IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

D. LYNN DUVALL and CONNIE S. DUVALL,	)	
Appellants,	)	
	)	
v.	)	**WD83645**
	)	
JOSEPH J. YUNGWIRTH,	)	**FILED: November 10, 2020**
Respondent.	)	

Appeal from the Circuit Court of Boone County
The Honorable Jodie C. Asel, Judge

Before Division Three: Edward R. Ardini, Jr., P.J., and Alok Ahuja and Gary D. Witt, JJ.

Lynn and Connie Duvall filed suit against attorney Joseph Yungwirth in the Circuit Court of Boone County, alleging claims for legal malpractice, breach of fiduciary duty, and negligent misrepresentation. The circuit court granted summary judgment to Yungwirth, finding that the Duvalls' claims were time-barred under the five-year statute of limitations found in § 516.120(4).[1] The Duvalls appeal. We affirm.

Factual Background[2]

Lynn Duvall was Mildred Ruth Duvall's nephew. Connie Duvall is Lynn Duvall's wife. We refer to Lynn and Connie collectively as "the Duvalls" in this

---

[1] Statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated through the 2019 Cumulative Supplement.

[2] The circuit court rejected the Duvalls' evidentiary objections to the exhibits supporting Yungwirth's summary judgment motion. The court found that the Duvalls had failed to otherwise controvert any of the paragraphs of the Statement of Uncontroverted Material Facts accompanying Yungwirth's summary judgment motion. The Duvalls do not

opinion, and use Lynn, Connie and Ruth's first names to refer to them individually for sake of clarity.

The Duvalls' claims in this action arise from estate-planning legal services provided by Yungwirth to Ruth in 2002. One of the goals of Yungwirth's work was to qualify Ruth for Medicaid benefits.

On July 28, 2002, Ruth executed documents prepared by Yungwirth to establish the M. Ruth Duvall Trust, with Lynn Duvall as trustee.

Yungwirth calculated that the value of Ruth's assets, together with the amounts she had gifted to the Duvalls and their children in the previous three years, was equal to 98% of the value of the Duvalls' home in Monroe County. In order to qualify for Medicaid benefits, and based on Yungwirth's recommendation, Ruth transferred all of her assets (including her home, bank and investment accounts, and personal property) to the Duvalls. In exchange, the Duvalls executed a quitclaim deed granting Ruth's Trust a 98% interest in the Duvalls' home. The Duvalls alleged that Yungwirth represented to them that, as a result of these transactions, Ruth's property would not be subject to probate, or subject to any claim by the State for recovery of Medicaid benefits.

Following the execution of the documents Yungwirth had prepared, Ruth began receiving Medicaid benefits. While Ruth's Medicaid application was being processed in 2003, the Department of Health and Senior Services ("DHSS") received a "hotline" report that Lynn was financially exploiting Ruth. As a result, on July 11, 2003, DHSS filed a petition seeking to have the Randolph County Public Administrator appointed as Ruth's guardian and conservator. On Yungwirth's

---

challenge those rulings on appeal. The facts alleged in Yungwirth's Statement of Uncontroverted Material Facts are accordingly deemed admitted. *See* Rule 74.04(c)(2); *Cent. Trust & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 320 (Mo. 2014); *Fidelity Real Est. Co. v. Norman*, 586 S.W.3d 873, 883 (Mo. App. W.D. 2019).

recommendation, the Duvalls retained attorney Dan Dunham to oppose DHSS's petition.

In the summary judgment proceedings the Duvalls admitted that, "[f]rom the beginning of the 2003 action to appoint the public administrator as Ruth Duvall's guardian and conservator, Plaintiff Lynn Duvall blamed Defendant Joe Yungwirth for said action being filed."

Following an evidentiary hearing on July 23, 2004, the circuit court found good cause not to appoint Lynn as Ruth's guardian and conservator, and instead appointed the Public Administrator. In open court, the judge expressed his concerns with the appropriateness of the various transactions consummated as part of Yungwirth's estate-planning services in 2002. The judge observed that

> An attorney-client relationship was established on the same day that this client deeded away her entire life's savings and assets, and this was done with the person that stood to gain the most being in the same room while this is happening, without any independent legal advice. The Court is incredulous as to how something like this is – can be done and not reported to the Missouri Bar.
>
> . . . .
>
> The Court feels like, if not Medicaid fraud, not any of that, not bad estate planning, at least it's an extreme gross negligence . . . .

In September 2004, the Duvalls' attorney Daniel Dunham consulted with another attorney about the possibility of asserting a claim against Yungwirth arising out of the legal services he had provided in 2002.

Ruth died on April 26, 2005.

After the circuit court's judgment appointing the Public Administrator as Ruth's guardian and conservator was affirmed by this Court, *In re Duvall*, 178 S.W.3d 617 (Mo. App. W.D. 2005), *Missouri Lawyers Weekly* published an article in October 2005 entitled "Nephew Exploits Aunt's Assets, Loses Chance to Administer Estate." Dunham showed the article to Lynn Duvall "right after it was published."

Lynn Duvall complained that he experienced a substantial decrease in the referrals to his insurance business as a result of the derogatory article.

On January 11, 2006, Dunham made demand on Yungwirth for payment of $31,269.24 in legal fees which the Duvalls had incurred in connection with the guardianship and conservatorship proceeding. Dunham's letter noted that, beyond the appointment of the Public Administrator,

> [i]t now remains to be seen what, if any, other actions will be taken with adverse consequences for Lynn and/or Connie, e.g., the opening of a probate estate to seek Medicaid reimbursements and possibly an accounting action against Lynn [or a discovery of assets proceeding], etc. based on the report of suspected financial exploitation by them.

The letter – on which Lynn was copied – stated that "[w]e have not fully analyzed Lynn's and/or Connie's legal theories or ascertained the full extent of the damages they might have for any legal claim against you based on the property transfers and estate planning services you provided in connection with qualifying Ruth for nursing home Medicaid payments." Dunham noted that he might "refer that matter to other attorneys should that be the direction [the Duvalls] need to go."

On April 18, 2006, DHSS filed a claim in the probate proceeding involving Ruth's estate, which was pending in the Circuit Court of Randolph County. DHSS's claim sought to recover over $75,000 in Medicaid benefits paid by the State on Ruth's behalf. In August 2006, DHSS filed a petition against the Duvalls in the probate proceeding for an accounting and discovery of assets. On July 15, 2008, DHSS filed a *lis pendens* against the Duvalls' Monroe County home, in which Ruth's Trust held a 98% interest, in connection with its claim to recover Medicaid benefits.

From May 2006 through February 2008, the Duvalls consulted with a second attorney about potentially bringing a legal malpractice action against Yungwirth. In February 2008, the attorney wrote to Lynn Duvall. The attorney stated that, in his view, Lynn would likely prevail on the State's claims against him to recover the

Medicaid benefits. He also stated that, "if you do lose and damages are assessed against you either on the real estate or any of the other monetary holdings, such as mutual funds, then I believe you would have a cause of action against [Yungwirth] for negligence."

In June 2007, Dunham wrote to the Assistant Attorney General prosecuting the State's discovery of assets and accounting claims. Dunham wrote that the Duvalls "are wanting to recoup their losses from Joe Yungwirth if they can." He stated that, although they did not intend to pursue claims against Yungwirth while the probate proceeding was pending, "statute of limitations concerns are approaching which might make it necessary to attempt to third-party Yungwir[th] in the pending action."

On August 6, 2008, Dunham sent a second demand by e-mail to an attorney representing Yungwirth. Dunham noted that the State's claims were set for hearing on August 25. In his e-mail, Dunham stated that he expected that, if liability was imposed on Lynn Duvall in Ruth's probate proceeding, it would be based on provisions of the Trust Agreement Yungwirth had drafted. Dunham stated that such a ruling "would create a liability claim against [Yungwirth] by the Duvalls." Dunham asked that Yungwirth "step[ ] up to the plate to help resolve these matters by . . . paying for a compromised amount to either the State or into the estate or [by] join[ing] the Duvalls in defending these matters if he believes the Duvalls should not be liable as a result of his work."

On August 29, 2008, the circuit court entered partial summary judgment in favor of the State in the probate proceeding, finding that Lynn Duvall was liable to account to Ruth's estate, and was liable for all allowed claims, attorney's fees, and costs of administration of the estate.

Five years later, on August 20, 2013, the Duvalls entered into a settlement agreement with the State, which required the Duvalls to pay $10,300 to Ruth Duvall's estate.

Eight days after settling the State's claims, on August 28, 2013, the Duvalls filed the present action against Yungwirth, asserting claims for legal malpractice, breach of fiduciary duty, and negligent misrepresentation. The Duvalls' petition sought to recover as damages the attorney's fees they had incurred beginning in 2003 in the guardianship and conservatorship proceeding involving Ruth; attorney's fees incurred in the probate proceeding involving her estate, beginning in 2006; attorney's fees and a reduction in property value caused by DHSS' filing of a *lis pendens* against the Duvalls' Monroe County property in July 2008; and loss of income to Lynn Duvall's insurance business.

Yungwirth filed a motion for summary judgment, claiming that the statute of limitations had expired on the Duvalls' claims. In a Final Judgment and Decree entered on January 30, 2020, the circuit court granted Yungwirth's motion for summary judgment. In its judgment, the circuit court noted that the Duvalls had admitted three of Yungwirth's statements of uncontroverted material fact. As to the remaining thirteen facts alleged by Yungwirth, the court noted that the Duvalls did not deny them, but instead made evidentiary objections to Yungwirth's supporting exhibits (which the court rejected), and alleged that the facts were "irrelevant" as "contrary to the letter and spirit of § 516.100, RSMo." The court accordingly treated the facts alleged by Yungwirth as admitted.

The Duvalls appeal.

Standard of Review

> The trial court makes its decision to grant summary judgment based on the pleadings, record submitted, and the law; therefore, this Court need not defer to the trial court's determination and reviews the grant of summary judgment *de novo*. In reviewing the decision to

> grant summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper. Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. The facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. . . .
>
> . . . .
>
> The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record.

Green v. Fotoohighiam, 606 S.W.3d 113, 115-16 (Mo. 2020) (quoting *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452-53 (Mo. 2011)); *see ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993).

Discussion[3]

The parties agree that the Duvalls' claims are subject to the five-year statute of limitations found in § 516.120(4), which applies to an action for "injury to the person or rights of another, not arising on contract and not herein otherwise enumerated." The question on appeal is *when* their causes of action accrued, and thus when the statute of limitations began to run.

The Duvalls contend that the statute of limitations did not begin to run on their claims until they reached a settlement with the State in the probate proceeding involving Ruth Duvall's estate on August 20, 2013. They argue that until the settlement was reached, it was uncertain whether they would be held liable for property transfers they received from Ruth, and if so, in what amount. Because the existence, and full extent, of their liability was unknown until the

---

[3] The Duvalls' Brief contains three Points Relied On, which separately challenge the circuit court's grant of summary judgment on their claims for legal malpractice, breach of fiduciary duty, and negligent misrepresentation. Their arguments under all three Points are identical, however, and we address all of them in this single consolidated discussion.

probate proceeding was finally resolved, they argue that their claims against Yungwirth did not accrue until that time.

We emphasize the limited nature of the Duvalls' argument on appeal. They do not dispute that, prior to August 2008, they were aware of potential wrongdoing by Yungwirth, and were on notice that they might have legally cognizable claims against him. The Duvalls acknowledge that all of their claims against Yungwirth relate to legal services he provided in 2002 – well outside the five-year limitations period. They also admit that they incurred damages caused by Yungwirth's alleged malpractice outside the five-year limitations period in the form of attorney's fees (beginning in 2003 in the guardianship and conservatorship proceeding, and beginning in 2006 in the probate proceeding), as well as purported damage to Lynn Duvall's insurance business. The Duvalls argue only that accrual of their causes of action was delayed because they suffered a final item of damage – the settlement of the probate proceeding – in August 2013, just days before they filed this lawsuit.

Section 516.100 governs the accrual of causes of action subject to the statutes of limitations found in chapter 516. Section 516.100 provides, in relevant part,

> that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, *but when the damage resulting therefrom is sustained and is capable of ascertainment*, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

Damage is "sustained and capable of ascertainment" "when it can be discovered or made known, even though the amount of damage is unascertained." *M & D Enterps. v. Wolff*, 923 S.W.2d 389, 394 (Mo. App. S.D. 1996) (citation omitted). "The word 'ascertain' has always been read as referring to the fact of damage, rather than to the precise amount" of damages. *Dixon v. Shafton*, 649 S.W.2d 435, 438 (Mo. 1983) (analyzing *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771 (Mo. App. 1933)). "[T]he fact of damage may be ascertainable 'even if the exact amount of

damage cannot be verified or if some additional damage may arise at a future time.'" *Verbrugge v. ABC Seamless Steel Siding, Inc.*, 157 S.W.3d 298, 302 (Mo. App. S.D. 2005) (citation omitted). "All possible damages do not have to be known, or even knowable, before the statute accrues." *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. 1997) (citations omitted). "That additional damage may yet occur does not matter." *Day v. DeVries & Assocs.*, 98 S.W.3d 92, 96 (Mo. App. W.D. 2003) (citation omitted).

The Missouri Supreme Court has explained that a cause of action can accrue within the meaning of § 516.100 even though the full extent of the plaintiff's damages only becomes known at a later time. The Court observed that,

> [i]n many actions the extent of damage may be dependent on uncertain future events. A personal injury plaintiff might be awaiting an operation which might substantially effect the extent of liability. If a lawyer overlooks the statute of limitations in filing his suit, there may be no certainty that the suit, if filed, would be successful or of the amount which might be recovered. Such uncertainties have never been held to preclude the filing of suit and . . . have not delayed the accrual of the plaintiff's claim for purposes of the statute of limitations. 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.

Dixon, 649 S.W.2d at 439.

The test for accrual of a cause of action under § 516.100 is objective. *See Powel v. Chaminade College Prepatory, Inc.*, 197 S.W.3d 576, 584 (Mo. 2006).

> The issue is not when the injury occurred, or when plaintiff subjectively learned of the wrongful conduct and that it caused his or her injury, but when a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages.

Id. at 584. In other words, the statute of limitations will begin to run when the "'evidence was such to place a reasonably prudent person on notice of a potentially actionable injury.'" *Id.* at 582 (quoting *Bus. Men's Assurance Co. of Am. v. Graham*, 984 S.W.2d 501, 507 (Mo. 1999)). Because the test is an objective one, the statute of

limitations can be decided as a matter of law where (as here) the relevant facts are uncontested. *Id.* at 585.

Missouri courts have repeatedly rejected arguments like the Duvalls'. Prior decisions hold that claims for attorney negligence can accrue prior to the final resolution of collateral litigation which is triggered by the attorney's malpractice, where the malpractice plaintiff incurred damages in defending the collateral litigation prior to its conclusion.

> [T]here are a number of cases which have held that, in malpractice claims against attorneys, the statute of limitations commenced to run before resolution of the underlying dispute upon which those claims were based. . . . In none of those cases was the accrual of a cause of action delayed by the fact that a person sustained later damage resulting from the same acts which also produced earlier ascertainable damage.

Wolff, 923 S.W.2d at 398 (citations omitted).

In *Dixon*, a lawyer negligently failed to discover a contract clause which required his clients to pay contingent accruals of interest and taxes. 649 S.W.2d at 436. After the clients signed the contract with their lawyer's advice, the lawyer discovered the clause and notified the clients of his mistake. *Id.* at 437. The clients then retained new counsel. *Id.* The clients later failed to pay the fees required by the contract and were sued. *Id.* at 436. The clients argued that the statute of limitations on their legal malpractice claim did not begin to run at least until they had been sued on the underlying contractual obligation. *Id.* at 438. The Missouri Supreme Court disagreed. The Court held that the statute of limitations was triggered not when suit was filed against the clients, but when they retained new counsel, having been notified of the lawyer's mistake. *Id.* The Court explained that, when they hired new counsel, the clients

> knew that a substantial claim existed as to them. They had suffered some damage, at least to the extent that they had to hire new counsel who would have otherwise been unnecessary. They also realized they

> could avoid liability, if at all, only with the expenditure of even more substantial amounts for attorney's fees.

Id.

Dixon cited and followed the Supreme Court's earlier decision in *Jepson v. Stubbs*, 555 S.W.2d 307 (Mo. 1977). In *Jepson*, a client pleaded guilty to violation of the Selective Service laws based on his lawyer's poor advice. *Id.* at 309. The client was later released on parole, and became aware of his lawyer's faulty advice. *Id.* The client's conviction was expunged six years later, after which he filed suit against his original lawyer. *Id.* The Court found that the client's claim was time-barred. It held that the statute of limitations accrued when the client became aware of the lawyer's mistake; accrual was not postponed until his conviction was expunged. *Id.* at 312-14. The *Dixon* court described *Jepson* this way:

> It is clear that the full amount of plaintiff's damages could not be determined at the time he was released, inasmuch as it was then assumed that his conviction was valid. *The subsequent vacation of his conviction was a very significant circumstance in determining what damages could be recovered.* This Court held, nevertheless, that he was in a position to protect his rights as soon as he was released from prison, and that the statute of limitations began to run at that time.

Dixon, 649 S.W.2d at 439 (emphasis added).

Thus, even where an uncertain future event (such as the conclusion of collateral litigation) is "a very significant circumstance" in determining the full extent of the client's injury, accrual is not delayed pending that event where the client is otherwise aware at an earlier time of the existence of a potential legal malpractice claim, and has sustained present damages.

The Southern District applied *Dixon* in *Bormaster v. Baldridge*, 723 S.W.2d 533 (Mo. App. S.D. 1987). *Bormaster* held that the plaintiff-client's damages were capable of ascertainment when the client paid a new lawyer to defend him against a suit resulting from their original lawyer's negligence, even where the client was not absolutely certain of his full damages because he had not yet settled the underlying

case or fully paid his new lawyers. *Id.* at 540. The court held that such uncertainties did not delay the statute of limitations from starting to run.

> Appellant's hypothesis, as we understand it, is that because he could not, on [the date of initial payment to the new lawyer], conclude with absolute certainty that he had a legally cognizable claim against respondent, the statute of limitations did not commence running that date. If that argument be sound, the statute has not yet, even at this late date, begun to run, as it has not yet been determined by a court of competent jurisdiction whether respondent owed any duty to appellant in the [provision of legal services], it has not yet been determined by any court whether respondent committed malpractice . . . and it has not yet been determined by any court whether [the prepared trust] amendment was void. . . .
>
> The paucity of merit in such a theory is demonstrated by *Dixon*.

Id.

Other cases have come to the same conclusion: a cause of action for a lawyer's negligence may accrue prior to the conclusion of litigation caused by the lawyer's negligence, if the client incurs some damage at an earlier time. *See, e.g.*, *Coin Acceptors, Inc. v. Haverstock, Garrett & Roberts LLP*, 405 S.W.3d 19, 27-28 (Mo. App. E.D. 2013) (rejecting argument that legal malpractice claim did not accrue until malpractice plaintiffs' damages liability was finally determined in underlying litigation); *Brower v. Davidson, Deckert, Schutter & Glassman, P.C.*, 686 S.W.2d 1, 3-4 (Mo. App. W.D 1984) (finding that cause of action accrued when Internal Revenue Service informed plaintiffs of tax deficiency caused by lawyer's malpractice, even though plaintiffs litigated the correctness of the deficiency assessment, and the amount of their liability, for several years thereafter; rejecting plaintiffs' argument that, until they resolved the tax litigation, "[o]ne could not be sure . . . that plaintiffs even owed any additional taxes, much less the amount they owed").

The Duvalls' claims are plainly time-barred under these cases. Here, well outside the five-year statute of limitations, and as a result of Yungwirth's legal

advice, the Duvalls became embroiled in litigation to decide who would serve as Ruth's guardian and conservator, and whether they would be required to restore assets to Ruth's estate to reimburse the State for the Medicaid benefits she had received. They were required to hire separate counsel, and incur substantial legal fees, to defend their interests in that litigation – fees which they now seek to recover from Yungwirth. Lynn Duvall also claims that he suffered business losses as a result of Yungwirth's malpractice beginning in 2005. More than five years before filing this suit, the Duvalls had consulted two different attorneys concerning the possible assertion of claims against Yungwirth, and they had actually made demand on Yungwirth – not once, but twice – to recoup expenses and liabilities to which they had been exposed as a result of his alleged incompetence. The fact that the full extent of the Duvalls' damages may not have been known, or knowable, until later is not controlling. Given that they had suffered substantial damages stemming from Yungwirth's alleged negligence, and were plainly on notice that their financial losses may be attributable to Yungwirth's actions, the accrual of the Duvalls' causes of action was not postponed until a settlement was reached in the probate litigation, finally determining the full extent of their damages.[4]

---

[4] This case is distinguishable from cases in which an attorney allegedly committed malpractice *in the course of underlying litigation*, where the malpractice plaintiff does not experience <u>any</u> injury until the underlying litigation concludes with an adverse outcome. *See*, *e.g.*, *Murray v. Fleischaker*, 949 S.W.2d 203, 206 (Mo. App. S.D. 1997); *Kueneke v. Jeggle*, 658 S.W.2d 516, 517-18 (Mo. App. E.D. 1983).

This case is also distinguishable from cases in which the malpractice plaintiff retains other attorneys to prosecute claims which the malpractice defendant failed to pursue. In that situation, courts have held that a malpractice claim would be premature until the malpractice plaintiff actually suffers injury through the unsuccessful conclusion of the underlying litigation. *See Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo. App. S.D. 1988) (because suits asserting claims which malpractice defendant failed to pursue remained pending, the malpractice plaintiff "may yet recover in those suits *and may never suffer any damages*"; emphasis added); *Eddleman v. Dowd*, 648 S.W.2d 632, 633-34 (Mo. App. E.D. 1983) (same).

In this case, the Duvalls have alleged that they suffered damages as early as 2003, when they had to retain counsel to defend their interests in collateral litigation which was allegedly caused by Yungwirth's negligence. *See Wolff*, 923 S.W.2d at 395 (distinguishing

Section 516.100 states that, "if more than one item of damage" is involved, the cause of action accrues when "the last item" of damage is sustained and capable of ascertainment, "so that all resulting damage may be recovered, and full and complete relief obtained." The Duvalls argue that they incurred multiple, separate "items of damage" as a result of Yungwirth's negligent legal services, and that "the last item" did not occur until they settled the probate proceeding in August 2013.

The settlement of the probate proceeding was not a distinct "item of damage" which delayed the running of the statute of limitations. As explained above, Missouri decisions have repeatedly held that a cause of action may accrue even though the full extent of the plaintiff's injuries is not yet determinable. The running of the statute of limitations is not suspended by "mere aggravating circumstances enhancing a legal injury already inflicted, or the mere development of such injury." *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771, 773 (Mo. App. 1933) (citation omitted). In *Allison*, the court held that a plaintiff's personal-injury action accrued when the plaintiff was struck in the face with an iron bar, even though the plaintiff was told three years later that he would require surgery to address the effects of the earlier injury. *Id.* *Allison* was cited with approval by the Missouri Supreme Court in *Dixon*, 649 S.W.2d at 438, and has been followed in multiple more recent cases. *See Grady v. Amrep, Inc.*, 139 S.W.3d 585, 588-89 (Mo. App. E.D. 2004); *Day v. DeVries & Assocs.*, 98 S.W.3d 92, 96 (Mo. App. W.D. 2003); *Nettles v. Am. Tel. & Tel. Co.*, 55 F.3d 1358, 1363 (8th Cir. 1995) (citing *Allison*, and noting that "Missouri courts have declined to give to the term 'item of damage' the broad interpretation that [the plaintiff] argues for here"). The various expenses which the Duvalls incurred as a result of Yungwirth's estate-planning services

---

Cain and *Eddleman* because in those cases, there was no "indication that the plaintiff had suffered other damages which were proximately caused by the attorneys' negligence").

(which were completed in 2002) were all "mere developments" of the legal injury which they first suffered in 2003, not separate "items of damage" under § 516.100.

The Duvalls contend that the accrual of their claims is governed by the Missouri Supreme Court's decision in *Linn Reorganized School District v. Butler Manufacturing Co.*, 672 S.W.2d 340 (Mo. 1984). In *Linn*, the plaintiffs brought suit to recover damages to a public-school building allegedly caused by the faulty design and improper installation of the roof. *Id.* at 340. The roof itself was installed more than five years prior to the filing of suit, although the construction of the school building continued into the limitations period. *Id.* at 341. Plaintiffs sought to recover not only for the faulty roof, which "leaked from the first day of construction" and throughout the construction project, but also for the resultant damage to the gymnasium floor (which was installed within the limitations period). *Id.* at 341, 342. The Court found, "in the peculiar and particular circumstances of this case," that plaintiffs had suffered "continual damages," which were not capable of ascertainment at the time of the initial wrongful conduct, but which continued during the construction of the remainder of the facility. *Id.* at 342, 343 (citation omitted).

Linn relied heavily on the Court's earlier decision in *Davis v. Laclede Gas Co.*, 603 S.W.2d 554 (Mo. 1980), from which *Linn* quoted at length:

> "If some completed part of the defendant's conduct will cause all the harm which may result, so that continuance or repetition will not increase the plaintiff's damage, the statutory period properly commences immediately without regard to future conduct, for the certainty of harm is sufficient to allow recovery for all the damage and the first impact generally assures both knowledge of the conduct and incentive to sue. . . .
>
> "Where the potentiality of future harm is not clear, however, limitations should not run until damages become recoverably certain. Thus, the possibility that the defendant may remove the harmful condition or cease his wrongful conduct, or that injury may not result, may prevent the recovery of full prospective damages, so that the

> period limiting an action to recover for such damage does not begin prior to its maturation. Since the amount of future harm will vary with the extent of the later wrongful conduct, recovery is permitted only for that portion of the wrong – whether it be affirmative conduct or a failure to act – which has occurred within the statutory period immediately preceding suit. . . ."

Linn, 672 S.W.2d at 343 (quoting *Davis*, 603 S.W.2d at 556 (in turn quoting *Developments in the Law – Statutes of Limitation*, 63 HARV. L. REV. 1177, 1205, 1206 (1950)).

Linn and *Davis* recognize a "continuing-wrong exception" to "traditional accrual" principles. *Smock v. Associated Elec. Coop.*, 567 S.W.3d 211, 219 (Mo. App. W.D. 2018). That exception does not apply here, because Yungwirth's allegedly negligent acts occurred – and concluded – in 2002. As this Court has explained:

> For the continuing tort exception to apply, the wrong must be continuing or repeating. Damages resulting from one completed, wrongful act, although they may continue to develop, are not adequate. When there is only one wrong which results in continuing damage, the cause of action accrues when that wrong is committed and the damage sustained is capable of ascertainment. Damage resulting from one wrong that continues and becomes more serious over time does not extend the time within which suit may be brought.

D'Arcy & Assocs. v. K.P.M.G. Peat Marwick, LLP, 129 S.W.3d 25, 30 (Mo. App. W.D. 2004) (citations and internal quotation marks omitted).

This case does not involve a "continuing wrong"; on the contrary, all of the Duvalls' alleged damages arose from legal services which Yungwirth provided in 2002. Although Yungwirth's alleged malpractice may have caused "[d]amage . . . [which] bec[a]me[ ] more serious over time," the damages alleged by the Duvalls here stemmed from "one completed, wrongful act" – Yungwirth's allegedly faulty estate-planning services in 2002. *D'Arcy*, 129 S.W.3d at 30. This was not a case in which there was a "possibility that the defendant may remove the harmful condition or cease his wrongful conduct, or that injury may not result" – to the contrary, the Duvalls had suffered damage as a result of Yungwirth's completed, allegedly

negligent actions as early as 2003. *Linn*, 672 S.W.2d at 343 (citations and internal quotation marks omitted). The continuing-wrong exception recognized in "the peculiar and particular circumstances" of the *Linn* and *Davis* cases did not delay the accrual of the Duvalls' causes of action.

Conclusion

The uncontroverted facts establish that the Duvalls' claims against Yungwirth are barred by the five-year statute of limitations found in § 516.120(4). The circuit court's grant of summary judgment to Yungwirth is affirmed.

Alok Ahuja, Judge

All concur.