STATE OF MICHIGAN

COURT OF APPEALS

C. J. ENTERPRISES, LTD., a Michigan corporation, CYNTHIA JONES, and LLOYD JONES,

Plaintiffs-Appellants,

v

RATTENBURY & ASSOCIATES, INC., a Michigan corporation, and BETTY J. RATTENBURY, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
July 9, 1996

No. 165164
LC No. 92-3524-NZ

Before: White, P.J., and T.G. Kavanagh* and S.N. Andrews,** JJ.

PER CURIAM.

In this accounting negligence case, plaintiffs appeal as of right from the circuit court order granting summary disposition in favor of defendants on the basis that the period of limitations had expired. MCR 2.116(C)(7). We affirm in part and reverse in part.

I

Plaintiffs Cynthia and Lloyd Jones, owners of a trucking firm, C. J. Enterprises, Ltd., hired defendants, who were "independent accountants" and enrolled agents of the Internal Revenue Service, not certified public accountants, to prepare plaintiffs' 1985 and 1986 tax returns. The sparse record in this case indicates that, in September 1987, the IRS conducted a civil audit of plaintiffs' 1986 corporate federal income tax return, form 1120. Thereafter, the scope of the audit was broadened to include investigation of plaintiffs' 1985 and 1986 individual and corporate tax returns. In March 1988, plaintiffs were notified by the IRS of a deficiency concerning their payment of employment taxes, and they signed

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** Circuit judge, sitting on the Court of Appeals by assignment.

an "Agreement to assessment and collection of additional tax" concerning this deficiency. Plaintiffs paid the deficiency.

Sometime in late 1988, the criminal fraud division of the IRS began an investigation of plaintiffs' 1985 and 1986 individual and corporate tax returns. In September 1989, plaintiffs met with the two criminal fraud investigators, who indicated that in their preliminary opinion defendants had made various errors in the preparation of plaintiffs' returns and that taxes, penalties, and interest had accrued in excess of $100,000. Eventually, in October 1991, plaintiffs received a deficiency notice from the IRS. On December 3, 1991, plaintiffs filed a complaint against defendants alleging negligence. The complaint was dismissed without prejudice on June 23, 1992, due to a failure to comply with discovery, and they refiled the complaint on July 22, 1992.

The trial court granted defendants' motion for summary disposition, finding plaintiffs' complaint to be time-barred under the three-year statute of limitation for negligence actions inasmuch as they had signed the acknowledgment of employment tax deficiency in March 1988. MCR 2.116(C)(7). Plaintiffs appeal as of right.

II

Where a malpractice action is brought against an accountant, who is or holds himself or herself out to be a state licensed professional, the period of limitation is two years pursuant to MCL 600.5805(4); MSA 27A.5805(4), MCL 600.5838; MSA 27A.5838. *Local 1064, RWDSU AFL-CIO v Ernst & Young,* 449 Mich 322; 535 NW2d 187 (1995). Notably, however, defendants are not certified public accountants, therefore, they are not licensed professionals under the Michigan Occupational Code, MCL 339.701 *et seq.*; MSA 18.425(701) *et seq.* Where an ordinary negligence action is brought against an accountant, bookkeeper, or tax preparer who is neither a CPA nor otherwise state licensed, the period of limitation is three years pursuant to MCL 600.5805(8); MSA 27A.5805(8) [injury to a person or property].

In the latter case, the general accrual statute, MCL 600.5827; MSA 27A.5827, provides that a negligence claim "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." To ensure that a prospective plaintiff's valid cause of action is not time-barred before the existence of a cognizable injury, our Supreme Court has held that, pursuant to § 5827, an ordinary negligence claim accrues on the date that the plaintiff was harmed by the defendant's negligent act, as opposed to the date that the defendant acted negligently. See *Stephens v Dixon,* 449 Mich 531, 534-535; 536 NW2d 755 (1995); *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich 146, 150-151; 200 NW2d 70 (1972). Hence, a claim of simple negligence accrues once the plaintiff is able to allege all elements of the cause of action—duty, breach, causation, and damages—in a proper complaint. *Stephens, supra* at 539.

Here, defendants allegedly breached their duty to plaintiffs on the date that they mailed the prepared 1985 and 1986 tax returns to plaintiffs for their signatures, i.e., March 7, 1986, and March 2,

1987, respectively. Plaintiffs' cause of action did not accrue, however, until they suffered damage as a result of this alleged breach. Harm, as an essential element of a negligence action, is established "not by the finality of the damages, but by the occurrence of identifiable and appreciable loss." *Gebhardt v O'Rourke,* 444 Mich 535, 545; 510 NW2d 900 (1994); *Luick v Rademacher,* 129 Mich App 803; 342 NW2d 617 (1983).

Although there is a dearth of cases from this state analyzing the accrual of a malpractice or negligence cause of action against an accountant, there are several cases which discuss this issue in the context of legal malpractice. See, e.g., *Seebacher v Fitzgerald, Hodgman, Cawthorne & King, PC,* 181 Mich App 642; 449 NW2d 673 (1989); *Adell v Sommers, Schwartz, Silver & Schwartz, PC,* 170 Mich App 196; 428 NW2d 26 (1988); *Gambino v Cardamone,* 163 Mich App 574; 414 NW2d 896 (1987).[1] Because attorneys, CPAs, and a variety of unlicensed accountants dispense tax advice and prepare tax returns, there is an overriding need for consistency among basic principles for malpractice and negligence actions involving these professionals and paraprofessionals. See *Peat, Marwick, Mitchell & Co v Lane,* 565 So 2d 1323, 1325 (Fla, 1990).

In this case, plaintiffs filed their original complaint on December 3, 1991 and, after it was dismissed without prejudice in June 1992, the complaint was refiled on July 22, 1992. Under the three-year limitation period, taking into consideration the nearly seven months that the period of limitations was tolled between December 1991 and June 1992, see *Sherrell v Bugaski,* 169 Mich 10, 16-17; 425 NW2d 707 (1988), plaintiffs' claims that accrued after January 1989 remain viable.[2] Therefore, the question arises whether defendants' alleged negligence resulted in identifiable and appreciable loss for plaintiffs before or after January 1989.

For defendants to prevail on this question, we would be required to find that identifiable and appreciable loss occurred contemporaneously with defendants' breach. Although this claim has arguable merit, given the fact that plaintiffs, as taxpayers, were at all times liable for any lawfully due tax, the argument is flawed. First, it would lead many plaintiffs to file premature and baseless negligence claims against accountants where the mere breach of a professional duty has caused only nominal damages, speculative harm, or the threat of future harm. See, e.g., *International Engine Parts, Inc v Fedderson & Co,* 9 Cal 4th 606, 614; 888 P2d 1279 (1995). See generally anno: *Application of statutes of limitation to actions for breach of duty in performing services of public accountant,* 7 ALR5th 852. Second, we are persuaded that a client's cause of action accrues when he or she learns of the accountant's negligence through notice that a penalty will be assessed. See *Seebacher, supra* at 647; *Adell, supra* at 208; *Gambino, supra* at 580. The client suffers identifiable and appreciable harm when he or she becomes liable for a tax penalty, rather than liable for any lawful tax deficiency. *International Engine Parts, Inc, supra* at 613 n 1.

Because of the posture of this case, we need not decide whether plaintiffs' claim accrued in September 1989, when they were informed by the tax fraud investigators that in their opinion a deficiency notice would be forthcoming from the IRS, or in October 1991, when they actually received the deficiency notice. Both dates are well within the three-year period of limitation. Accordingly,

because plaintiffs suffered identifiable and appreciable loss within three years of the date they filed their complaint, summary disposition was improperly granted as to this claim.

Affirmed in part, reversed in part, and remanded for further proceedings. We retain no further jurisdiction.

/s/ Thomas G. Kavanagh
/s/ Steven N. Andrews

[1] While we recognize that legal malpractice cases are subject to different statutes of limitation than apply in this case, we look to these cases *solely* for guidance in determining the point at which identifiable and appreciable harm occurs in cases alleging negligent tax advice or negligent tax return preparation. Indeed, we recognize that our Supreme Court has limited the accrual/tolling and commission/omission holdings of the *Gambino* and *Adell* opinions. See *Gebhardt, supra* at 546, 554 n 18.

[2] Accordingly, any claim arising from the employment tax deficiency, which plaintiffs acknowledged and paid in March 1988, is time-barred. To the extent that the trial court granted summary disposition of this claim we affirm.