Not Reported in N.W.2d, 2000 WL 665684 (Minn.App.)
(Cite as: 2000 WL 665684 (Minn.App.))

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Court of Appeals of Minnesota.
REID ENTERPRISES, INC., Appellant,
v.
DELOITTE & TOUCHE, LLP., Respondent.
No. C8-99-1801.

May 23, 2000.

George G. Eck, Minneapolis, MN, for appellant.

Lawrence M. Shapiro, Minneapolis, MN, for respondent.

Considered and decided by RANDALL, Presiding Judge, AMUNDSON, Judge, and FOLEY, Judge.[FN*]

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

UNPUBLISHED OPINION

AMUNDSON.

***1** Appellant sued respondent, its former accountant, on various theories including malpractice, breach of contract, and breach of fiduciary duty regarding respondent's preparation of appellant's tax returns using an improper procedure. The district court granted respondent's motion for summary judgment on statute-of-limitations grounds, holding that appellant's claims accrued in January 1992, when appellant's liability for IRS penalties was a certainty. Appellant argues that: (1) its claims did not accrue until September 1992, when appellant's potential liability to the IRS was established; and (2) the district court erred in dismissing the case without addressing whether the statute of limitations barred appellant's claims of breach of contract and breach of fiduciary duty.

FACTS

Appellant Reid Enterprises, owner of several automobile dealerships, hired respondent Deloitte and Touche (D & T) in 1981 to perform accounting services. Reid terminated the services of D & T in 1994. In 1997, Reid elected to participate in a settlement negotiated by the National Automobile Dealers' Association for past violations of the LIFO Conformity Rule. The rule requires that taxpayers electing to use the "last in, first out" method of inventory accounting for income tax purposes also use it for credit purposes. Reid admits to have been in violation of the LIFO Conformity Rule because it used the LIFO method for income tax purposes, but not for inventory accounting on annual reports submitted to manufacturers. Reid filed suit against D & T to recover the full amount of its IRS penalty, claiming that D & T failed to advise Reid of the LIFO Conformity Rule and that D & T exposed Reid to violations of that rule by preparing its income tax returns on a LIFO basis instead of the FIFO ("first in, first out") basis it utilized in preparing some of the 12th period monthly reports submitted to Reid's manufacturers.

DECISION

In reviewing a grant of summary judgment, this court must determine (1) whether genuine issues of material fact exist and (2) whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990). This court will view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993).

I.

Reid's claims accrued more than six years before commencement of its lawsuit against D & T

Minnesota Statutes prescribe a six-year limitation period for malpractice claims. Minn.Stat. § 541. 05, subd. 1 (1998). Reid commenced its lawsuit on June 23, 1998, which makes any action based upon D & T's negligence untimely if it accrued before June 23,

1992. A cause of action accrues when the claim could have withstood a motion to dismiss. *Bonhiver v. Graff*, 311 Minn. 111, 116-17, 248 N.W.2d 291, 296 (1976).

D & T's alleged failure to advise Reid that an inconsistency between its 12th period monthly reports and tax returns violated the LIFO Conformity Rule first occurred, if at all, in the 1980's when Reid made its LIFO elections for each of the Reid dealerships. In each and every year since 1982, Reid used LIFO inventory accounting on its tax returns and FIFO accounting on its 12th period monthly reports, which violated the LIFO Conformity Rule. The district court correctly concluded that Reid could have commenced its lawsuit anytime after 1982 and survived a motion to dismiss.

***2** Reid argues that Revenue Procedure 97-44 compelled self-reporting of LIFO Conformity Rule violations that occurred in tax years 1991 through 1996. Therefore, according to Reid, its claim accrued as late as 1996. But any violation of the LIFO Conformity Rule, as it related to Reid's 1991 tax year, occurred in January 1992, when its 12th Period Monthly Reports for 1991 were delivered to manufacturers. In fact, Reid admitted it was "required to pay the IRS * * * penalty." If Reid had not again violated the LIFO Conformity Rule, it would still have been required to pay that penalty because a "non-conformity in any of the six most recent taxable years ending on or before October 14, 1997," created the liability. Reid's own expert testified that the penalty would have been the same regardless of how many conformity violations Reid had during the six years preceding October 14, 1997. Therefore, D & T's negligence for any one year (1991, 1992, or 1993) was the direct cause of Reid's damages. Both the LIFO Conformity Rule and the settlement reflected in Revenue Procedure 97-44 based liability on any single infraction of the rules. Any later negligence by D & T, including that which Reid claims with respect to a 1993 LIFO project, is therefore without consequence.

It does not matter whether we focus on D & T's alleged malpractice in the 1980s or its alleged malpractice in permitting Reid to submit FIFO 12th period monthly reports in January 1992. In either view, the district court correctly concluded that Reid's claims of alleged malpractice accrued before June 23, 1992, and are, therefore, time-barred.

The record is void of evidence supporting Reid's attempt to establish a later accrual date. According to Reid, D & T's alleged negligence in permitting it to use FIFO on the 12th period monthly reports given to creditors in January 1992 (for year 1991) was not actionable until September 1992 because any violation of the LIFO Conformity Rule was not complete until it filed its 1991 tax returns using LIFO. Reid argues that between January and September 1992, D & T could have acted to "cure" the LIFO Conformity Rule violation by obtaining permission from the IRS to use FIFO accounting on the 1991 tax returns. Both Reid's original "completion" argument and this new "cure" argument rest upon a misunderstanding of the LIFO Conformity Rule.

The LIFO Conformity Rule requires that automobile dealers electing to use LIFO for tax purposes must also use it for credit purposes. It is undisputed that, as a result of its LIFO election, not the post-election filing of LIFO tax returns, appellant came under certain obligations, including a requirement of using the LIFO method in any reports or statements sent to others for credit purposes.

Once each of the Reid dealerships made their LIFO elections, in 1981, 1983, and 1986, they were then obligated to use LIFO on all subsequent tax returns by I.R.C. § 472(e)(1981) and Treas. Reg. § 1.472-2(g) (1954). Therefore, analysis of any alleged LIFO Conformity Rule violation by Reid turns on the method of inventory accounting it used in its 12th period monthly reports. These are compared to the LIFO elections that it made for tax purposes in the 1980s, and not to the tax returns that it subsequently filed each year. Properly understood, the LIFO Conformity Rule compels the conclusion that Reid's claims accrued in the 1980s, and certainly no later than January 1992.

II.

The statute of limitations was not tolled by "continuous representation"

***3** Reid suggests that the district court's order acknowledged a "doctrine of continuous representation" that should have tolled the statute of limitations by stating, "Reid's ignorance of D & T's negligence did not toll the statute of limitations unless the negligence was continuing."

Reid buttresses his argument by citing decisions from Texas and New York courts in support of the proposition that the applicable statute of limitations was tolled by the "continuous representation" doctrine. Reid's conclusion that the district court must not have considered D & T's negligence continuing because it did not find that the statute of limitations was tolled is tautological. The district court could not properly make such a statement because Minnesota has not yet recognized the tolling of the limitations statute by "continuous representation" in situations such as this. *See* *Fletcher v. Zelmmer*, 909 F.Supp. 678, 685 (D.Minn.1995) (limiting the continuous representation to situations of continuous and repented breaches). The fact that that rule may be the law in Texas and New York is not persuasive. Furthermore, the continuous representation doctrine is a companion of a discovery rule rejected by the supreme court rejected in *Hermann v. McMenomy & Severson*, 590 N.W.2d 641 (Minn.1999). The law in Minnesota is that a cause of action accrues for limitations purposes when it would first survive a dismissal motion, not at the end of a continuous representation. *See* *Bonhiver*, 311 Minn. at 117, 248 N.W.2d at 296 (stating that a cause of action "accrues at such time as it could be brought in a court of law without dismissal for failure to state a claim") (citation omitted).

III.

The statute of limitations was not tolled by "continuing negligence" or "separate and discrete acts"

Reid argues that its relationship with D & T consisted of a series of separate contracts, each governing services performed during a single tax year. But Minnesota law is clear that when a professional provides a series of separate and distinct services over a period of years, the existence of an ongoing relationship does not toll the statute of limitations with regard to acts of negligence for which service has been completed. *Hermann*, 590 N .W.2d at 643-44. The cases appellant uses to urge adoption of a different rule are distinguishable because, in this instance, the LIFO Conformity Rule does not permit a single deviation. After January 1992, the latest possible date of Reid's LIFO Conformity Rule violation, any separate or continuing negligence by D & T became entirely irrelevant because the penalty for D & T's prior alleged negligence had attached and was irreversible.

IV.

The statute of limitations was not tolled by "fraudulent concealment"

Reid also argues that another reason why the statute of limitations was tolled in the present case is fraudulent concealment. To establish fraudulent concealment, however, a plaintiff must prove there was an affirmative act or statement which concealed a potential cause of action, that the statement was known to be false or was made in reckless disregard of its truth or falsity, and that the concealment could not have been discovered by reasonable diligence. *Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn.App.1992), *review denied* (Minn. Aug. 04, 1992). Rule 9.02 of the Minnesota Rules of Civil Procedure requires that, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

***4** Reid's complaint contains no allegations of fraudulent concealment by D & T, and certainly not sufficient allegations to meet the higher standard of Rule 9.02. Furthermore, even if Reid had pleaded fraud, it failed to respond to the motion for summary judgment by presenting admissible evidence of any fraudulent concealment by D & T. In *Haberle*, a case also decided on a motion for summary judgment, the plaintiff appealed from the grant of summary judgment to the defendant, arguing that fraudulent concealment tolled the statute of limitations. *Haberle*, 480 N.W.2d at 357. Affirming the district court's grant of summary judgment, we said:

> [A]ppellant has produced no facts suggesting [respondent] intentionally concealed anything from her or made statements in reckless disregard of the truth. While appellant's expert expressed opinions as to the cause of appellant's injuries and [respondent's] departures from accepted practice, he did not opine that [respondent] intentionally or fraudulently kept information from appellant regarding the cause of her complications. * * *
>
> Appellant correctly notes that fraud may be proved by circumstantial evidence or "collateral facts." However, while appellant's expert witness may have been of the *opinion* that there was medical negligence, that opinion does not constitute cir-

> cumstantial evidence of a fact that [respondent] knew he had been negligent and intentionally failed to disclose it.

Id. (citation omitted). The plaintiff in *Haberle* failed in response to a summary judgment motion to produce facts supporting the theory of fraudulent concealment. *Id.* Here, Reid also failed in its response to D & T's motion, and its expert's affidavit, like the affidavit of the expert in *Haberle*, fails to constitute proper evidence of D & T's knowledge of its alleged negligence and intentional failure to report it. The record properly before the district court did not contain any admissible evidence that D & T, with knowledge of the alleged negligence and intent to conceal it, made any affirmative act or statement that concealed from Reid its claim in this action. The district court properly rejected Reid's fraudulent concealment theory.

V.

Reid seeks review of two issues that were presented to the district court, but were not passed on by the district court when it granted D & T summary judgment. Reid contends that the district court erred in dismissing the case without addressing whether the statute of limitations barred appellant's claims of breach of contract and breach of fiduciary duty.

A reviewing court will not address an issue raised in the district court if the district court did not rule on the issue. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988); *Minnesota Cent. R.R. Co. v. MCI Telecommunications Corp.*, 595 N.W.2d 533, 539 (Minn.App.1999), *review denied* (Minn. Sept. 14, 1999). This is particularly true when the underlying facts are in dispute. *Id.* at 539. Although presented to the district court and raised in the parties' briefs, these issues were not passed on by the district court. Therefore, this panel need not address the merits of these issues. *See id.* (holding irrelevant the fact that an issue was presented to the district court and argued in the briefs, if the issue was not passed on by the district court).

***5** Affirmed.

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