was resigning to start his own firm and would be attending the meeting in his individual capacity.

In reliance on this advice, plaintiff attended the Michigan Physicians meeting in his individual capacity and at his own expense. At that meeting, he disclosed his decision to leave The Chicago Corporation and begin his own firm. On July 31, plaintiff informed The Chicago Corporation of his decision to resign, effective August 15. On \*352 August 7, Michigan Physicians informed The Chicago Corporation\*\*476 \*\*\*615 it would be transferring its portfolio to plaintiff's new firm. On August 25, The Chicago Corporation filed suit against plaintiff based upon the loss of the Michigan Physicians account (the *Chicago Corporation* suit).

Plaintiff retained Gertz and Pretzel & Stouffer to defend him in the *Chicago Corporation* suit. Throughout plaintiff's representation by defendants in this suit, defendants continually advised plaintiff he had a valid defense to the claims asserted by The Chicago Corporation. In June or July of 1994, for reasons unrelated to the *Chicago Corporation* suit, plaintiff requested defendants withdraw from representing him. Plaintiff then retained other counsel. At the time of plaintiff's complaint, the *Chicago Corporation* suit was still pending.

Plaintiff filed the instant malpractice action against defendants on July 11, 1995. The only date relevant to the statute of limitations in this complaint was July 1989, the date the allegedly negligent advice was given. Defendants filed a motion to dismiss, arguing plaintiff's cause of action, having accrued in July 1989, was barred by the five-year statute of limitations applicable to legal malpractice actions accruing prior to January 1, 1991. See 735 ILCS 5/13-205 (West 1992). In response to this motion, plaintiff filed his first amended complaint, the contents of which we have just set forth.

Defendants again filed a motion to dismiss, pursuant to section 2-619 of the Code (735 ILCS 5/2-619(a)(5) (West 1996)), arguing plaintiff's action was barred by the applicable five-year statute of limitations. Defendants acknowledged plaintiff's first amended complaint did set forth a new date (June or July 1994-the date upon which plaintiff's representation by defendants ended) for statute of limitations purposes. They argued plaintiff's action was, nonetheless, still barred by the five-year statute of limitations, since Illinois does not recognize the "continuous representation rule." This rule, in theory, would toll the running of the statute of limitations until representation by the defendants ceased. See Witt v. Jones & Jones Law Offices, P.C., 269 Ill.App.3d 540, 544, 206 Ill.Dec. 891, 646 N.E.2d 23 (1995). The trial court dismissed plaintiff's complaint, with prejudice, on the basis that the only harm alleged by plaintiff was the filing of the *Chicago Corporation* suit on August 25, 1989, resulting in the statute of limitations expiring on August 25, 1994.

The primary thrust of the parties' arguments on appeal, both in their briefs and at oral argument, concerns the application, under Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill.2d 240, 198 Ill.Dec. 786, 633 N.E.2d 627 (1994), of equitable estoppel, *i.e.*, whether defendants should be equitably estopped from asserting the statute of limitations \*353 defense because plaintiff's delay in bringing suit was induced by defendants' reassurances that plaintiff had a valid defense to the claims made by The Chicago Corporation. As plaintiff acknowledges in his brief, however, it appears from both the trial judge's oral pronouncements and her written order that the judge was more concerned with the fact that the underlying *Chicago Corporation* litigation was unresolved and plaintiff, therefore, could allege no damages at that point. Without damages, the trial court reasoned, plaintiff's malpractice action had not yet accrued, and both the statute of limitations and the doctrine of equitable estoppel would be inapplicable. *Cf. Jackson Jordan, 158 Ill.2d at 253, 198 Ill.Dec. 786, 633 N.E.2d 627* (discussing equitable estoppel in a case where the defendant law firm's representation of the plaintiff continued past date of entry of first ruling adverse to plaintiff).

[1] [2] [3] [4] [5] We agree with the trial court that plaintiff's malpractice action was premature, at least in the procedural context presented here. The elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship that establishes a duty on the part of

the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) actual damages. Serafin v. Seith, 284 Ill.App.3d 577, 586-87, 219 Ill.Dec. 794, 672 N.E.2d 302 (1996). The injuries resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests. **\*\*477 \*\*\*616** Glass v. Pitler, 276 Ill.App.3d 344, 349, 212 Ill.Dec. 730, 657 N.E.2d 1075 (1995). Damages must be incurred and are not presumed (Farm Credit Bank v. Gamble, 197 Ill.App.3d 101, 103, 143 Ill.Dec. 844, 554 N.E.2d 779 (1990)), and the plaintiff must affirmatively plead and prove that he suffered injuries as a result of the attorney's malpractice. Bartholomew v. Crockett, 131 Ill.App.3d 456, 465, 86 Ill.Dec. 656, 475 N.E.2d 1035 (1985). Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists. See Farm Credit Bank, 197 Ill.App.3d at 104, 143 Ill.Dec. 844, 554 N.E.2d 779.

Both parties have asserted at various times in the proceedings leading to this appeal that plaintiff's cause of action accrued in July 1989, when the allegedly negligent advice was first given. That is not the law in Illinois. Defendants may have breached a duty owed plaintiff when they gave him allegedly negligent advice in July 1989, but a cause of action for legal malpractice does not accrue until a plaintiff discovers, or within a reasonable time should discover, his injury and incurs damages directly attributable to counsel's neglect. See Goran v. Glieberman, 276 Ill.App.3d 590, 594-95, 213 Ill.Dec. 426, 659 N.E.2d 56 (1995). In **\*354** Goodman v. Harbor Market, Ltd., 278 Ill.App.3d 684, 215 Ill.Dec. 263, 663 N.E.2d 13 (1995), this court commented upon the position taken by the parties in this case:

"The relationship between an attorney and the client is one in which the attorney is charged with a duty to act skillfully and diligently on the client's behalf. Given the duty, the client is presumed unable to discern any misapplication of legal expertise. As the California Supreme Court has stated:

'If [the client] must ascertain malpractice at the moment of its incidence, the client must hire a second professional to observe the work of the first, an expensive and impractical duplication, clearly destructive of the confidential relationship between the practitioner and his client.' (Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971), 6 Cal.3d 176, 188, 491 P.2d 421, 428, 98 Cal.Rptr. 837, 844.)

'Therefore, it is 'the realized injury to the client, not the attorney's misapplication of the expertise, [which] marks the point in time for measuring compliance with a statute of limitations period.' "Goodman, 278 Ill.App.3d at 689-90, 215 Ill.Dec. 263, 663 N.E.2d 13, quoting Hermitage Corp., 166 Ill.2d at 89-90, 209 Ill.Dec. 684, 651 N.E.2d 1132 (Freeman, J., dissenting).

The trial court justifiably questioned whether the statute of limitations had even begun to run in this case.

If no cause of action accrued in July 1989, the question becomes when (if at all) did plaintiff's cause of action against defendants accrue? Neither party in this case has provided us with much argument or citation to authority on this point, although it clearly appears to have been the foremost concern of the trial court in dismissing this case. Plaintiff (without citation to authority) and defendants (in a footnote) both assert that, even if we find no cause of action accrued at the time the allegedly negligent advice was given, plaintiff's malpractice action accrued when he dismissed defendants as counsel and began incurring attorney fees to defend himself in the Chicago Corporation litigation. That argument has some support in the caselaw, primarily from this court's decision in Goran. See Goran, 276 Ill.App.3d at 595, 213 Ill.Dec. 426, 659 N.E.2d 56; Zelenka v. Krone, 294 Ill.App.3d 248, 253, 228 Ill.Dec. 733, 689 N.E.2d 1154 (1997) (following Goran); Palmros v. Barcelona, 284 Ill.App.3d 642, 647, 220 Ill.Dec. 233, 672 N.E.2d 1245 (1996) (following Goran).

In Goran, the plaintiff was represented by the defendant attorney in an appeal from an adjudication of marriage dissolution and child custody. The defendant filed an appellant's brief but then withdrew from the appeal. The plaintiff subsequently hired other counsel to represent her. The subsequently retained attorneys were required by the appellate court to redo the appellate brief written by the defendant, as well the record on appeal, to bring them both into compliance with court

rules. Subsequent counsel incurred fees of \$11,000 reviewing the \*355 case and \$1,297 \*\*478 \*\*\*617 in redoing the record and appellant's brief. The plaintiff eventually lost her appeal and filed a malpractice action against the defendant.

[6]  The appellate court in *Goran* held the plaintiff incurred actionable damages-and, thus, her cause of action accrued-when she paid \$1,297 in attorney fees to bring her brief into compliance with court rules, as ordered by the appellate court. *Goran*, 276 Ill.App.3d at 595-96, 213 Ill.Dec. 426, 659 N.E.2d 56. The court was careful to distinguish the \$11,000 in fees, which "was not actionable as a result of [defendant]'s neglect but was simply incurred as a result of his permitted withdrawal from the case \* \* \*." *Goran*, 276 Ill.App.3d at 596, 213 Ill.Dec. 426, 659 N.E.2d 56. Thus, although the \$1,297 in attorney fees triggered the running of the statute of limitations, the only reason these damages were actionable was that a clear finding of attorney neglect had already been made in that case. As the defendant argued, and the appellate court impliedly accepted, "regardless of whether the [trial court's] decision was reversed or affirmed, [the plaintiff] sustained damages" when she paid to have her brief redone. *Goran*, 276 Ill.App.3d at 595, 213 Ill.Dec. 426, 659 N.E.2d 56. Thus, the *Goran* holding is a limited one: the incurring of additional attorney fees may trigger the running of the statute of limitations for legal malpractice purposes, but only where it is clear, at the time the additional fees are incurred, that the fees are directly attributable to former counsel's neglect (such as through a ruling adverse to the client to that effect). We reject the parties' assertion that subsequently incurred attorney fees will, in every case, automatically give rise to a cause of action for legal malpractice against former counsel.

[7]  [8]  [9]  Admittedly, where an attorney's neglect is a direct cause of the legal expenses incurred by the plaintiff, the attorney fees incurred are recoverable as damages. *National Wrecking Co. v. Coleman*, 139 Ill.App.3d 979, 983-84, 94 Ill.Dec. 287, 487 N.E.2d 1164 (1985); *Sorenson v. Fio Rito*, 90 Ill.App.3d 368, 373-74, 45 Ill.Dec. 714, 413 N.E.2d 47 (1980). However, the converse of this rule is equally true: where an attorney's neglect is *not* a direct cause of the legal expenses incurred by the plaintiff ( *i.e.*, the plaintiff prevails when sued or loses for reasons other than incorrect legal advice), the attorney fees incurred are generally not actionable. Since it is also possible the former client will prevail when sued by a third party, damages are entirely speculative until a judgment is entered against the former client or he is forced to settle. When uncertainty exists as to the very fact of damages, as opposed to the amount of damages, damages are speculative, *Goran*, 276 Ill.App.3d at 595, 213 Ill.Dec. 426, 659 N.E.2d 56, and no cause of action for malpractice can be said to exist.

The trial court in this case recognized these concerns. The following colloquy occurred prior to the judge's ruling:

\*356 "THE COURT: If [plaintiff] wins the litigation with The Chicago Corporation, then the advice he got from Pretzel & Stouffer was not malpractice. He has to have damages to have a malpractice claim, doesn't he?"

\* \* \*

MR. GOODMAN [Plaintiff's counsel]: There are two problems: The question is whether or not they are quantified. I do believe there are damages.

THE COURT: What are they?

MR. GOODMAN: Well, the damages, at this point, would be the attorney fees.

THE COURT: But if he wins the litigation-I thought about that too. If he wins the litigation, the attorney fees are not as a result of any malpractice. They are the result of being sued by someone. Pretzel & Stouffer never guaranteed he would not be sued."

Plaintiff himself acknowledges that he may never have a cause of action against defendants in the prayer for relief in his first amended complaint. Tellingly, plaintiff struggled to put a finger on his damages when forced to state the relief he sought. In each count of his complaint, plaintiff first seeks "[a]n award for damages exceeding \$30,000 as a result of *any judgment* for monetary

damages that may be entered **\*\*479 \*\*\*618** against the Plaintiff" in the *Chicago Corp.* litigation. (Emphasis added.)

Illinois courts have frequently recognized, either expressly or implicitly, a cause of action for legal malpractice will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which plaintiff has become entangled due to the purportedly negligent advice of his attorney. See *Hermitage Corp.*, 166 Ill.2d at 84-87, 209 Ill.Dec. 684, 651 N.E.2d 1132 (where plaintiffs alleged defect in mechanics lien prepared by defendants, statute of limitations began running when circuit court first entered order reducing the amount of the lien); *Jackson Jordan*, 158 Ill.2d at 253, 198 Ill.Dec. 786, 633 N.E.2d 627 (mere filing of a lawsuit against client insufficient to trigger running of statute of limitations); *Glass*, 276 Ill.App.3d at 354-55, 212 Ill.Dec. 730, 657 N.E.2d 1075 (where plaintiffs claimed that, contrary to the advice of defendant attorneys, their pension funds would not have been protected from creditors had they filed a petition for bankruptcy, damages were speculative, and malpractice action properly dismissed, since there was no ruling by a bankruptcy court and law was unsettled); *Goran*, 276 Ill.App.3d at 595-96, 213 Ill.Dec. 426, 659 N.E.2d 56 (attorney fees incurred after court order finding defendant had negligently performed legal work triggered cause of action); *Belden v. Emmerman*, 203 Ill.App.3d 265, 269-70, 148 Ill.Dec. 583, 560 N.E.2d 1180 (1990) (statute of limitations in legal malpractice action started to run when the circuit court entered the order that was the subject of the legal malpractice action, not when **\*357** the circuit court declined to vacate the order or thereafter); *Zupan v. Berman*, 142 Ill.App.3d 396, 399, 96 Ill.Dec. 889, 491 N.E.2d 1349 (1986) ("the adverse result at the time of the end of the trial is the operative factor" in determining when statute of limitations in legal malpractice action commenced, not the date of the denial of post-trial motions); *Bartholomew*, 131 Ill.App.3d at 465, 86 Ill.Dec. 656, 475 N.E.2d 1035 (where attorney's negligence resulted in dismissal of one of two tortfeasors in plaintiff's suit, malpractice action properly dismissed as premature since actual damages would occur only if plaintiff failed to recover or failed to fully recover against remaining tortfeasor); *Gruse v. Belline*, 138 Ill.App.3d 689, 698, 93 Ill.Dec. 297, 486 N.E.2d 398 (1985) (evidence of two judgments entered against plaintiff, allegedly due to attorney's negligence, was sufficient proof of damages, regardless of whether judgments had been paid or collected yet); *Bronstein v. Kalcheim & Kalcheim, Ltd.*, 90 Ill.App.3d 957, 959-60, 46 Ill.Dec. 374, 414 N.E.2d 96 (1980) (dismissing as premature plaintiff's malpractice complaint against attorneys for negligent tax advice, since issuance of a Notice of Deficiency did not establish plaintiff had suffered a loss; plaintiff would have actionable damages only after a liability determination was made by Tax Court). But see *Goodman*, 278 Ill.App.3d at 690, 215 Ill.Dec. 263, 663 N.E.2d 13 (finding date plaintiff was sued due to attorney's alleged negligence to be date plaintiff's cause of action accrued, where that was the "undisputed date" of discovery).

Sound policy reasons exist in opposition to a rule which would require the client file a provisional malpractice action against his attorney whenever the attorney's legal advice has been challenged. Among them are judicial economy and preservation of the attorney-client relationship. As our supreme court recognized in *Jackson Jordan*:

"The mere assertion of a contrary claim or the filing of a lawsuit [by a third party] [a]re [ sic ] not, in and of themselves, sufficiently compelling to induce [a] client to seek a second legal opinion. Meritless claims and nuisance lawsuits are, after all, a fairly commonplace occurrence. It would be a strange rule if every client were required to seek a second legal opinion whenever it found itself threatened with a lawsuit." *Jackson Jordan*, 158 Ill.2d at 253, 198 Ill.Dec. 786, 633 N.E.2d 627.

See also *International Engine Parts, Inc. v. Feddersen & Co.*, 9 Cal.4th 606, 38 Cal.Rptr.2d 150, 888 P.2d 1279, 1287 (Cal.1995) (where client brought accountant malpractice action based upon accountant's negligent filing of tax returns, rule that cause of action does not accrue until date of deficiency tax assessment conserves judicial resources); **\*\*480 \*\*\*619** *ITT Small Business Finance Corp. v. Niles*, 9 Cal.4th 245, 36 Cal.Rptr.2d 552, 885 P.2d 965, 972 (Cal.1994) (holding it would be a waste of judicial resources to require both the **\*358** underlying litigation and the legal malpractice action to be litigated simultaneously, rejecting argument that "actual injury" occurred when client incurred attorney fees due to attorney's alleged negligence); T. Ochoa & A. Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U.L.Rev. 1, 22-23 (1994) (noting "[i]t makes little sense to clog court dockets and expend limited judicial time and resources in litigating malpractice actions which may be avoided completely by a

favorable result in the pending proceeding"). Simultaneous litigation raises the possibility of inconsistent verdicts and may well be disadvantageous to both the attorney and client. See United States National Bank of Oregon v. Davies, 274 Or. 663, 548 P.2d 966, 968-70 (Or.1976) (simultaneous litigation may be "disastrous" to both attorney and client, since client will be taking polar positions in each suit permitting his impeachment in his defense of the underlying suit); Dearborn Animal Clinic v. Wilson, 248 Kan. 257, 806 P.2d 997, 1005-6 (Kan.1991) (following Davies, rejecting argument that malpractice action accrued when plaintiff's incurred attorney fees due to attorney's alleged negligence); 24 Sw. U.L.Rev. at 19-23 (noting that exposing the attorney's error by filing a malpractice action may alert the other party in the underlying action to potentially beneficial information or defenses and cause damages which might not otherwise have arisen; malpractice action also may waive attorney-client privilege to client's detriment in the pending litigation).

[10] ¶ In light of the foregoing principles, we believe the trial court correctly dismissed plaintiff's action in this case as premature. This is not a case where it is plainly obvious, prior to any adverse ruling against the plaintiff, that he has been injured as the result of professional negligence. See Dancor Int'l v. Friedman, Goldberg & Mintz, 288 Ill.App.3d 666, 674, 224 Ill.Dec. 302, 681 N.E.2d 617 (1997) (where client brought malpractice action against certified public accounting firm alleging firm failed to detect warehouse fraud and embezzlement, professional opinion of new accountants was not required to start the limitations period running, since plaintiff had enough information without a professional opinion to file a 35-page federal RICO complaint alleging fraud and embezzlement by perpetrators); Kaplan v. Shure Bros., No. 96C982, 1996 WL 411448, at \*8 (N.D.Ill. July 18, 1996) (where plaintiff brought breach of contract claim against attorney who represented him in purchase of property later found to be environmentally contaminated, malpractice action arose when plaintiff learned of contamination, not when related environmental litigation terminated). Inasmuch as "the client is presumed unable to discern any misapplication of legal expertise," Goodman, 278 Ill.App.3d at 689-90, 215 Ill.Dec. 263, 663 N.E.2d 13, it cannot \*359 be said plaintiff, as a layman, knew or reasonably should have known defendants' legal advice was actionably erroneous when he was sued by The Chicago Corporation. In fact, defendants assured plaintiff to the contrary through June 1994, according to plaintiff's complaint. Although plaintiff may have been alerted to the possibility defendants had given him incorrect legal advice when he dismissed them and retained other counsel in June or July 1994, his tentative damages would not become actionable unless and until the Chicago Corp. litigation ended adversely to him. See Glass, 276 Ill.App.3d at 349, 212 Ill.Dec. 730, 657 N.E.2d 1075 (injuries resulting from legal malpractice are pecuniary, not personal); see also Hermitage Corp., 166 Ill.2d at 86-87, 209 Ill.Dec. 684, 651 N.E.2d 1132 (malpractice statute of limitations started to run when trial court reduced value of plaintiffs' mechanic lien, not when court ruled on motion to reconsider); Belden, 203 Ill.App.3d at 269-70, 148 Ill.Dec. 583, 560 N.E.2d 1180 (statute of limitations in legal malpractice action started to run when the circuit court entered the order that was the subject of the legal malpractice action, not when the circuit court declined to vacate the order or thereafter); Zupan, 142 Ill.App.3d at 399, 96 Ill.Dec. 889, 491 N.E.2d 1349 (statute of limitations in legal malpractice action started to run from the date of judgment, not from the denial of the post-trial motions). As actionable damages were a mere potentiality prior to resolution of the Chicago \*\*481 \*\*\*620 Corp. litigation, plaintiff failed to state a claim for legal malpractice, and his first amended complaint was properly dismissed. Although the time at which a malpractice plaintiff knew or should have known that he has been injured and that his injury was wrongfully caused is normally a question of fact, a court may decide the issue as a matter of law where the facts are undisputed and only one conclusion may be drawn from them. Nolan v. Johns-Manville Asbestos, 85 Ill.2d 161, 171, 52 Ill.Dec. 1, 421 N.E.2d 864 (1981).

[11] ¶ Plaintiff argues that even if we find his complaint was properly dismissed, it should not have been dismissed with prejudice. While we concur in the trial court's reasons for dismissing plaintiff's complaint, we believe the trial court abused its discretion in dismissing the complaint with prejudice (see City of Elgin v. County of Cook, 169 Ill.2d 53, 71-72, 214 Ill.Dec. 168, 660 N.E.2d 875 (1995) (trial court's refusal to allow filing of an amended complaint reviewed under an abuse of discretion standard)), at least to the extent that the court's order suggested plaintiff would not be permitted to refile if and when the Chicago Corp. litigation is resolved adversely to him. The facts of the present case are similar to those in Superior Bank FSB v. Golding, 152 Ill.2d 480, 178 Ill.Dec. 720, 605 N.E.2d 514 (1992).

In *Golding*, the defendant law firm issued a legal opinion assuring the plaintiff bank that the borrowers, partners in a partnership, would be personally liable on a loan being issued to the partnership by the \*360 bank. The firm further guaranteed the genuineness of all the loan guarantees and signatures. When the bank was forced to sue the individual partners on the loan guaranty, one partner defended on the ground his guaranty was a forgery. The bank then amended its complaint to add the law firm as defendants. The supreme court, noting that the record did not reveal whether the matter of the forgery defense had been resolved, ruled that it would be inequitable to summarily dismiss, with prejudice, the bank's action against the firm, since the accuracy of the firm's legal opinion was assumed "pending and undetermined." *Golding*, 152 Ill.2d at 485, 178 Ill.Dec. 720, 605 N.E.2d 514. The court noted the bank would be without a remedy if its complaint was dismissed with prejudice and the firm's legal opinion was later found to be inaccurate. In reaching this conclusion, the *Golding* court relied upon the purpose of the Code—"to encourage the trial of cases on their merits and to avoid premature summary dismissals which would frustrate the search for truth." *Golding*, 152 Ill.2d at 488, 178 Ill.Dec. 720, 605 N.E.2d 514. Under the rationale of *Golding*, plaintiff's complaint in this case should not have been dismissed with prejudice.

[12] ✓ Since the issue is likely to arise if plaintiff's cause of action does eventually accrue and he refiles his complaint, we address the potential application of the statute of limitations. As already discussed, the parties have both contended plaintiff's cause of action accrued in July 1989, when the allegedly negligent advice was first given. Having assumed this date of accrual, both parties limit their discussion to the application the five-year statute of limitations in effect for legal malpractice actions accruing before January 1, 1991 (see Ill.Rev.Stat.1991, ch. 110, par. 13-205), and argue over whether equitable estoppel was sufficiently pled to toll the running of the statute.

Nevertheless, as the trial court correctly found, plaintiff's cause of action will accrue, if at all, well after January 1, 1991, the effective date of the most recent statute of limitations applicable to legal malpractice actions. See 735 ILCS 5/13-214.3 (West 1992). Section 13-214.3 of the Code provides:

"(b) An action for damages based on tort, contract, or otherwise \* \* \* against an attorney arising out of an act or omission in the performance of professional services \* \* \* must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) \* \* \* An action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

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**\*\*\*621** (f) This Section applies to all causes of action accruing on or after its effective date." 735 ILCS 5/13-214.3 (West 1992).

**\*361** The effective date of the statute was January 1, 1991.

Were the older statute applicable in the present case, plaintiff would have five years from the date of the discovery of his cause of action ( *i.e.*, the date he settles or has an adverse judgment rendered against him in the *Chicago Corp.* litigation) to bring suit, regardless of how distant in time the filing of his complaint was from the date defendants allegedly gave plaintiff negligent advice—the older statute had no repose period. However, under section 13-214.3, plaintiff has two years from the date of discovery, subject to a six-year statute of repose, which runs from "the date on which the [negligent] act or omission occurred." 735 ILCS 5/13-214.3(c) (West 1992). Thus, in this case, the statute of repose would have commenced running on July 19, 1989, when defendants allegedly gave plaintiff inaccurate advice. Assuming no tolling of the statute of repose (see *Cunningham v. Huffman*, 154 Ill.2d 398, 405-6, 182 Ill.Dec. 18, 609 N.E.2d 321 (1993) (rejecting continuous course of treatment doctrine as tolling medical malpractice statute of repose but interpreting "act or omission or occurrence" broadly so as to encompass "a continuous and unbroken course of negligent treatment" where the treatment is "so related as to constitute one continuing wrong")), plaintiff's cause of action would be barred by the statute of repose on July 19, 1995, unless he could successfully assert the previously non-existent statute of repose cut off his cause of action before he had a reasonable time in which to file (see *Mega v. Holy Cross Hosp.*, 111 Ill.2d 416, 420, 95 Ill.Dec. 812, 490 N.E.2d 665

(1986) (in the wake of a statute shortening a repose period or providing one where one did not exist previously, a plaintiff whose cause of action is based upon events occurring prior to the effective date of the new statute will be allowed a reasonable period of time in which to bring his action); Goodman, 278 Ill. App.3d at 694-95, 215 Ill.Dec. 263, 663 N.E.2d 13 (the reasonable period of time in which a plaintiff may bring suit for injuries sustained prior to the effective date of a statute of repose can never be more than the repose period itself, computed from the effective date of the statute)).

We note that while a malpractice plaintiff who is injured by his attorney's negligent advice in the course of representation in a litigation setting will rarely be troubled by the new statute of repose, a six-year repose period, running from the date of the negligent advice, may cut off many legal malpractice actions before they accrue when the malpractice occurs in a transactional setting. In a transactional setting, an attorney gives his client advice relevant to some transaction, which may be challenged, if at all, at some indefinite time in the future. Since the client in a transactional setting is infrequently in control of these outside events which call into question the accuracy of the legal \*362 advice he received, and since he generally must await a legal finding in other litigation before he can be reasonably certain he has damages directly attributable to the transactional attorney, a short statute of repose, such as that of section 13-214.3, may cut off many transactional malpractice actions before they accrue.

[13] ✓ The effects of the new repose period on transactional malpractice actions may not, however, be as harsh as they first appear. The Code permits persons in plaintiff's position to seek third-party relief in situations such as this. Plaintiff essentially has alleged contingent liability here. See *Black's Law Dictionary* 223 (6th ed.1990) (defining contingent liability as "[o]ne which is not now fixed and absolute, but which will become so in case of the occurrence of some future and uncertain event. A potential liability; e.g., pending lawsuit \* \* \*") (Emphasis added). Section 2-406 of the Code permits a defendant to bring a third-party action against anyone who "is or may be liable" to the defendant as a result of the plaintiff's claim against the defendant. See 735 ILCS 5/2-406(b) (West 1996); Federal Deposit Insurance Corporation v. Wells, 164 F.R.D. 472, 474 (N.D.Ill.1995).

In Wells, the FDIC as plaintiff brought an action against the defendants, former officers and directors of a bank, alleging the defendants were grossly negligent in approving loans and transactions, and in failing to supervise\*\*483 \*\*\*622 the bank's lending function. The defendants filed third-party complaints against their former attorneys, who provided legal counsel to the bank and its directors prior to the bank's failure. The third-party complaints alleged reliance upon the faulty advice of their attorneys and that such erroneous advice amounted to malpractice. Wells, 164 F.R.D. at 473.

The attorneys in Wells were impleaded pursuant to Fed. R.Civ. P. 14(a), which, like its Illinois counterpart, section 2-406(b), permits a defendant to bring into a suit any party "who is or may be liable" to him for all or part of plaintiff's claim against defendant. The attorneys in Wells objected to impleader on the grounds that the defendants had failed to state a cause of action against them, since defendants had not yet been found liable in the principal action and, therefore, could not allege actual damages as required for a claim of legal malpractice in Illinois. Wells, 164 F.R.D. at 474.

In denying third-party defendants' motion to dismiss, the court initially noted that in each of the cases cited by the attorneys in support of their motion, the defendant in the primary action (like plaintiff in the present case) brought a separate suit for malpractice, rather than impleading the third-party defendants. Wells, 164 F.R.D. at 474. Finding this distinction to be "crucial," the Wells court found the purposes of the federal and Illinois impleader rules to be identical \*363 and concluded that allowing dismissal of a third-party legal malpractice complaint simply because damages were contingent upon resolution of the primary action would undercut the very purpose of the impleader statute:

"Allowing the 'actual damages' requirement of a given cause of action to prevent impleader \* \* \* would effectively eviscerate th[e impleader] statute, as most civil causes of action require that the plaintiff have suffered damages as a result of the defendant's acts or omissions. Accordingly, Illinois

courts have recognized generally the distinction which controls here: although a defendant may not bring a separate action for indemnification while the primary lawsuit is pending, a defendant does have 'a choice of filing a third party complaint against a party who may be liable to indemnify him as part of the original action, or of waiting until the original action is over and filing a separate action for indemnity if he is found liable.' " *Wells*, 164 F.R.D. at 474, quoting *Anixter Bros., Inc. v. Central Steel & Wire*, 123 Ill.App.3d 947, 953, 79 Ill.Dec. 359, 463 N.E.2d 913 (1984) (citation omitted).

*Cf. Farm Credit Bank*, 197 Ill.App.3d at 104, 143 Ill.Dec. 844, 554 N.E.2d 779 (where defendant alleged he might one day be sued by his mother's heir due to attorney's negligent advice, third-party complaint properly dismissed on the basis of speculative damages, but defendant not foreclosed from impleading attorney if and when defendant is sued by mother's heir). Thus, as *Wells* makes clear, impleader may be available to persons in plaintiff's position. See *Anixter Bros.*, 123 Ill.App.3d at 953, 79 Ill.Dec. 359, 463 N.E.2d 913 ("In effect, Illinois law allows the third-party indemnity claim to be filed before it accrues, in order to promote settlement of all claims in one action").

This court has previously recognized that a legal malpractice action may be brought via a third-party complaint on an implied indemnity theory. The facts in *Kerschner v. Weiss & Co.*, 282 Ill.App.3d 497, 217 Ill.Dec. 775, 667 N.E.2d 1351 (1996) are strikingly similar to those of the present case. In *Kerschner*, the defendants were partners employed by the plaintiff firm. The defendants were considering leaving the firm and forming a new accounting partnership, and they sought legal advice from a law firm regarding these proposed actions. When defendants left their former firm and took a client with them, plaintiff sued them. Defendants then filed a third-party complaint against their attorney, alleging he gave them negligent advice. The appellate court reversed a summary judgment finding in favor of the law firm, holding that defendants had stated a cause of action for implied indemnity based upon quasi-contractual principles:

"Although not falling precisely within the classic forms of derivative liability, the claims asserted by the plaintiffs and by [the \*364 defendants] are sufficiently interrelated to allow a third-party action. A finding of liability against [the defendants] in the underlying action is a necessary predicate to a determination of liability in the third-\*\*\*484 party \*\*\*623 action against [the law firm]. Consequently, the broad purposes of judicial economy are best served by having both actions tried together. In light of the procedural posture of this case, our resolution avoids the fundamental unfairness of allowing the entry of summary judgment in favor of [the law firm], which constitutes an adjudication on the merits, to forever bar a claim for legal malpractice by [the defendants]." *Kerschner*, 282 Ill.App.3d at 507, 217 Ill.Dec. 775, 667 N.E.2d 1351.

[14] ✓ As of January 1, 1995, actions for contribution and indemnity have their own statute of limitations which preempt all other statutes of limitation and repose, except in medical malpractice cases. See 735 ILCS 5/13-204 (West 1996); *Ganci v. Blauvelt*, 294 Ill.App.3d 508, 228 Ill.Dec. 890, 690 N.E.2d 649, 652-53 (1998) (finding section 13-204 to be inherently inconsistent and incapable of being applied retroactively). Thus, plaintiff in this cause and others similarly situated are not without a remedy within the framework of the present statutory scheme.

AFFIRMED AS MODIFIED.

CAHILL, P.J., and GORDON, P.J., concur.

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