

A (very) close call for Minnesota's statute of limitations

by Thomas J. Shroyer



In a recent decision, the Minnesota Supreme Court upheld the long-standing rule that the clock for Minnesota's statute of limitations on tort claims starts ticking when a mistake is made and produces some (though not necessarily all possible) damage.

In doing so, it rejected the adoption of the "discovery rule" by the Minnesota Court of Appeals, which postpones the running of the statute until professional malpractice is – or should be – discovered by the client. Although gratifying, the margin of victory in the case was narrow, and the trial lawyers will relentlessly continue to press this legal battle.

Even though Minnesota has one of the most generous statute of limitations in the United States, the trial lawyers want to make it virtually limitless. Our state's six-year tort statute of limitations in (Minn. Stat. § 541.05, subd. 1(5)) does not specify when it begins to run. Minnesota courts have always held that the period of limitations begins to run when some act of negligence produces at least some measurable harm, even if all of the harm has

not occurred, and even if it cannot be determined. They have reasoned that six years is sufficient time to allow discovery and that longer delays will make it too difficult to gather accurate evidence – as memories fade, witnesses move or die, and documents are lost over time.

The Minnesota Supreme Court handed down its decision on August 17, 2006, in *Antone v. Mirviss*, 2006 WL 2372161 (Minn.). In a razor-thin, five-three decision, the court rejected the Minnesota Court of Appeals' earlier adoption of the "discovery rule" when it considered the case. In December 1986, Richard Antone asked his attorney, Israel Mirviss, to draft an antenuptial agreement in anticipation of his marriage. Mr. Antone would ultimately claim that his lawyer tricked him into signing the agreement after it was secretly changed to favor his prospective spouse. In the meantime, and following their 1986 marriage, Mr. Antone petitioned for divorce in 1998. The interpretation of the antenuptial agreement was pivotal for the divorce litigation, which ensued until 2003, after appeals all the way through the Minnesota Supreme Court (which construed the antenuptial agreement to

favor Mrs. Antone.) In September of 2003, Mr. Antone brought his action against Mr. Mirviss for alleged malpractice in drafting the antenuptial agreement.

Thus, the defendant lawyer was faced with a malpractice claim 13 years after he had allegedly committed the malpractice. The lawyer had been retired for several years and was completely uninsured when the suit was brought against him.

In the malpractice lawsuit, Mr. Antone argued that he could not have known of or brought a malpractice claim against his former lawyer any earlier because (a) he did not know if his marriage would be dissolved, (b) he did not know how the courts would interpret the allegedly deficient antenuptial agreement and (c) he did not know the amount he would end up losing until after the final court decision. The Minnesota Court of Appeals agreed and held that the malpractice lawsuit could proceed against the lawyer – and he appealed to the Supreme Court.

The announcement of that decision caused a tremendous outcry by malpractice defense lawyers, professional organizations and professional liability insurance companies. My law firm, Moss & Barnett, volunteered to prepare a "friend of the court" brief for the Minnesota Society of CPAs (MNCPA) – at no cost – to urge the Minnesota Supreme Court to reject the use of the "discovery rule." Similar briefs were also filed on behalf of a legal malpractice insurance company and the Minnesota State Bar Association, all urging reversal.

In rejecting the "discovery rule," the Antone court noted that such a rule provides "open-ended liability." It further reasoned that Minnesota's rule is a "middle ground" between

the extremes of not requiring any damage and the “discovery rule” and that it avoids “illogical results.”

The court then went on to hold that the allegedly defective antenuptial agreement caused some harm when the parties were married because at that precise moment Mr. Antone:

[P]assed a point of no return with respect to the laws of marital and nonmarital property and he did so without the legal shield he retained [the lawyer] to provide . . . Each property-related step [he] took after the date of his marriage was, unbeknownst to him, unprotected. While this reality needs no additional amplification, it is supported by Mr. Antone’s own testimony that he would not have entered into the marriage if he had known the antenuptial agreement did not adequately protect his property interest.

The MNCPA amicus brief urged the Minnesota Supreme Court to reach this result on these public policy grounds:

Accountants (like lawyers and many other professionals) provide services that are

- a) *inherently complex,*
- b) *subject to the exercise of much discretion and professional judgment and*
- c) *frequently adversely affected by unforeseeable subsequent events.*

It is manifestly unfair to subject accountants to liability exposure for claims commenced more than six years after their alleged negligence combines to produce some legally cognizable damage. For example, a tax return preparer who negligently advises a client to pay an incorrect amount of tax faces virtually unending exposure to being sued on a stale claim . . . [because] the plaintiff would contend that no damage was suffered until the client was actually forced to pay interest imposed by the IRS . . . Claims arising out of allegedly “failed audits” are even more difficult to litigate with the passage of time. Audits of financial statements are often stunningly

complex and entail the unraveling of audit trails and the translation of work papers, including myriad spreadsheets containing a blizzard of financial data, difficult tasks at best that are rendered virtually impossible after the passage of extended intervals.

It is truly fortunate that a majority of the Minnesota Supreme Court held the line against the continuing efforts of the trial bar to adopt the “discovery rule” in Minnesota. A case in point is provided by the decision under the “discovery rule” against a CPA in *McCormick v. Brevig*, 980 P.2d 603 (Mont. 1999). In that case, an accountant prepared tax returns and rendered rudimentary accounting services to a seemingly close-knit family (father, daughter and son) that jointly worked a cattle ranch. In 1982, the ranch was entirely owned by the father, but the accountant was told by the daughter that he was going to place the ranch into a living trust for the sole benefit of his son. After the accountant questioned the tax impact of the transaction, the father and daughter decided against the trust. The CPA did nothing further with regard to the matter, but continued to perform services for the family.

By the time of his death, the father had prepared a will that passed equal ownership of the ranch to his son and daughter. In 1995, after operating the ranch as partners for more than a decade, the daughter sued the brother to dissolve their partnership. The brother subpoenaed the accountant’s records and discovered notes concerning the discussion of the trust for his benefit in 1982. He sued the CPA for not telling him (recall that the son was a tax return client) in time to talk his father back into using the trust, prior to the father’s death. Even though more than 13 years had passed since that discussion, the Montana Supreme Court allowed the claim to proceed in the face of Montana’s two-year statute of limitations, citing the “discovery rule” and interpreting that rule to mean that the statute of limitations did not begin to run until the son actually had a reason to

specifically know that the accountant had breached his professional duties. In other words, there is often virtually no statute of limitations under the “discovery rule.”

Although the Minnesota Supreme Court was in the end steadfast in rejecting the “discovery rule,” the outcome was far too close for comfort. Of the six appellate judges who ruled in the case, six voted to reject the “discovery rule” (five on the Minnesota Supreme Court and one Minnesota Court of Appeals judge), while five voted (three Minnesota Supreme Court justices and two Minnesota Court of Appeals judges) in favor of adoption. The continuing rejection of the “discovery rule” in Minnesota is of paramount importance to all professionals, but especially accountants. It is critically important for the profession to remain actively engaged in the tort reform movement, electoral politics, the legislative process and in the selection of a fair and balanced judiciary.



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