IN THE IOWA SUPREME COURT

NO. 17-0151

MICHELLE R. SKADBURG,

Plaintiff-Appellant,

-vs-

GARY GATELY AND WHITFIELD & EDDY, P.L.C.

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
HON. RUSTIN T. DAVENPORT

APPELLEE'S APPLICATION FOR FURTHER REVIEW OF IOWA COURT OF APPEALS DECISION OF JANUARY 10, 2018

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in using the continuous representation rule to extend the statute of limitations in a non-litigation legal negligence action, (a) where the plaintiff admitted knowledge of the professional error and was able to quantify damages, prior to the date of the final services provided by the lawyer; and/or (b) beyond the date the court terminates the lawyer's responsibility to the client?

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STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals majority opinion (Skadburg opinion) conflicts with existing Iowa Supreme Court authority. The opinion's application of the continuous representation rule to toll the statute of limitations substantially changes and confuses the law governing the discovery rule in cases of alleged professional negligence. Further review is warranted. Iowa R. App. 6.1103(b)(1) [conflict with Supreme Court precedent]; Iowa R. App. 6.1103(b)(3) [changing legal principles]; and Iowa R. App. 6.1103(b)(1)(4) [issue of broad public importance].

Iowa Supreme Court decisions establish that in legal malpractice claims the statute of limitations starts "when the cause of action accrues". A cause of action accrues when the client sustains an actual non-speculative injury and has actual or imputed knowledge of the other elements of the claim. Imputed knowledge or inquiry notice exists when a person gains sufficient knowledge of the facts that would put a person on notice of a problem or potential problem.

The Skadburg opinion adopted a new rule, described as the continuous relationship rule, to toll the statute of limitations until the end

of the attorney client relationship, regardless of whether the client suffered damages **and** had inquiry notice of the claim prior to that time. This contradicts prior Iowa Supreme Court decisions that have declined to adopt the continuous representation rule to toll the statute of limitations where the individual suffered harm and had notice of the alleged negligent action, prior to the termination of the relationship. The opinion's erroneous application of the continuing relationship rule in the context of a traditional discovery rule case, creates confusion with existing Supreme Court precedent and erodes the application of the Supreme Court approved discovery rule. The new Skadburg rule is detrimental to the public policy that underlies limitations of actions, cutting off stale claims.

The Skadburg dissenting opinion summarizes specific conflicts between the majority opinion and both Iowa Supreme Court and Iowa Court of Appeals decisions. The dissent also notes that plaintiff explicitly expressed her awareness of the [alleged] bad advice and resulting injury prior to the termination of the relationship and, used the allegation of wrong advice and resulting injury as a point of leverage to contest her legal fees.

The Skadburg opinion also changed the law regarding when the statute of limitations begins to run in discovery rule cases. It created a notice rule. According to the opinion, the starting date on which the statute of limitations begins to run, is neither the date when the client knew of the alleged professional error and damage caused thereby, nor the date the attorney's responsibility to the client terminated, but is the "date the client is given notice" that the attorney client relationship ended. Under existing precedent, the date of the court order that closed the estate and discharged the administrator and lawyer would start the statute of limitations. Instead, the Skadburg opinion determined that the statute should begin to run from the date of a transmittal letter that enclosed the order. Such a "notice rule" may, in some circumstances, keep the statute of limitation open *ad infinitum*.

The Skadburg opinion contradicts other decisions of the Iowa Supreme Court that designate the statutory starting point as the date of knowledge of error and injury when it coincides with the last possible date when the attorney's alleged negligence became irreversible.

STATEMENT OF THE CASE

Defendants Gary Gately and Whitfield Law Firm deny any wrongdoing, malpractice or liability in the handling of the estate and will continue to refer to Plaintiff Michelle Skadburg's claims of negligence and damages as "alleged". "Negligence" and "damage" are contested facts that were viewed in the light most favorable to Skadburg for the purpose of addressing the statute of limitation issues raised in Defendants' summary judgment motion.

Skadburg alleged she was damaged by legal advice about payment of her mother's estate debts. Gately and Whitfield moved for summary judgment alleging that the action was barred by the applicable five year statute of limitations. Viewing the claims in light most favorable to the non-moving party, the district court found Skadburg's case was based on negligence and ensuing damage that occurred between November 6, 2008 and December 2008. Skadburg's petition was filed on August 19, 2015, almost 7 years later. To support their motion, Gately and Whitfield produced emails authored by Skadburg to prove her actual or imputed knowledge of the alleged negligence and injury. Skadburg's case is a textbook example of inquiry notice. As shown by her own words, she had knowledge of the alleged mistake and related damages.

- On January 30, 2009 Skadburg admitted to Gately: "I would like to think I would have done the right thing and paid off [mother's] debts even if I wasn't **legally** obligated to." (emphasis added, App. p. 44).

- On December 30, 2009 Skadburg acknowledged: "Paying off mom's debt with money that should not have been part of the estate is one issue that has arisen." (App. p. 45) In the same email Skadburg proposes a reduction in legal fees due to this "issue".

- On March 26, 2010 Skadburg asks Gately: "Is any of the money paid to creditors refundable *since those should not have been paid out of the estate assets?"* (Emphasis in Ruling, App. p. 55)

Relying on the email admissions, the district court held Skadburg's knowledge of the alleged error triggered the statute of limitations on either December 30,, 2009 (expiring on December 30, 2014) or March 26, 2010 (expiring on March 26, 2015). The district court found there was no genuine issue of material fact that plaintiff's action was barred by the statute of limitations. The district court granted summary judgment.

The district court also rejected Skadburg's argument that the statute of limitations should be tolled by the continuing representation rule. The district court found when an individual had notice of negligent acts causing damage prior to the termination of the relationship, the continuing representation rule did not toll the statute.

Skadburg appealed and requested that the Supreme Court retain the case, contending that the impact of continuous representation on statute of limitations was uncertain. Gately and Whitfield countered that the requirements for application of the continuous representation rule were well established in Iowa. Gately and Whitfield also urged that the District Court was correct in deciding that the undisputed facts of the Skadburg case excluded it from application of the continuous representation rule. The case was transferred to the Iowa Court of Appeals.

The Iowa Court of Appeals reversed the district court holding: "[h]ere, Skadburg was aware of the error in prematurely paying debts but there is a genuine issue of material fact on the issue of when she knew of the cause of action". (Skadburg Opinion pg. 12) The Iowa Court of Appeals concluded it would be unjust and unreasonable to require her to obtain a second opinion while the attorney client relationship lasted.

McDonald, J dissented, and disagreed with the majority's reading of *Vossoughi v. Polaschek,* 859 N.W.2d 643, 650 (Iowa 2015) and *Dudden v. Goodman*, 543 N.W.2d 624, 627 (Iowa Ct. App. 1995).

The Skadburg majority also adopted Skadburg's argument that the Defendants legal representation ended on August 31, 2010 the date of a transmittal letter which enclosed the probate order closing the estate,

rather than August 18, 2010, the date the probate court granted Skadburg's application to discharge the administrator and close the estate. The malpractice petition was filed on August 19, 2015.

ARGUMENT

The Iowa Court of Appeals opinion substantially changes the law governing the discovery rule in legal malpractice cases. The Skadburg opinion holds that the statute of limitations is not tolled until the client receives notice that the attorney client relationship has ended, even though the client previously knew of both the alleged error and damage and the matter was concluded, effectively ending the attorney's responsibility in the matter prior to that time. Ultimately, the Skadburg opinion renders the concept of inquiry notice irrelevant and eliminates the discovery rule in legal negligence cases.

Gately and Whitfield seek further review because the opinion conflicts with prior decisions of this Court that hold the statute of limitations runs when the person has actual or imputed knowledge of the facts that support all elements of the action. *Franzen v. Deere & Co.*, 377 N.W.2d 660, 662 (Iowa 1985). Furthermore, as the dissenting opinion recognizes the majority opinion also conflicts with *Vossoughi v. Polaschek*, 859 N.W. 2d 643, 650 (Iowa 2015) (Skadburg Opinion, pgs. 15-16).

THE COURT OF APPEALS OPINION CONFLICTS WITH ESTABLISHED IOWA SUPREME COURT PRECEDENT

The five year statute of limitations for professional negligence runs when the claimant has actual or imputed knowledge of the facts that support all elements of the action. IOWA CODE § 614.1(4). The Supreme Court has specifically distinguished between knowledge of facts and knowledge that they are actionable. *Franzen v. Deere & Co.*, 377 N.W.2d 660, 662 (Iowa 1985) ("It is sufficient that the facts support a cause of action. It is not necessary that the person know that they are actionable. Knowledge of the facts and knowledge they are actionable are distinct and unrelated issues for the purpose of the discovery rule.").[1]

In *Dudden v. Good*man, 543 N.W.2d 624 (Iowa Ct. App. 1995) the damage resulted from the negligent preparation of an estate tax return. Plaintiff did not know of the error until she met with an accountant. Because the plaintiff did not know of the error and lacked the ability to discover it the Court of Appeals fashioned a continuous attorney-client

[1] A "cause of action" is a legal term of art. It is unrealistic to formulate a rule based upon a layperson's knowledge of or appreciation for the *actus reus* of a *prima facie* claim for a cause of action. Were it the case, the statute of limitations would not run until the person obtained a favorable legal opinion from malpractice counsel. *Ranney v. Parawax Co.* 582 N.W.2d 152, 156 (Iowa 1998) ("If we adopted Ranney's interpretation of when inquiry notice is triggered, the beginning of the limitations period would be postponed until the successful completion of the plaintiff's investigation.").

relationship exception to the "presumption of knowledge of the law". But in doing so it recognized that *Franzen* was still persuasive authority stating:

> "The Franzen case is persuasive authority under those factual settings where the injured person discovers or in the exercise of reasonable care should have discovered the allegedly wrong act. We are not convinced that Franzen applies to this case. Franzen knew he was injured when his arm was caught in the revolving beater mechanism. He had a duty to investigate once he knew he had been injured. However, the executor in the present case did not know the estate had been injured when the taxes were paid in 1983. There was nothing to put her on notice."
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> Dudden v. Goodman, 543 N.W.2d 624, 626.

The Skadburg opinion relied on *Dudden* to support the proposition that "Skadburg as administrator was entitled to rely upon the advice of counsel and it would be palpably unjust and quite unreasonable to require her to obtain a second opinion while that relationship lasted," notwithstanding the fact that Skadburg was aware of the error in prematurely paying debts. Skadburg Opinion pg. 12. Instead of focusing on Skadburg's actual knowledge, the court avoided the ramifications of inquiry notice under the discovery rule by expanding *Dudden* to require evidence that Skadburg know she had a "cause of action." This conflicts with *Franzen v Deere & Co*., 377 N.W.2d 660, 622 (Iowa 1985) ("It is sufficient that the facts support a cause of action. It is not necessary that the person know that they are actionable. Knowledge of the facts and

knowledge they are actionable are distinct and unrelated issues for the purpose of the discovery rule. [internal citation omitted] There is no suggestion that accrual of the action is postponed until plaintiff learns or should learn the state of the law positing a right of recovery upon facts already known to or reasonable knowable by the plaintiff.").

The dissent also recognizes that the majority opinion conflicts with *Vossoughi* which clarified existing law by holding that the statute of limitations does not accrue until damage has resulted, *Vossoughi v. Polaschek*, 859 N.W. 2d 643, 650 (Iowa 2015) ("No matter what the plaintiff knew or when they knew it, the statute of limitations could not have begun to run any earlier than the date the actual injury occurred."). As the dissent noted, the majority opinion's reliance on *Vossoughi* was misplaced. Instead of supporting Skadburg's claim, it "actually forecloses it." Skadburg Opinion pg. 15.

The Skadburg opinion has created a new and different form of the discovery rule to be used in legal malpractice cases, i.e. knowledge of a "cause of action". For other professions, knowledge of an error and that the error caused injury is sufficient to trigger the start of the limitation period. *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 462-63 (Iowa 2008) ("We emphasize the knowledge standard under the statute is predicated on

actual or imputed knowledge of the facts to support the injury and of the facts to support a cause. [internal citations omitted]. Importantly, we continue to adhere to the rule that the plaintiff does not need to discover that the doctor was negligent.")

The continuing treatment rule, the medical equivalent of the continuing representation rule, does not apply when the plaintiff is on inquiry notice. *Ratcliff v. Graether*, 697 N.W.2d 119, 125 (Iowa 2005) ("Here, by Ratcliff's own admission, he was aware of an eye problem on May 1, 1997, the day following surgery on his left eye. He was on inquiry notice at that point which charged him with knowledge of facts that would have been disclosed by a reasonably diligent investigation.") Likewise, when presented with the issue in the light of architect malpractice, the U.S. Court of Appeals for the Eight Circuit in *Cedar Rapids Lodge & Suites, LLC v. JFS Dev., Inc.*, 789 F.3d 821, 826 (8th Cir 2015) opined:

> "If there is actual proof that the patient *knows or reasonably should know of the injury or harm before termination of medical treatment*, the statute of limitations is not tolled." *Ratcliff v. Graether*, 697 N.W.2d 119, 125 (Iowa 2005). In light of these pronouncements, we are not convinced that the Iowa court would apply the continuous representation rule to toll the running of the statute of limitations here, where the client of an architect, in the exercise of reasonable diligence, should have discovered its claim before construction was completed."

The Skadburg opinion now creates a different standard for attorneys that presumably keeps the statute open for as long as the client delays in obtaining a favorable legal opinion regarding the existence of a legal cause of action.[2]

The Skadburg opinion is based upon the rationale in *Amfac Distri. Corp. v. Miller*, 673 P. 2d 795, 799 (Ariz Ct. App. 1983), that "…a client will not have to challenge and question every decision made by his attorney or routinely double check his attorney's conduct and thus the client will have peace of mind to allow the legal process to work fully and finally in the hopes that his position will be vindicated and he will not be forced to disrupt his relationship with his lawyer to preserve what he thinks may be a valid malpractice claim". The Skadburg majority failed address, however, the Arizona Court's later determination that the *Amfac* holding is limited to litigation cases, as explained in *Best Choice Fund, Ltd. Liab. Co. v. Low & Childers, P.C.,* 228 Ariz. 502, 507, 269 P.3d 678, 683 (Ct. App. 2011):

> "…As our supreme court has recognized, the holdings in the Amfac cases were limited to malpractice claims based on acts or omissions that occurred in the context of litigation: In contrast [to litigation], when a legal malpractice action arises in a non-litigation context, the cause of action accrues when the plaintiff knew or should have known that its attorneys had provided negligent legal advice, and that the

[2] The facts of this case certainly do not merit such a serious departure from existing Iowa authority. Skadburg was actually in the office of her new counsel on February 12, 2014, over a year and a half before the statute, under either continuing representation theory, expired. APP. Pg 9, Fact No. 8.

> attorneys' negligence was the direct cause of harm to the plaintiff, notwithstanding that the plaintiff's damages may not have been fully ascertainable at that time. This is because the harm is "irremediable" or "irrevocable" at that point and will not be avoided by a future appeal or other court proceedings. [Internal citations omitted]
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> *Best Choice Fund, Ltd. Liab. Co. v. Low & Childers, P.C.,* 228 Ariz. 502, 507, 269 P.3d 678, 683 (Ct. App. 2011)

The litigation versus non-litigation distinction is important. In litigation neither the error nor damages can be determined until the litigation runs its course. In a non-litigation matter, e.g., advice, document drafting, etc. the error and damages can be determined without reference to ongoing judicial action.

The *Best Choice* "irremediable or irrevocable" starting point is consistent with *Neylan v. Moser,* 400 N.W.2d 538 (Iowa 1987), that, while acknowledging *Amfac,* held the date of injury "coincides with the last possible date when the attorney's negligence becomes irreversible." *Id. At 542.*

Skadburg is a non-litigation case. As the dissent recognized "Because Skadburg had actual knowledge of the alleged breach and injury by March 2010, at the latest, application of the discovery rule does not avoid the bar." Skadburg Opinion, pg. 15.

CONTINUING REPRESENTATION EXTENSION ENDS WHEN THE COURT TERMINATES THE ATTORNEY'S RESPONSIBILITY.

Even if the court of appeals was correct in applying a continuing representation rule, the extension must end when the court terminates the attorney's responsibility. Skadburg alleges that "Gately [and Whitfield] were negligent in his representation of Skadburg in connection with the probate of her mother's estate." (App. p. 12). If a continuing representation rule applies, the relationship ended on August 18, 2010, when the probate court entered the order that terminated Gately's responsibility with respect to representation of the estate and the attorney client relationship. Skadburg's Petition was filed on August 19, 2015, five years and one day after the end of the representation.

Applying the irremediable and irrevocable test referenced in *Best Choice* and affirmed in *Neylan*, any extension of the statute of limitations must be based on the discovery rule and the statutory starting date calculated from the last possible date when the attorney's negligence becomes irreversible. Assuming for point of argument that any alleged error could have been remedied or reversed after December 30, 2009, the absolute final date that any such error could have been corrected was August 18, 2010, the date when the probate court granted Skadburg's

application to close the estate by holding: "10. That the Final Report and Supplemental Final Report of the Administrator herein be and the same are hereby approved and ratified, including all of the acts and conduct of said Administrator, and said Administrator is discharged as such; that said estate is hereby finally settled and closed." APP. Pg. 47. The Estate was Gately's client and Skadburg was its Administrator. Neither the Estate nor the Administrator existed after August 18, 2010. It was not the August 31, 2010 transmittal letter that ended the attorney client relationship, it was the Court Order of August 18, 2010. But the Court of Appeals held otherwise: "For the same reasons a client is entitled to rely upon counsel's superior knowledge, a client's potential malpractice action should not be precluded by the termination of the attorney-client relationship before being given notice it has ended." Skadburg Opinion pg. 13. Within the context of the continuing representation rule, the holding is an anomaly to the concept of judicial finality. It ignores the reality of the probate court's order but more important it creates an open-ended statute of limitations against lawyers. Under the majority's opinion, unless and until an attorney has sent a formal closing letter, the statute of limitations would not begin to run on claim that may be decades old. The Iowa Court of Appeals holding creates bad public policy.

CONCLUSION

Defendant Appellees, Gary Gately and Whitfield & Eddy, P.L.C. respectfully request this Court to grant their application for further review, and upon further review, vacate the decision of the Iowa Court of Appeals and affirm the Judgment of the District Court.

REQUEST FOR ORAL ARGUMENT

If this application is granted, Gary Gately and Whitfield & Eddy, P.L.C. respectfully request oral argument on the issues addressed above.

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CERTIFICATES OF FILING SERVICE, AND COMPLIANCE.

I certify that on January 30, 2018 I electronically filed the foregoing Application for Further Review with the Clerk of the Iowa Supreme Court via the Iowa Electronic Document Management System per Rule 16.317(1(a) which electronically notifies Appellant's Counsel Peter Riley.

I certify this Application for Further Review complies with the type-volume limitation of Iowa R. App. 6.903(g)(1) containing less than 3,331 word excluding parts exempted by the Rule.

Additionally, the Application complies with the typeface requirements of Iowa R. App. P. 6.903(1)(c) and is prepared using Georgia size 14 font.

January 30, 2018

Lylea D. Critelli