

IN THE MISSOURI SUPREME COURT

SC92800

**THE STATE OF MISSOURI, ex rel. TIM E. DOLLAR, THE LAW OFFICES OF
TIM DOLLAR n/k/a DOLLAR, BURNS & BECKER, LLC,
MICHAEL P. HEALY, and THE HEALY LAW FIRM, LLC,
Relators,**

vs.

**THE HONORABLE SANDRA C. MIDKIFF,
JUDGE OF THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI at KANSAS CITY
Respondent.**

**Petition for Writ of Prohibition
From the Circuit Court of Jackson County, Missouri
Case No. 1116-CV07373**

RELATORS' REPLY BRIEF

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POINT RELIED ON

I.

RESPONDENT SHOULD BE PROHIBITED FROM DENYING RELATORS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT BECAUSE THE LEGAL MALPRACTICE CLAIM OF MATTHEW HEADLY HOLDINGS, LLC (MHH) AGAINST RELATORS ARISING FROM THE USE AT TRIAL IN AUGUST 2004 OF A FORM OF VERDICT AND SPECIAL INSTRUCTION WHICH REQUIRED THE JURY TO DIVIDE INDIVISIBLE DAMAGES AMONG MULTIPLE CONSISTENT THEORIES OF RECOVERY RESULTING IN A REDUCTION OF THE FINAL JUDGMENT COLLECTED BY MHH IS BARRED BY THE FIVE YEAR STATUTE OF LIMITATIONS BECAUSE MHH FILED ITS LAWSUIT AGAINST RELATORS ON MARCH 10, 2011 – MORE THAN FIVE YEARS AFTER ITS DAMAGES WERE CAPABLE OF ASCERTAINMENT ON FEBRUARY 25, 2005 WHEN THE TRIAL JUDGE REDUCED THE JURY VERDICT BY 2.15 MILLION DOLLARS.

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Mo. Rev. Stat. § 516.120

REPLY ARGUMENT

I.

RESPONDENT SHOULD BE PROHIBITED FROM DENYING RELATORS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT BECAUSE THE LEGAL MALPRACTICE CLAIM OF MATTHEW HEADLEY HOLDINGS, LLC (MHH) AGAINST RELATORS ARISING FROM THE USE AT TRIAL IN AUGUST 2004 OF A FORM OF VERDICT AND SPECIAL INSTRUCTION WHICH REQUIRED THE JURY TO DIVIDE INDIVISIBLE DAMAGES AMONG MULTIPLE CONSISTENT THEORIES OF RECOVERY RESULTING IN A REDUCTION OF THE FINAL JUDGMENT COLLECTED BY MHH IS BARRED BY THE FIVE YEAR STATUTE OF LIMITATIONS BECAUSE MHH FILED ITS LAWSUIT AGAINST RELATORS ON MARCH 10, 2011 – MORE THAN FIVE YEARS AFTERS ITS DAMAGES WERE CAPABLE OF ASCERTAINMENT ON FEBRUARY 25, 2005 WHEN THE TRIAL JUDGE REDUCED THE JURY VERDICT BY 2.14 MILLION DOLLARS.

The fundamental question before this Court is whether the theory of malpractice alleged by MHH against Relators is one wrong resulting in damage or whether it constituted two distinct and separate claims with two different items of damage.¹

¹ Relators note that Respondent's first Point Relied On (pp. 18-36) addresses numerous alleged trial errors committed by Relators which, if the case were tried, would go to the merits of MHH's claims for malpractice. Relators only respond to those arguments or

Respondent's rationale for denying Relators' Motion for Summary Judgment is premised on the unsupported conclusion that the theory of malpractice alleged in this case can be divided into separate claims and separate damages. Respondent's decision that the statute of limitations has not expired cannot survive legal scrutiny if this critical finding fails as a matter of law.

MHH's claims of legal malpractice all arose out of one alleged wrong: Relators' failing to understand the law and procedure applicable to MHH's underlying case, instructions and damages. (Exh. 3, First Amended Petition, p. 7, ¶ 32(a); pp. 8-9, ¶40 (a); pp. 10-11, ¶ 48(a)). The litany of remaining allegations in ¶¶ 32, 40, and 48 are merely derivatives of that single wrong; that Relators did not provide adequate legal representation. The "fact of damage" was capable of ascertainment on February 25, 2005 when Judge Gaitan reduced the verdict based upon an award of duplicitous damages arising out of instructional error.

The significance of this Court's determination of whether cumulative trial errors constituted one wrong or multiple wrongs is immense for if Respondent's logic is affirmed, the statute of limitations could be infinite in legal malpractice cases stemming from trial error. Every conceivable trial error, from objections, to admission of evidence, to the use of experts, to instructions and verdict forms could accrue separately for the purpose of the statute of limitations. This Court recently discussed the policy concerns

allegations that go to this Court's determination of the applicability of the statute of limitations.

associated with statutes of limitations in State v. Mixon, ___ S.W. 3d ___, 2012 WL 5640761 (Mo. banc November 13, 2012). Citing with approval, Dorris v. State, 360 S.W. 3d 260, 269 (Mo. banc 2012), the Court held that “[a] statute of limitations is a legislative declaration of public policy not only to encourage our citizens to seasonably file and to vigilantly prosecute their claims for relief, but also to require them to do so or, otherwise, find their claims proscribed by law.” Id. “Statutes of limitation tend to promote the ‘peace and welfare of society, safeguard against fraud and oppression and compel the settlement of claims within a reasonable period after their origin while the evidence remains fresh in the memory of the witnesses.’” Id. “A statute of limitation provides the defendant a right to know that no claim will be filed against him after a certain time.” Id. at 270.

These policy concerns are self-evident in this case. There would never be finality for trial lawyers for claims arising from trial error if Respondent’s logic prevails. In this case, the alleged wrong MHH suffered occurred at trial and the fact of damage became capable of ascertainment when Judge Gaitan entered his order of February 25, 2005. Whereas more than five years has transpired after the causes of action accrued under § 516.120(4), R.S.Mo., and before MHH filed suit, the Preliminary Writ should be made Permanent and Relators’ Motions to Dismiss and Motions for Summary Judgment granted.

1. Whether the statute of limitations bars MHH’s causes of action is a question of law because no material facts are in dispute.

This case is properly before the Court and Prohibition is appropriate because the statute of limitations issue in this case is a question of law. “Because the capable of ascertainment standard is an objective one, where relevant facts are uncontested, the statute of limitations issue can be decided by the Court as a matter of law.” Powell v. Chaminade College Preparatory, Inc., 197 S.W. 3d 576, 585 (Mo. banc 2006). Summary judgment is generally appropriate in statute of limitation situations because the underlying facts are relatively easy to develop. Rose v. City of Riverside, 827 S.W. 2d 737, 739 (Mo. App. W.D. 1992) (citing Dixon v. Shafton, 649 S.W. 2d 435, 440 (Mo. banc 1983)).

In this case, the undisputed facts material to the question of when the causes of action accrued are:

- a. The lawsuit Matthew Headley Holdings, LLC d/b/a Heartland Snacks f/k/a Incito Capital Group v. McClearly, Inc., Charles Patrick McCleary & Jerry Stokely was filed in the U.S. District Court for the Western District of Missouri on July 12, 2002. (Respondent’s App. at A7, ¶4; Exh. 3, First Amended Petition at p. 2, ¶4).
- b. MHH hired Relators to litigate its lawsuit in federal court. (Respondent’s App. at A8, ¶9; Exh. 3, First Amended Petition at p. 2, ¶5).
- c. MHH’s representative, Mark Stisser, was present at the trial which was presided over by Judge Gaitan on August 12, 2004. (Respondent’s App. at A7, ¶¶2, 4)

- d. Prior to and at trial Relators offered Verdict Form “C” an Approved Instruction form (M.A.I. 36.05 and 36.11), which provided a single damage line if the jury found in favor of MHH on any of the three theories of recovery submitted against all defendants in order to recover indivisible damages. (Respondent’s App. at A9, ¶16; Exh. 3, First Amended Petition at p. 3, ¶¶ 8, 9, 17).
- e. Judge Gaitan rejected Relators’ proposed Verdict Form “C” and submitted a Verdict Form with a damage line for the two contract theories of recovery and a damage line for the concealment theory of recovery. (Respondent’s App. at A9, ¶18; Exh. 3, First Amended Petition at p. 3, ¶9).
- f. The jury returned a verdict in favor of MHH and against McCleary Inc. and assessed damages totaling \$8.6 million on August 12, 2004. On the verdict form submitted by Judge Gaitan, the jury allocated \$4.3 million against McCleary Inc. for breach of express contract and breach of the implied duty of good faith and another \$4.3 million against McCleary Inc. for concealment resulting in a total award of \$8.6 million. (Respondent’s App. at A7, ¶3; Exh. 3, First Amended Petition at p. 3, ¶10).
- g. After the verdict was received, Judge Gaitan gave the jury a Special Instruction requiring the jury to further allocate the amounts between the two contract theories (express contract and implied duty of good faith) and between McCleary, Inc. and the two individual defendants on the concealment claim. In response the jury allocated \$2.15 million for breach of express contract, \$2.15 million for breach of the implied covenant of good faith, and \$4.3

- million against McCleary, Inc. for the concealment claim but no damages against the individual defendants. (Respondent's App. at A10, ¶22; Exh. 3, First Amended Petition at p. 3, ¶¶9, 10).
- h. Judge Gaitan reduced the \$8.6 million verdict by \$2.15 million for a total award of \$6.45 million on February 25, 2005. (Respondent's App. at A7, ¶4; Exh. 3, First Amended Petition at p. 4, ¶15).
- i. The February 25, 2005 Order reducing the damage award contained language that the verdict was reduced because the Verdict Form and Special Instruction provided for duplicate damages on the express contract and implied contract claims. In the same order Judge Gaitan denied McCleary Inc.'s post-trial motion seeking to vacate the \$4.3 million fraud verdict for violating the *McGinnis* Rule. (Respondent's App. at A8, ¶5; Respondent's Brief at p.6).
- j. The February 25, 2005 Order of Judge Gaitan reducing the verdict was public record. (Respondent's App. at A8, ¶6).
- k. MHH's representative, Mark Stisser, was aware of Judge Gaitan's Order, including the reduction of the verdict by \$2.15. (Respondent's App. at A8, ¶8).
- l. Following appeal, on May 19, 2006, the United States Court of Appeals for the Eight Circuit affirmed Judge Gaitan's \$2.15 million reduction based upon duplication of damages and further reduced the verdict by \$4.3 million based upon the *McGinnis* Rule. Matthew Headley Holdings, LLC v. McCleary, Inc., 447 F.3d 115 (8th Cir. 2006). (Respondent's App. at A15, ¶56; Exh. 3, First Amended Petition at p. 5, ¶22).

m. On March 10, 2011, MHH filed the instant lawsuit against Relators alleging seven counts consisting of negligence, breach of contract, breach of fiduciary duty, conversion, constructive trust, equitable relief and punitive damages. (Respondent's App. at A8, ¶8).

As these facts are undisputed, there are not any questions of fact for the jury to decide as to the applicability of the statute of limitations. There is no dispute as to the material facts necessary for this Court to make a determination on the applicability of the statute of limitations. It is a question of law as to whether or not MHH's causes of action are time barred and therefore this issue is properly before this Court.

2. MHH alleges one fundamental wrong; one breach of contract; or one breach of duty resulting in its claimed damages.
 - a. There is but one wrong with one item of damage.

While denying Relators' Motions for Summary Judgment, Respondent found that since all of MHH's claims stem from allegations of legal negligence the five year statute of limitations under § 516.120(4) applied. (Exh. 7 at p. 3). Wright v. Campbell, 277 S.W. 3d 771, 777 (Mo. App. W.D. 2009). Each of MHH's claims against Relators arise from the same operative facts and allege identical damages pertaining to the Relators' understanding of the law and procedures of the case, instructions and damages. (Exh. 3, First Amended Petition, ¶¶32 (a)-(1), 40(a)-(1); and 48(a)-(1). A careful reading of MHH's First Amended Petition reveals that MHH's theory of malpractice centered on the Relators' trial philosophy that the damages resulting from all causes of action were indivisible. Relators' alleged failure was to inadequately advance that philosophy at trial,

improperly arguing to and instructing the jury as to the concept of indivisible damages, as well as failing to properly preserve any objections and arguments regarding indivisible damages for appellate review. Thus alleged damages from the theory of malpractice flowed from these trial errors. However, Respondent inexplicably divided MHH's alleged theory of malpractice into two separate claims; one based on the jury instructions and verdict form submitted at the trial and one based on Relators' failure to recognize and take timely action correcting the defects in the jury's verdict. (Exh. 7, Order Overruling Motion for Summary Judgment at p. 3-4). This impermissible and wholly unsupported splitting of MHH's theory of malpractice at trial inaccurately created the illusion of two distinct and separate claims with two separate items of damages.

The first step in determining when the statute of limitations begins to accrue under § 516.100 is to determine what was the wrong. The term "wrong" is defined as "a violation of the legal rights of another." See Black's Law Dictionary at p. 1445 (5th ed. 1979). This Court has defined a "wrong" as "an invasion of right to the damage of the parties who suffer it." State ex rel and to Use of Donelson v. Deuser, 134 S.W. 2d 132, 133 (Mo. 1939). When there is only one wrong which results in damage, the cause of action accrues when the wrong is committed and the damage sustained is capable of ascertainment. Arst v. Barken, Inc., 655 S.W.2d 845, 847 (Mo.App. E.D.1983).

Respondent erroneously argues that two separate "wrongs" occurred which resulted in separate items of damages, the verdict duplication error and the *McGinnis* Rule error. Yet the allegations in MHH's Amended Petition as well as the arguments set forth in Respondent's Brief spell out that Relators' theory of malpractice is, in fact, the

Relators' alleged trial errors centered on the theories of recovery related to factually indivisible damages including the instructions, the verdict forms and the jury's verdict, itself. These allegations include that "Relators knew that their various legal theories sought recovery of factually indivisible damages at trial, [and] they knew or should have known that the jury had to award the full \$8.6M on each theory it found supported by the evidence to avoid damages from duplication errors;" "Relators were negligent by failing to timely and specifically object to the use of multi-lined special interrogatories at trial under Rule 51;" "by failing to educate the jury on how to avoid duplicating verdicts when completing the forms;" "by failing to identify and correct the duplicate verdicts before the jury was discharged;" "by waiving MHH's right to new trial on damages by failing to raise it [the duplicate verdicts] in Rule 59 post-trial motions and on appeal;" and that "Relators mishandled the fraud instruction and failed to identify and correct a *McGinnis* Rule violation with the fraud verdict." (Respondent's brief at pp. 33-34).

Of significance, Respondent's Brief, Introduction and the accompanying statement of facts acknowledges that the issue of the *McGinnis* Rule was part of the discussion between counsel and Judge Gaitan during a bench conference, after the jury verdicts were read and before the jury was discharged. (Respondent's Brief at p. 6). Clearly all these errors cumulatively constitute Relators' alleged theory of malpractice, i.e., failing to "understand the law and procedures of the case, instructions and damages;" all which occurred at trial and which became a "fact of damage" when Judge Gaitan entered his order of February 25, 2005.

Respondent's parceling of MHH's theory of recovery into multiple claims or wrongs subverts the statutory analysis set forth in § 516.100 for determining the accrual of a cause of action and is contrary to Missouri law which provides that when there is only one item of wrong, the damage occurs when the right to sue arises. "The fact that the damage continued and became worse as time went on does not extend the time within which suit may be brought in some indefinite time in the future." See Hasemeier v. Metro Sales, Inc., 699 S.W. 2d 439, 442 (Mo.App.E.D.1985). That is precisely what happened in this case. The damage that MHH argues that it sustained all flowed from the alleged trial errors of Relators. As alleged in MHH's First Amended Petition, the trial errors of Relators first resulted in Judge Gaitan reducing the verdict based upon the duplication error by \$2.15 million. The damage allegedly grew worse when the Eighth Circuit reduced the verdict further by \$4.3 million based upon the *McGinnis* Rule violation. Each reduction of the verdicts was born from the same alleged malpractice at trial. As such there is only one wrong from which damage arose.

- b. Only one item, not two items, of damage flow from the single wrong.

Respondent contends that even if only one wrong existed, that there were separate items of damages, ascertainable at different dates. In support Respondent relies on Linn Reorganized School Dist. V. Butler Mfg., 672 S.W. 2d 340 (Mo. banc 1984). However Linn arises out of an entirely different set of facts.

In Linn, the plaintiff contracted for the building of a vocational school and field house. The field house roof was completed in July, 1972 at which time a leak was

immediately discovered. Id. at 341. A gym floor was installed four months later. Id. In determining whether the statute of limitations ran from the time the plaintiff knew the roof leaked, the Court relied heavily on the fact that roof leakage occurred before the construction of the gym floor and the completion of the entire project. Id. at 342. The Court expressed concerns that requiring a suit to be filed upon evidence of an alleged faulty construction could require a plaintiff to sue long before the entire construction project was complete. Id. In addition, the Court in Linn accorded weight to the proposition that a statute of limitations does not begin to run in a contract action until the time allowed for correction of defects has passed. Id. at 344.

Respondent also relies on Davis v. Laclede Gas Co., 603 S.W. 2d 554 (Mo. banc 1980). In Davis, the gas utility failed for five years to move a dangerously located meter to the outside of the building rather than installing a vent which interfered with the owner's supply of gas, resulting in lower profits. Id. at 555. This Court held that the wrong continued from day to day, thereby extending the statute of limitations period. Id. at 556.

Both Linn and Davis concerned fact situations which were unusual or as the Court emphasized "peculiar and particular circumstances." Id. This case is more analogous to Arst v. Barken Inc., 655 S.W. 2d at 847. In Arst, the plaintiff homeowner discovered cracks and shifting foundation in the residence in 1969. Efforts to fix the cracks occurred two to four years after the discovery. In 1976, the homeowner discovered additional movement in the foundation. The homeowner filed suit in 1981, claiming that it was only in 1976 that he could maintain this action because only then the full extent of the

damages were known. Id. The Arst court rejected this argument and found that the damage was sustained and capable of ascertainment in 1969. “The fact that the damage was continuing was immaterial as there was a single wrong, not multiple wrongs. The wrong caused damage which was **not a continuing wrong, which caused new and distinct damages.**” (emphasis added). See also Ball v. Friese Construction Co., 348 S.W. 3d 172, 178 (Mo. App. E.D. 2011).

The facts of this case do not create circumstances which are “peculiar” or “particular.” Relators’ alleged errors and malpractice arise from their conduct at trial. In fact, MHH in its First Amended Petition essentially alleges that “but for” Relators’ trial errors, it would not have suffered an ultimate reduction of \$6,450,000 from the jury’s verdict. The wrong that was alleged as a theory of malpractice and the resulting damage incurred due to the reduction of the jury’s verdict by both Judge Gaitan and the Eighth Circuit are factually and causally connected. Respondent does not cite and Relators cannot find any case which permits a legal malpractice cause of action, based upon trial error, to be separated into component parts with separate statute of limitations for each discrete act.

There is but one wrong with one damage which arguably grew worse as time elapsed. This circumstance, in and of itself, does not change the time when the statute of limitations begins to run. Respondent erroneously split the wrong and the damage into separate and distinct parts. The Preliminary Writ should be made Absolute.

3. MHH's damages were sustained and capable of ascertainment on February 25, 2005 when Judge Gaitan vacated \$2.15 Million of the Verdict and MHH's cause of action accrued at that time.
 - a. The injury was complete prior to the Eighth Circuit's decision.

Respondent misconstrues the concept of "complete legal injury" to find that MHH could not have successfully maintained a suit to recover damages until March 10, 2006, the day the Eighth Circuit entered its opinion. Respondent's argument is incorrectly premised on the belief that the damage in this case could not be complete as a legal injury until the underlying action became final in the Eighth Circuit. Respondent's position ignores numerous Missouri cases which specifically have held that a legal malpractice action can accrue prior to final judgment.

The concept of "complete legal injury" hinges on when a plaintiff's right to sue arises. See Anderson v. Griffin, Dysart, Taylor, Penner & Lay, P.C., 684 S.W.2d 858, 861 (Mo.App.W.D.1984). However this does not mean that all damage has to be known prior to when a right to sue arises.

The injurious consequences or resulting damages which bring about the accrual of a cause of action are the indispensable elements of the injury itself, and not the mere aggravating circumstances enhancing a legal injury already inflicted.

Gruenewalden v. Winterman, 360 S.W. 2d 678, 690 (Mo. 1962). In this case, the right to sue or said another way, the "fact of damage" occurred when Judge Gaitan reduced the

verdict by \$2.15 million on February 25, 2005, due to instructional error.

Respondent's reliance on Eddleman v. Dowd, 648 S.W. 2d 632 (Mo. App. E.D. 1983) and Cain v. Hershewe, 760 S.W. 2d 146 (Mo.App.S.D.1988) for the proposition that a legal injury is never complete until a judgment is entered and appeals exhausted is misplaced. Specifically each of these cases is distinguishable because in neither case was there any indication that the plaintiff had suffered any damages which were proximately caused by the attorney's negligence.

In Eddleman, the plaintiff sought to bring a personal injury case. When the plaintiff became dissatisfied with his attorney, not long after the filing of the lawsuit, he hired other lawyers, who were continuing to prosecute the underlying case. No judgment or dispositive disposition of the personal injury case had occurred at the time the plaintiff filed a legal malpractice case against his first attorney. The court of appeals properly found that the legal malpractice case was premature because the underlying case was still pending. Eddleman v. Dowd, 648 S.W. 2d at 633. The appellate court's decision was not inconsistent with the concept of "legal injury" because nothing had been decided in the personal injury case – no decision on the merits, dismissal or summary judgment; no damage existed and as such no evidence existed that would support any conclusion that the first lawyer was the proximate cause of such damage. In this case, MHH has alleged numerous trial errors, directly related to the division of indivisible damages and the application of the *McGinnis* Rule. A final judgment was entered by Judge Gaitan which took \$2.15 million from the jury's verdict in favor of MHH. As argued by Respondent, MHH incurred additional attorney's fees due to the subsequent appeal. This is the "fact

of damage” and the “complete legal injury” that exists in the case at bar, which did not exist in Eddleman.

Arguably, Cain is an anomaly because the *pro se* plaintiff in the legal malpractice suit attempted to sue two Missouri attorneys for whom there was no credible evidence that any attorney-client relationship had been established. Cain v. Hershewe, 760 S.W.2d at 149. The allegation in the malpractice suit was that the attorneys did not represent the plaintiff in a license revocation hearing as well as sue two other attorneys from the State of Arkansas. In concisely affirming the trial court’s summary judgment, the appellate court recognized that since the *pro se* litigant had sued the two Arkansas lawyers in federal court, and those cases were still pending, no evidence established that the two Missouri attorneys had proximately caused any damage to the plaintiff. Id. In the present case if the allegations of MHH in its First Amended Petition were found to be true, plaintiff would have sustained damage for Relator’s alleged trial errors upon Judge Gaitan entering his order of February 25, 2005.

Wallace v. Helbig, 963 S.W. 2d 360 (Mo. App. E.D. 1998), cited approvingly by Respondent actually supports Relators’ position that the statute of limitations accrued in this case when Judge Gaitan entered his Order and final Judgment on February 25, 2005. Plaintiff Wallace sued his insurance agent for negligent failure to provide insurance coverage. After an accident in which plaintiff’s employee was injured, the insurance company denied coverage. A declaratory judgment action was filed and the trial court held that the insurance company was not liable under the policy. When Wallace subsequently filed a lawsuit against Helbig for negligence failure to provide insurance,

Helbig argued that the statute of limitations had run because the plaintiff had notice of damages when the declaratory judgment action was filed by the insurance company. Wallace argued that his damages were not capable of ascertainment until a judgment of \$900,000 was entered against him in the employee's subsequent lawsuit. The appellate court found that neither party was correct. Rather it found that the cause of action accrued for purposes of the statute of limitations when the declaratory judgment was entered. At that point plaintiff had a claim for existing damages, which included litigation expenses and attorney's fees. Id. at 362.

Respondent suggests that the fees that Relators charged cannot serve, in part, as the basis for the legal injury, *citing*, Wilson v. Lodwick, 96 S.W.3d 879 (Mo. App.W.D.2002). (Respondent's Brief at 43). Wilson does not stand for such a proposition. Wilson merely reiterates that a client's expenditure of money for attorney fees alone does not necessarily trigger the running of the statute of limitations. Rather, it is the expending of money for attorney fees in realization that the client is subjected to harm or is exposed to a claim that triggers the accrual of the statute of limitations. Id. at 884. In this case, the expenditure of the additional litigation fees to Relators based upon the alleged trial errors recognized by Judge Gaitan's order of February 25, 2005, is part of the complete legal injury which commences the accrual of the statute of limitations.

Similarly, in the present case, at the point that Judge Gaitan entered his order reducing the jury's verdict from \$8.6 million to \$6.4 million MHH had an existing claim against Relators' alleged malpractice, as well as any potential litigation expenses and attorney's fees, which constituted "complete legal injury" sufficient to maintain a cause

of action for legal malpractice.

- b. The precise amount of damage is not necessary for injury to be legally complete and the statute of limitations to accrue.

This Court held in Dixon v. Shafton, 649 S.W. 2d at 438, that in order to find the fact of damage does not require a precise amount of damage. “In many actions the extent of damage may be dependent on uncertain events” Id. at 439. “The most that is required is that some damages have been sustained so that the claimants know that they have a claim for some amount.” Id. The extent of potential damages need not even be knowable. Klemme v. Best, 941 S.W. 2d 493, 497 (Mo. banc 1997). Thus damages are ascertained when the fact of damage appears, not when the extent or amount of damage is determined. Kennedy v. Microsurgery & Brain Research Inst., 18 S.W. 3d 39, 42 (Mo.App.E.D.2000). The fact that plaintiff can’t prove all damages sustained at the time of suit does not affect when the statute of limitations begins to run. See e.g., Dixon v. Shafton, 649 S.W. 2d at 438; Bormaster v. Baldridge, 723 S.W.2d 533, 541 (Mo.App.S.D.1987).

Despite Respondent’s claim that the legal injury was not complete until the Eighth Circuit entered its opinion, the legal injury was actually complete for purposes of the statute of limitations analysis when Judge Gaitan entered his order and final judgment on February 25, 2005. For purposes of the accrual of the statute of limitations it was not necessary for the Eighth Circuit to enter its final opinion and affirm Judge Gaitan’s reduction of \$2.15 million or to further reduce the verdict by \$4.3 million because the fact of damage and complete legal injury occurred on February 25, 2005.

- c. “Special circumstances” do not need to exist to find that the statute of limitations began to accrue when Judge Gaitan entered his order.

Remarkably, Respondent attempts to create the illusion that “special circumstances” must exist before Missouri courts will find that the statute of limitations have begun to accrue in a legal malpractice case. (Respondent’s Brief at 41-43). Respondent cites a variety of cases with differing results about when a legal malpractice case accrued for purposes of the statute of limitations. However, contrary to Respondent’s assertions, no such “special circumstances” requirement exists under Missouri law.

The questions courts must ask when reviewing whether the statute of limitations has expired is when is the damage sustained and capable for ascertainment? When can the damage be discovered or made known, even though the exact amount of damage is not known? Dixon v. Shafton, 649 S.W. 2d at 438.

In Zero Manufacturing Co. v. Husch, 743 S.W. 2d 439, 441 (Mo. App. E.D. 1987), the plaintiff employed the defendant law firm to prepare contracts for a business transaction. Plaintiff alleged that the defendant attorneys gave legally incorrect advice, which it relied upon to terminate the contract with the other party to the contract. Plaintiff was subsequently advised by the other party that its termination violated Wisconsin state law. Plaintiff continued to consult with defendant attorneys. Plaintiff reiterated its termination of the contract. Subsequently plaintiff was sued by the other

party and suffered over \$300,000 in damages. Plaintiff then sued the defendant law firm. The court of appeals found that the plaintiff's **damage was capable of ascertainment the date that defendant law firm reaffirmed its legally incorrect advise**, rather than when it was sued by the other party or when judgment was entered. *Id.* (emphasis added).

In M& D Enterprises, Inc. v. Wolff, 923 S.W. 2d 389, 395 (Mo. App. S.D. 1996), defendant attorneys represented plaintiff in a case seeking claims for commissions owed and unauthorized use of product formula. After several years, plaintiffs discharged defendant attorneys for failing to properly litigate the case. Subsequently, several years after that, plaintiff entered into a settlement. Although plaintiffs asserted that the statute of limitations for their subsequent malpractice case against defendant attorneys did not accrue until the conclusion of the underlying case, the court of appeals found that damage was sustained and ascertainable very early in the underlying case, **seven years before the defendant attorneys were discharged as counsel and independent counsel was hired**, and eleven years before settlement. *Id.* (emphasis added).

In Ferrellgas Inc. v. Edward A. Smith, P.C., 190 S.W.3d 615, 622-23 (Mo.App.W.D.2006), plaintiff sued defendant attorneys for malpractice based upon trial errors which resulted in a judgment against plaintiff. The court of appeals found that the damage was sustained and ascertainable when judgment was entered in the underlying lawsuit. "Ferrellgas actually did discover the damage at that time . . . **even though the full amount of damage may not have been determined until appeals were exhausted.**" *Id.* at 622 (emphasis added).

Likewise, numerous other cases support a conclusion that no “special circumstances” standard, no bright line test, exists in the application of the statute of limitations in legal malpractice cases. See Bormaster v. Baldrige, 723 S.W. 2d at 540 (damage capable of ascertainment when plaintiff advised by third party that problems existed with trust documents, rather than when he concluded he had a legally cognizable claim against attorney for malpractice); Fischer v. Browne, 586 S.W. 2d 733, 737(Mo. App. W.D. 1979) (claim of legal malpractice accrued when summary judgment entered in underlying case); Murray v. Fleischaker, 949 S.W.2d 203, 206 (Mo.App.S.D.1997) (in claim of attorney malpractice for handling of underlying case, cause of action accrued when judgment was entered in the underlying case); Kuenke v. Jeggle, 658 S.W. 2d 516, 517 (Mo. App.E.D.1983) (damage for malpractice in personal injury case was sustained and ascertainable the date judgment was entered on original suit). All of these cases stand for the proposition that a determination as to the applicability of the statute of limitations is decided on a case by case basis, relying on the general standards expressed under Missouri law.

- d. The statute of limitations begins to run regardless if independent counsel is hired.

Respondent suggests to the Court that independent counsel is necessary in order to ascertain the damage. (Respondent’s Brief at 26). Numerous cases refute this suggestion and demonstrate that a legal malpractice cause of action may accrue prior to any advice by independent counsel or the expenditure of legal fees for independent counsel. See generally, Zero Manufacturing Co. v. Husch, 743 S.W. 2d at 441; Ferrellgas, Inc. v.

Edward A. Smith, P.C., 190 S.W. 3d at 622-23; Fischer v. Browne, 586 S.W. 2d at 739; See Bormaster v. Baldrige, 723 S.W. 2d at 540; Kuenke v. Jeggle, 658 S.W. 2d at 517.

- e. The continued relationship between MHH and Relators and Relators' failure to admit trial errors or malpractice does not prevent the damage from being sustained or capable of ascertained.

Much of Respondent's brief is a litany of Relators' failures at trial and the inference that because they did not advise MHH to retain independent counsel or disclose trial errors to MHH or admit malpractice, that this somehow precludes the accrual of the statute of limitations. This argument is not supported by Missouri law.

In Bormaster v. Baldrige, 723 S.W.2d at 540-41, the court of appeals addressed a similar argument by plaintiff. The court accurately held that:

If the statute of limitations on a malpractice claim against a lawyer does not begin running until he admits he committed malpractice, a lawyer accused thereof has the Hobson's choice of admitting he is guilty of malpractice, thereby starting the statute running, or refusing to so admit, thereby tolling the statute and remaining everlasting exposed to suit.

The appellate court found that such was not the teaching of Dixon. It concluded that "[t]he fact that respondent never conceded he was guilty of malpractice did not prevent the statute of limitations from starting to run." Id.

Likewise, Missouri courts have refused to hold that a continuing relationship

between an attorney and his client postpones the commencement of the running of the statute of limitations. Brower v. Davidson, Deckert, Schutter & Glassman, P.C., 686 S.W. 2d 1, 4 (Mo. banc 1983); Zero Manufacturing Co. v. Husch, 743 SW.2d at 442; Carr v. Anding, 793 S.W.2d 148, 151 (Mo.App.E.D.1990).

- f. Under the reasonably prudent person standard MHH was put on notice that an injury and damages may have occurred.

This Court has held that the “capable of ascertainment” standard is an objective standard. Powel v. Chaminade College Preparatory, Inc., 197 S.W. 3d at 582. The test to be applied is “evidence is such to place a reasonable prudent person on notice of a potentially actionable injury.” Id. Notice of sufficient information to alert plaintiff of the need to make inquiry is the trigger for the running of the statute of limitations. Bus. Men’s Assurance Co. of Am v. Graham, 984 S.W.2d 501, 507 (Mo. banc 1999). Plaintiff will be held to know facts that he could, by exercise of ordinary care commensurate with the circumstances, discover by due diligence or other means within his power. Kuenke v. Jeggel, 658 S.W. 2d at 518. A cause of action accrues in a malpractice case when “the plaintiff knew or should have known of any reason to question the professional’s work. Martin v. Crowley Wade & Milstead, Inc., 712 SW. 2d 57, 58 (Mo. banc 1985).

Respondent contends that despite having knowledge of Judge Gaitan’s order of February 25, 2005, which addressed the issues related to the division of indivisible damages, the McGinnis Rule, and instructional problems, that MHH did not know of facts that put it on “inquiry notice” or that MHH could have discovered by due diligence. Such an argument is incongruous in light of a \$2.15 million dollar reduction in the jury

verdict though Judge Gaitan's order on February 25, 2005. Respondent asks this Court to believe that a reasonably prudent person would not have been on inquiry notice or put on notice of a potentially actionable injury. C.f., Wright v. Campbell, 277 S.W. 3d at 776 (in comparing the facts of Ferrellgas, wherein a \$2 million jury verdict was announced in open court, to the facts in its case, the court noted that "[a]ny layperson could appreciate the adverse impact of this award at the moment it was rendered, particularly in relation to the \$275,000 settlement demand the client had been advised to reject.")

Respondent urges this Court to find that because MHH was in the status of a layperson, that it was absolved of any duty to investigate and discover it had a potential injury. However, ignorance of the plaintiff of his cause of action will not prevent the running of the statute of limitations. Carr v. Anding, 793 S.W. 2d at 150. Said another way, deliberate ignorance cannot relieve a plaintiff from the duty to investigate or discover. The fact that Judge Gaitan reduced a jury verdict by \$2.15 million due to errors in the instruction of the jury as to damages should have placed a reasonably prudent person on notice of a potentially actionable injury.

Additionally, Missouri courts have held that a court room verdict is a matter of public record which is immediately capable of ascertainment. Wright v. Campbell, 277 S.W.3d at 776; Ferrellgas Inc. v. Edward A. Smith, P.C., 190 S.W.3d at 621. MHH does not deny that a representative of the company was in the courtroom during the entire trial, present during the initial jury verdict, present when the jury returned its additional verdict regarding damages upon special instructions, and was aware of Judge Gaitan's order reducing the damages awarded to the jury. It seems implausible that with all these issues

surrounding the division of indivisible damages, the instructing of the jury, and the reduction of the jury's verdict by \$2.15 Million did not pique MHH's interest sufficient to investigate. Relators respectfully urge this Court to find that all these facts, separately and cumulatively, were sufficient to provide MHH, under a reasonable prudent person standard, notice that an injury and damages may have occurred and that as such, "inquiry notice" triggered the running of the statute of limitations.

CONCLUSION

WHEREFORE, for the foregoing reasons, Relators Time E. Dollar, The Law Offices of Tim Dollar n/k/a Dollar, Burns & Becker, LLC, Michael P. Healy, and the Healy Law Firm, LLC respectfully pray that this Court issue a Permanent Writ of Prohibition preventing Respondent from enforcing her Orders overruling Relators' motions to dismiss and summary judgment, and request any further relief this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2013, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system and a copy was sent via U.S. Mail to the parties listed below:

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RULE 84.06(c) CERTIFICATION

The undersigned counsel for Relators herein by certifies that this Reply Brief contains the information required by Rule 55.03. Additionally, this Brief complies with the limitations contained in Rule 84.06(b), in that it contains 6,565 words counted using Microsoft WORD. Furthermore, this Brief complies with Rule 84.06(g) in that the CD-ROM provided to the Court containing the Brief has been scanned for viruses and that is virus-free and has been formatted in Microsoft WORD.

/s/ John G. Schultz

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