STATE OF MINNESOTA
IN COURT OF APPEALS

A07-0103

Helen Devereaux, et al.,
Appellants,

vs.

Kevin K. Stroup, et al.,
Respondents.

Filed January 8, 2008
Affirmed in part, reversed in part, and remanded
Ross, Judge

Lyon County District Court
File No. 42-CX-06-000035

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Considered and decided by Dietzen, Presiding Judge; Ross, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

ROSS, Judge

Appellants Helen and Douglas Devereaux filed a lawsuit asserting legal malpractice and other claims against respondent Kevin Stroup and his law firm for allegedly giving erroneous gifting and tax advice in 1997 and performing negligent litigation services in the consequent lawsuit in 2002. The district court dismissed the Devereauxs' claims on both stated bases as barred by the statute of limitations after it construed the two bases as arising from the same act—Stroup's allegedly inappropriate advice in 1997. Because the two bases arise from two distinct actions, the district court incorrectly applied the same statute-of-limitations deadlines to both. We therefore affirm in part, reverse in part, and remand.

FACTS

This case concerns a dispute between the Devereauxs and Kevin Stroup regarding two acts of alleged malpractice that occurred while Stroup served as the Devereauxs' attorney. The first act involves gifting and tax advice that Stroup gave the Devereauxs in May 1997. The second act involves Stroup's responsiveness to official requests for financial data and legal advice he gave to the couple while he represented them in 2002 regarding criminal and civil investigations and charges that resulted after the Devereauxs followed Stroup's 1997 advice.

The underlying conflict arose from a breakdown in the financial relationship between the Devereauxs and Ella Blanchette, an elderly friend of the Devereauxs. In early 1996, Blanchette appointed Douglas and Helen Devereaux to serve with limited

powers of attorney over Blanchette's affairs. In May 1997, Stroup, in his capacity as the Devereauxs' attorney, drafted a more liberal power-of-attorney authorization and gave it to Helen Devereaux for Blanchette to execute. The proposed power of attorney would allow the Devereauxs to make gifts to themselves, a power not conferred by Blanchette's original grant of power of attorney. Presumably premised on his prediction that Blanchette would bequeath all of her property to the Devereauxs, Stroup recommended that the Devereauxs begin gifting Blanchette's property to themselves and to their children to reduce the eventual estate taxes. Stroup advised the Devereauxs that their children could then gift the property to the Devereauxs.

Blanchette signed the proposed power of attorney, and the Devereauxs immediately began to gift her property to themselves. Over the next three years, they gifted approximately $380,000 to themselves and their relatives. Blanchette revoked the power of attorney in September 2001, and she and her county's social services department soon began making requests to Stroup about her assets. Among other things, they requested the immediate return of Blanchette's property, an accounting, and to be informed of the location of her assets. Stroup allegedly repeatedly delayed compliance with these requests. He told the Devereauxs to turn over to him between $300,000 and $400,000 of Blanchette's savings bonds. He allegedly then tossed these bond documents to the floor, saying that Blanchette would "die soon anyway." Stroup allegedly advised the Devereauxs to delay complying with Blanchette's requests regarding her property. He did not immediately return the bonds to Blanchette and did not provide Blanchette's attorney with an accounting of her assets.

In March 2002 Blanchette sued the Devereauxs for conversion and to obtain an accounting of her assets, requesting damages and injunctive relief. Stroup then referred the Devereauxs to another lawyer, but his written communication during this period strongly indicates that he was continuing to remain involved as their attorney in some capacity. The Devereauxs eventually settled with Blanchette, paying $140,000 and agreeing to injunctive relief. Helen Devereaux also pleaded guilty to one count of theft by false representation over $35,000.

In January 2006 the Devereauxs served Stroup and his law firm, Stoneberg, Giles & Stroup, P.A., with a complaint alleging that Stroup committed legal malpractice and breached his fiduciary duties, and alleging that his firm negligently supervised him. The district court held that the two alleged malpractice events both arose in May 1997 when the Devereauxs relied on Stroup's advice and began to gift Blanchette's property to themselves, and it therefore determined that both claims were barred by the six-year limitations period imposed by Minnesota Statutes section 541.05. This appeal follows.

D E C I S I O N

This appeal requires us to decide how the statute of limitations applies to the two alleged acts of Stroup's negligence. The parties agree that a six-year limitations period controls. *See* Minn. Stat. § 541.05, subd. 1(1), (5) (2006) (providing a six-year statute of limitations for breach of contract or for negligence). The district court reasoned and Stroup asserts that because the Devereauxs' "legal problems [that] underlie the claim of legal malpractice result from their taking money from Ella Blanchette," both the allegedly negligent advice to direct gifts to themselves and the negligent conduct and

advice during the consequent civil and criminal actions constitute a single cause of action for the malpractice claim. Under that theory, the single act is the sole triggering event for the statute of limitations. Like the district court, Stroup relies on two supreme court cases for this supposition: *Herrmann v. McMenomy & Severson* and *Antone v. Mirviss*. Those cases do not lead us to the same conclusion.

In *Herrmann*, the court determined that a legal malpractice claim accrues and the limitations period begins to run once the party asserting negligence has incurred "some damage" that would prohibit a hypothetical motion to dismiss. *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). The *Herrmann* plaintiffs alleged only a single act of legal malpractice—the law firm's failure to advise the plaintiffs that engaging in certain contemplated business transactions would subject the plaintiffs to liability for federal excise taxes. *Id*. at 642. Materially distinct from the Devereauxs' allegations in this case, the *Herrmann* plaintiffs did not claim that the allegedly negligent law firm also negligently advised the plaintiffs in later litigation arising from the original professional deficiency.

The *Antone* court considered the claim that an attorney committed legal malpractice when he negligently drafted an antenuptial agreement that failed to protect the plaintiff's interest in the appreciation of certain premarital real property. *Antone v. Mirviss*, 720 N.W.2d 331, 332-33 (Minn. 2006). When the plaintiff petitioned to dissolve the marriage, he discovered the agreement's defect, and the dissolution court issued a final judgment that divided the appreciation between the divorcing spouses. *Id*. at 333-34. Relying on *Herrmann*, the supreme court held that once the plaintiff married, he

began to suffer "some damage" because of the defective antenuptial agreement that resulted from the attorney's negligent drafting. *Id*. at 338. The beginning of the marriage therefore marked the beginning of the limitations period. *Id*. But that case differs substantially from this one in the same way that *Herrmann* does; *Antone* did not involve an attorney accused of two separate acts of negligence.

In contrast to those cases, the malpractice complaint in this case plainly challenges two separate acts of negligence: "Defendants provided negligent legal advice and services to and on behalf of Plaintiffs *in rendering legal advice* and *during the proceedings*." (Emphasis added.) And the factual allegations separately entitle "Representation and Legal Advice in Gifting Matter," followed by specific facts concerning the 1997 advice, and "Failure to Cooperate Causing Litigation," followed by different facts concerning the 2002 inaction and deficient advice regarding the litigation.

That the second negligent act would not have occurred without the first does not answer whether the two acts occasioned the same cause of action. The underlying attorney conduct occurred in different periods, 1997 and 2002. The acts are distinct—one incident concerns allegedly bad advice that led to civil and criminal exposure because of conversion and theft, and the other concerns bad advice and stalling that allegedly aggravated the civil and criminal penalties by leaving the Devereauxs in a less defensible litigation position. In other words, the first negligent act purportedly left the Devereauxs liable, and the second allegedly increased their practical liability. Under the Devereauxs' theory, they relied on Stroup's 1997 negligent advice and incurred liability for doing so. Then, when they relied on Stroup to respond to requests and to advise them

concerning the developing legal matters, his negligence worsened their position and therefore increased their liability. It cannot be seriously asserted that a malpractice claim for the second act of negligence would have the same limitations period as the first if the Devereauxs had chosen different counsel in 2002. Stroup would have us interpret *Herrmann* and *Antone* such that an attorney who negligently exposes his client to immediately accrued damages is immune from any liability for additional negligent representation that occurs substantially later and that aggravates the original negligence. We decline to do so.

In this framework, we consider the district court's summary judgment decision. On appeal from summary judgment, this court determines whether there are any genuine issues of material fact and whether the district court misapplied the law. *Herrmann*, 590 N.W.2d at 643. The parties agree on all the material dates and events relevant to the accrual of the Devereauxs' causes of action. The application of the statute of limitations to undisputed facts is a question of law, which we review de novo. *Antone*, 720 N.W.2d at 334.

The Devereauxs' prohibited transactions occurred in May 1997, when they began self-dealing in Blanchette's property and gifting-back with their children, relying on Stroup's advice. At the point the Devereauxs began converting Blanchette's property they incurred some damage, becoming liable to her. *See Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 838 (Minn. App. 1994) (noting that common law conversion is a deprivation of another's property interest), *review denied* (Minn. June 29, 1994). The Devereauxs' first claim for malpractice against Stroup would have survived a motion to

dismiss in May 1997. The district court therefore correctly applied the statute of limitations by ruling that the Devereauxs' malpractice claim for that conduct accrued in May 1997, more than six years before they filed their malpractice suit in December 12, 2005.

But the Devereauxs' claim as stated in their second theory of malpractice is based on Stroup's advice and actions in 2002 when he initially defended the Blanchette accusations and lawsuit, and this claim falls within the limitations period. The conduct occurred five years after the accrual of the 1997 alleged negligence. The allegedly negligent conduct in 2002 includes improper legal advice, litigation-provoking delaying tactics, misrepresentations, and omissions, all which allegedly enhanced the Devereauxs' criminal and civil liability. Any consequent damages for that conduct arose after the conduct. The Devereauxs filed their malpractice suit on December 12, 2005, less than six years after the claim accrued. The claim arising from the second theory is therefore timely. *See* Minn. Stat. § 541.05. The district court erred as a matter of law when it held that the malpractice claim as it related to the 2002 conduct is time-barred.

We observe that the district court's summary judgment memorandum addressed this claim by stating broadly, "[N]othing in the record would substantiate such a separate" cause of action "as a result of . . . actions and advice in 2002." Read literally, this language might suggest that the district court determined that, in addition to dismissal under the statute of limitations, there also is insufficient evidence on the merits to support a malpractice claim premised on the 2002 conduct. But we construe the district court's dismissal narrowly, based on how it had previously framed the issue: "The Defendants

acknowledge[] . . . that the only issue to be determined is the statute of limitations question." We therefore do not reach the undecided question of whether the Devereauxs have presented sufficient evidence of damages to support their malpractice claim on the merits.

The Devereauxs argue for the first time on appeal that this court should adopt a "continuous representation doctrine," borrowed from the continuous treatment doctrine in medical malpractice cases. *See, e.g.*, *Doyle v. Kuch*, 611 N.W.2d 28, 31 (Minn. App. 2000) (noting that a medical-malpractice cause of action does not accrue while the physician is treating the patient for the particular condition). The Devereauxs explain that the doctrine would toll the statute of limitations until the date when the last professional service was performed, reviving their dismissed claim as it regards the 1997 negligence. But this argument was not made to the district court, and it appears first in the Devereauxs' appellate brief. The argument is therefore waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Affirmed in part, reversed in part, and remanded.