1999

Deveaux Clark, Marjorie Clark v. Deloitte and Tocuhe LLP, Touche Ross and Co. : Reply Brief

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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IN THE UTAH SUPREME COURT

DEVEAUX CLARK and MARJORIE CLARK, Plaintiffs/Appellants v. DELOITTE & TOUCHE LLP, formerly known as TOUCHE ROSS & CO., *et al.*, Defendants/Appellees.	Appellate Court Case No. 990772-SC Subject to Assignment to the Court of Appeal Priority No. 15

APPELLANTS' REPLY BRIEF

APPEAL FROM FINAL ORDER OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE J. DENNIS FREDERICK PRESIDING

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IN THE UTAH SUPREME COURT

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v.

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In this *Reply Brief*, Appellants Deveaux and Marjorie Clark ("Clarks") will address five arguments raised by Deloitte & Touche, LLP ("Deloitte") in its *Opposition Memorandum.*[1]

UNTIL SUCH TIME AS THE CLARKS' TAX LIABILITY BECAME FIXED, THEY HAD ONLY AN "INCHOATE" OR CONTINGENT WRONG THAT WAS NOT AN ACTIONABLE, LEGAL OR REDRESSABLE INJURY

Deloitte argues that in Utah "the general rule is that a negligence action accrues when the negligence occurs . . ." (Deloitte's *Br.*, p. 6). That is an incorrect statement of the law. A cause of action accrues when the plaintiff could have first filed and prosecuted his or her lawsuit to a successful completion. *Meyer v. McDonald*, 635 P.2d 84, 86 (Utah 1981). Moreover, "accrual" as that term is used with regard to an event triggering the commencement of a statute of limitations is not merely the point in time a person first realizes that there has been a breach of duty owed to him or her by another. There must also be "actionable," "legal," or "redressable" injury. Whether one uses the term "actionable injury," "legal injury," or "redressable injury," the concept is one of "ripeness."

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[1] It is Appellants' belief that Deloitte's other arguments do not merit a response since they are obviously flawed. Deloitte, for example, contends that "as a practical matter, a plaintiff rarely, if ever, would need to prosecute its tax claim and its malpractice action simultaneously" because a taxpayer could enter into a tolling agreement with the accountant until the Tax Court decided the case. (Deloitte's *Br.*, pp. 18-19). But that is pure speculation on the part of Deloitte unless Deloitte is conceding that it would readily have given such a tolling agreement to Appellants. If that is so, then Deloitte would certainly have never moved to dismiss the Clarks' claims based upon the statute of limitations, which it did. Additionally, Deloitte ignores the fact that when it repeatedly advised the Clarks to "contest" the IRS tax deficiency assessment and the Clarks relied upon that advice, Deloitte tolled the running of the statute of limitations. *See infra* at page 22.

An actionable injury, legal injury, or redressable injury is some cognizable and discernable detriment resulting from another's breach of duty for which the injured party can seek compensation through a court of law. *See Winn v. Estate of Holmes*, 815 P.2d 1231, 1235 (Okl. App. 1991). Within the factual context of the instant case, the Clarks had no legally cognizable injury until the Tax Court decision was handed down. Prior to that time, the Clarks had an "inchoate" or contingent injury which, under Utah law, will neither support a claim for relief nor trigger the running of the state of limitations. *See Seale v. Gowans*, 923 P.2d 1361 (Utah 1996).

In *Seale*, the Utah Supreme Court decided whether a deceased plaintiff's medical malpractice claim was barred by the two-year statute of limitations contained in § 70-14-4 of the *Utah Code*. The defendant doctor in that case had misdiagnosed the deceased plaintiff's breast cancer. When the cancer was finally discovered approximately one year later, the patient underwent a radical mastectomy. Three years later, the cancer reappeared in the patient's left hip and she immediately sued for malpractice. The defendant doctor argued that the cause of action had actually accrued in 1987 when the misdiagnosis occurred because the plaintiff had sustained injury in the form of "enhanced risk" of the cancer's reoccurrence. Emphasizing that the law does not recognize an "**inchoate wrong**" and that a claim for negligence is not actionable until there is "**actual loss or damage**," the Utah Supreme Court rejected the notion that the patient's claim had accrued in 1987.

The *Seale* Court went on say that:

> **Our holding that damages in the form of an enhanced risk only are not sufficient to start the running of the statute of limitations not only comports with generally accepted principles of tort law, but also minimizes the filing of speculative suits thus saving judicial time and resources.** More importantly, any alternative ruling might effectively preclude a patient from any recovery, even when the significant harmful effect, such as the reoccurrence of cancer, later occurs . . .**[I]f we were to adopt defendant's position, plaintiffs who are not exhibiting any actual physical harm but are facing the running of the limitations period would be forced to bring an action for injuries that may or may not occur in the future.** However, many of these plaintiffs will be unable to produce the necessary evidence to show that the future harm is more likely to occur than not. Yet if the harm, such as the reoccurrence of cancer, actually later occurs, the plaintiff would be precluded from any recovery for devastating injuries by reason of having acquired an earlier claim for purely speculative ones. **We believe that the better approach is to wait until the potential harm manifests itself, allowing for a more certain proof and fewer speculative lawsuits.**

(*Id.* at 1365-66) (emphasis added). The same rationale applies to the Clarks' situation. Unless and until their tax penalties and assessment became fixed by the Tax Court's decision, their injuries were contingent, inchoate, and speculative and so much so that the Clarks could not have maintained a cause of action against Deloitte. The Clarks' injuries were, in other words, not "**ripe**" for decision. *See Colonia Insurance Co. v. Williams*, 941 F.Supp. 606, 608 (N.D. Miss. 1996) (holding that so long as a party's claim is subject to or may be disposed of by another pending proceeding, it is not "**ripe**" for litigation); *Boerger v. Levin*, 812 F.Supp. 564, 565 (E.D. Pa. 1993) (holding that in a legal malpractice action, the client's claims against the attorney are not "**ripe**" until the underlying lawsuit is adjudicated).

Deloitte attempts to get around the reasoning of *Seale* and the question of "ripeness" by arguing that the Clarks did in fact sustain actionable, legal, or redressable injury when they received the IRS *90-Day Letter*. Deloitte argues that at this point in time the Clarks began to incur legal fees in order to challenge the tax assessment and penalty, and that such fees constitute an actionable injury. (Deloitte *Br.*, p. 10). But that argument is specious. It is specious because it assumes that upon receipt of the *90-Day Letter*, the Clarks could have sued for and recovered from Deloitte the cost of pursuing their tax appeal, which they could not have done. Just because a taxpayer is audited does not mean that the tax advice was below the standard of care. Just because the taxpayer receives a *90-Day Letter* does not mean that the tax advice was substandard. More importantly, unless the tax advice was below the standard of care, the taxpayer has no right to sue his or her accountant for recovery of these expenditures. *See Bronstein v. Kalcheim & Kalcheim, Ltd.*, 414 N.E.2d 96 (Ill. App. 1980).

Bronstein is a case on point. The only difference between *Bronstein* and the instant case being that the defendants in that action were tax attorneys instead of accountants. The plaintiff in *Bronstein* sued his attorneys for bad tax advice on a divorce settlement. The attorneys, who represented themselves as "**experts in the field of federal income tax law**" advised Mr. Bronstein that if he labeled the reimbursement of his wife's attorney's fees as "additional alimony," these payments would be deductible on his federal income tax return. But the IRS took a different view and disallowed the deduction as a result of an audit.

Following that audit, Mr. Bronstein received a *90-Day Letter* informing him of the additional tax assessment.

Bronstein sued his attorneys for malpractice citing as his injuries the burden of either paying the additional tax or filing a petition in the United States Tax Court to contest the IRS's assessment of additional taxes owing. The attorneys moved to dismiss and the trial court granted that motion. The Illinois Court of Appeals affirmed, reasoning that Bronstein's action was "**premature**" because:

> **The issuance of the notice of deficiency (*i.e. 90-Day Letter*) does not establish the plaintiff has suffered a loss. Furthermore, because plaintiff's tax liability has not yet been determined in the Tax Court, it is clear that plaintiff has not yet suffered any actual loss.**

(*Id.* at 98) (emphasis added). Like Bronstein's malpractice suit against his tax attorneys, the Clarks suit against their tax accountants was "**premature**" until such time as the Tax Court ruled that the tax advice was "bad" or "unlawful" thereby entitling them to sue for damages (attorney's fees, penalties, etc.) caused by that advice.

Now Deloitte may wish it to be so, but *Bronstein* is not an aberration. In fact, when faced with the same issue (*i.e.*, the accrual of malpractice cause of action when a proceeding in another forum may be dispositive of the underlying malpractice claim), Courts typically hold that the malpractice action is "**premature**," "**contingent**," or "**speculative**." *See Boerger*, 812 F.Supp. at 565; *Bowman v. Abramson*, 545 F.Supp. 227 (E.D. Pa. 1982). *See also K.J.B. Inc. v. Drakulich*, 811 P.2d 1305, 1307 (Nev. 1991) (holding that when there has been "no final adjudication" of the matter in which the malpractice allegedly occurred, the element of injury or damage remains "**speculative and remote, thereby making premature** the cause of action for professional negligence"); *Amfac Distribution Corp. v. Miller*, 673 P.2d 792, 794 (Ariz. 1983) (stating that for legal malpractice cases, the injury or damaging effect on a client "**is not ascertainable** until the appellate process is completed or waived by failure to appeal");[2] *Golden v. Duggins*, 374 So.2d 243, 245 (Miss. 1979) ("**no injury**" until other action concluded); *Marchand v. Miazza*, 151 So.2d 372, 375 (La. App. 1963) ("**premature**" until underlying lawsuit decided since damages are speculative until then); *Wright v. Diabold*, 217 N.Y.S.2d 238 (1961) ("**premature**" because damages are "**contingent**" upon outcome of other suit).

The foregoing case law all involve situations in which the client and victim of legal malpractice was attempting to sue his or her attorney when there was another action pending that would ultimately be dispositive of the alleged malpractice. In each of these cases, the Appellate Courts concluded that until the underlying lawsuit was decided, the client's claims were not actionable because they were "**speculative**," "**contingent**," or "**premature**." But the concept is really one of "**ripeness**" or justiciability. More importantly, it applies to situations other than malpractice claims. It applies to every instance in which there is another proceeding pending which may dispose of a party's claims. *See Colonia Insurance*,

[2] *Amfac* was apparently cited with approval by the Utah Court of Appeals in *Merkley v. Beaslin*, 778 P.2d 16, 19 (Utah App. 1989). *Merkley* holds that on a legal malpractice claim, the cause of action accrues and the statute of limitations commences to run when the act complained of is discovered or, in the exercise of reasonable care, should have been discovered. (*Id.* at 17).

941 F.Supp. at 608; *Aircraft and Diesel Equipment Corp. v. Hirsch*, 62 F.Supp. 520, 524 (D. D.C. 1945); *Romano v. American Casualty Company*, 834 F.2d 968 (11th Cir. 1987).

Other Courts have applied this same "**ripeness**" reasoning to hold that the client's cause of action for legal malpractice does not accrue and, therefore, the statute of limitations does not commence to run until the underlying suit is decided. *See Shaw v. State Department of Administration*, 816 P.2d 1358 (Alaska 1991); *Pizel v. Zuspann*, 795 P.2d 42, *mod'fied* 803 P.2d 205 (1990); *Stephens v. GMC*, 905 P.2d 797 (Okl. 1995). *See also Boerger*, 812 F.Supp. at 566 fn. 4 (noting that until the claim becomes "**ripe**" after the underlying lawsuit has been decided, the statute of limitations does not begin to run). The rationale for concluding that the statute of limitations does not commence to run in legal malpractice actions until the underlying litigation is finally determined was cogently stated by the Oregon Supreme Court in *United States National Bank v. Davies*, 548 P.2d 966 (1976).

In *Davies*, a malpractice suit was filed against the defendant attorneys to recover money the client paid in settlement of lawsuit with a corporation in which he was an officer. The corporation was in the funeral marker or monument business and had on hand customer trust funds for prepaid funeral related services. The corporation sued the former officer for having sold his stock to the corporation and accepting those corporate trust funds in payment for his shares of stock in the corporation, which was illegal. The officer had done this solely upon the advice of his attorneys, and the malpractice action was commenced to recover the settlement money and attorney's fees incurred by the client in defending the suit brought by the corporation. The attorneys moved to dismiss arguing that the statute of limitations had expired and the trial court granted that motion. On appeal, the Oregon Supreme Court reversed. In doing so, the *Davies* Court specifically rejected the notion that incurring attorney's fees to defend the lawsuit would give rise to "actionable" or "legal" harm when the underlying malpractice had not been established:

> There is no doubt that . . . [plaintiff's] necessity to defend the action caused him damage more than two years prior to commencement of the present action. **It is not so clear, however, that at that time it could yet be determined that his expense of defense *was caused* by negligent advice by defendants**. In many situations, the closeness of the legal questions involved would make it impossible to ascertain until the ultimate determination of the case whether it was brought as a result of the attorney's bad advice or whether it was a result of a misapprehension on the part of the party who sued as to his legal rights. **In the present instance, if . . . [plaintiff] had won the case brought against him, he would not normally be in a position to claim that negligent advice on the part of the present defendants was a cause of his expense of defense**.

(*Id.* at 969) (emphasis added). Like *Bronstein*, *Davies* also makes clear that even though the client may have incurred legal expenses as a result of the advice he or she received from an accountant or attorney, there is no right to sue to recover those expenses unless and until it is determined that the advice was "bad" or unlawful.[3] Again, this is a question of "**ripeness**"

[3] *Davies* also disposes of Deloitte's argument that even assuming the taxpayer's injuries do not become actionable until the Tax Court decision, the taxpayer suffers no harm by making the statute of limitations commence to run upon receipt of the *90-Day Letter* since "a Tax Court decision would typically be issued well prior to the expiration of the malpractice limitation. . . ." (Deloitte *Br.* p. 19). Deloitte goes on to argue, for example, that even if the statute of limitations commenced to run upon the Clarks' receipt of the *90-Day Letter*, they still had 15 months in which to commence their lawsuit following the Tax Court decision. (Deloitte's *Br.*, p. 18). This same situation, however, also occurred in *Davies*. In

and that is why *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323 (Fla. 1990) is the better reasoned case law on accountant malpractice.[4]

Like the Clarks, *Peat, Marwick, Mitchell* involved husband and wife taxpayers suing their accountants for bad tax advice, including the preparation of their federal income tax return. The accountants in *Peat, Marwick, Mitchell* had advised the taxpayers to invest in limited partnerships and to claim deductions for losses incurred by those limited partnerships. Like the Clarks, the Lanes received a *90-Day Letter* from the IRS. The Lanes,

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Davies, the advice to sell the stock was given in 1967, the corporation sued the officer in August of 1971, the settlement occurred in May of 1973, and the malpractice action was commenced in 1974. Oregon had a two year statute of limitations on legal malpractice, which means that from the time the suit was commenced and attorney's fees were incurred by the officer in defending that suit until the eventual settlement with the corporation, the two year statute of limitations had not expired. But this was irrelevant to the *Davies* Court's decision since the focus is upon when the cause of action accrued. That is the key determination, because a party is entitled to the full limitation period to investigate, prepare and bring their action, especially the Clarks who upon the sale of their business retired to California, which was the state of their residence when the tax return was filed. (*Rec.* p. 202).

[4] Deloitte argues that the fact that *Peat, Marwick, Mitchell* is the only case to hold that a taxpayer's cause of action against his or her accountant does not accrue until the Tax Court decision is rendered somehow makes that decision defective or otherwise suspect. (*See* Deloitte's *Br.*, p. 3 fn. 4). Yet that argument ignores the fact that one can find case law to justify every conceivable date for accrual of a taxpayer's cause of action against his or her accountant. There are cases which say the cause of action accrues when the bad tax advice is given or the tax return is filed. Other cases hold that the cause of action accrues when the taxpayer receives the audit letter. Cases also exist that say the cause of action accrues when the taxpayer receives the *30-Day Letter* and/or *90-Day Letter*. (*See* Appellants' *Op. Br.*, pp. 15-16). But the thing that distinguishes *Peat, Marwick, Mitchell* from these other decisions, however, is that *Peat, Marwick, Mitchell* approached the question from an "actionable injury" or "ripeness" perspective, which is the same approach taken by the Utah Supreme Court in *Seale*. This argument likewise ignores the fact that *Peat, Marwick, Mitchell* is consistent with the "**ripeness**" case law from numerous jurisdictions.

also like the Clarks, were advised by their accountants to fight the assessment and they, too, followed that advice. The IRS eventually prevailed and the Lanes brought a malpractice action against their accountants, which was dismissed by the trial court based upon the expiration of the statute of limitations. But on appeal, the Florida Court of Appeals reversed the trial court because:

> [A] cause of action for professional malpractice does not arise until '**the existence of redressable harm has been established.**' . . . **The Lanes did not suffer redressable harm until the Tax Court entered judgment against them**. Until that time, the Lanes knew only that Peat, Marwick might have been negligent; however, **if the Tax Court did not uphold the deficiency, the Lanes would not have a cause of action against Peat, Marwick for accounting malpractice**.

(*Lane v. Peat, Marwick, Mitchell & Co.*, 540 So.2d 922, 924 (Fla.3d D.C.A. 1989) (emphasis added). The Florida Supreme Court granted *certiorari* and affirmed the Court of Appeals' ruling.

The issue before the Florida Supreme Court in *Peak, Marwick, Mitchell* was when the "**redressable**" harm or injury occurred. Was it when the Lanes received the ninety day letter or when the Tax Court Judgment was entered? (565 So.2d 1325). More importantly, in answering this question, the Florida Supreme Court looked to and was persuaded by the analogous situation of attorney malpractice:

> This situation is not unlike attorney malpractice actions. A clear majority of the District Courts have expressly held that **a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time, one cannot determine if there was any actionable error by the attorney.**
>
> . . .

> Peat, Marwick asserts that any malpractice resulting from the advice which a professional gives concerning tax matters is different from attorney malpractice because any cognizable legal injury with respect to accounting malpractice depends not upon a determination by a court of law but, instead, upon a determination by the IRS. Peat, Marwick argues that the Lanes' cause of action accrued when they received their '*Ninety-Day Letter*' from the IRS, reasoning that at that point, the Lanes have sustained a legally cognizable injury. While Peat, Marwick maintains that the letter reflected the IRS's conclusive determination that the Lanes had underpaid their federal income tax, it acknowledges that **the Lanes had the option to pay the tax owed or to prove that they did not owe the tax by petitioning for a redetermination of the deficiency in Tax Court**.

(*Id.* at 1325-26) (emphasis added).

According to the Florida Supreme Court, it was the taxpayer's opportunity to prove that the tax was not owing that made their malpractice claim not "**redressable**" or "**ripe**" for decision until the Tax Court had ruled:

> In this case, the Lanes chose to appeal the IRS's determination to the United States Tax Court, in accordance with the advice given them by Peat, Marwick. **We find, consistent with the holdings in numerous attorney malpractice cases, that until their Tax Court action was final, the Lanes did not have an action for malpractice**. We reject Peat, Marwick's contention that an IRS deficiency determination conclusively establishes an injury upon which to base a professional malpractice action. **If we were to accept that argument, the Lanes would have had to file their accounting malpractice action during the same time they were challenging the IRS's deficiency notice in their Tax Court appeal, such a course would have placed him in the wholly untenable position of having to take directly contrary positions in these two actions. In the Tax Court, the Lanes would be asserting that the deduction Peat, Marwick advised them to take was proper, while they would simultaneously argue in a Circuit Court malpractice**

> **action that the deduction was unlawful and that Peat, Marwick's advice was malpractice.**
>
> **To require a party to assert these two wholly inconsistent positions in order to maintain a cause of action over professional malpractice is illogical and unjustified. Until the Tax Court determination, both the Lanes and Peat Marwick believe that the accounting advice was correct; consequently, there was no injury.**[5] To hold otherwise would mean that an accountant's client would have an action for malpractice as soon as the client received a '*Ninety-Day Letter*' from the IRS. **That result is contrary to common sense and reason.**

(*Id.* at 1325-26) (emphasis added).

<u>THE UNEQUAL TREATMENT BETWEEN TAX ACCOUNTANTS AND TAX ATTORNEYS INHERENT IN THE DISTRICT COURT'S RULING IS PROPERLY BEFORE THIS COURT</u>

If the Clarks had received the bad tax advice from a tax attorney rather than a tax accountant, the case law clearly establishes that their cause of action against the negligent attorney would not have accrued until the Tax Court decision became final. The Clarks argued before the District Court that case law developed in this analogous area of attorney malpractice should govern in this situation and they even referred the District Court to that case law. (*Rec.* pp. 247 and 308). The District Court, however, rejected that argument, and in doing so arbitrarily and capriciously treated victims of accountant malpractice differently

[5] The *Peak, Marwick, Mitchell* holding is also consistent with the "discovery rule" articulated for legal malpractice by the Utah Court of Appeals in *Merkley*, 778 P.2d at 17, which is a factual inquiry case specific. Both the Lanes and the Clarks had no way of knowing that the tax advice was "unlawful" until they received a determination to that effect from the Tax Court. Prior to that point in time, any position they took with respect to the validity of the advice they had received from their respective accountants would have been speculation.

than victims of attorney malpractice. Consequently, the Clarks argued in their *Opening Brief* that in doing so, the District Court's decision was in fact a violation of the Clarks' *due process* and *equal protection rights*. (Appellants' *Op. Br.*, pp. 22-23). Deloitte did not respond to this argument other than to claim that it should not be considered since it was never presented to the District Court. (Deloitte's *Br.*, p. 21 fn. 14). Deloitte likewise suggests that this Court should not consider this equal protection argument since it was not "adequately briefed" in the Clarks' *Opening Brief*. But Deloitte is incorrect as to both matters.

While it is true that the Clarks did not use the terms "*due process*" or "*equal protection*" in the *Briefs* which they filed with the District Court, they did argue the application of the analogous body of law developed under attorney malpractice, which is all that is required to preserve for appeal the issue of their "*due process*" and "*equal protection*" violations occurring as a result of the District Court's rejection of that case law. This is so because arguments which are not dependent upon new facts and are closely related to and could have been inferred from a party's contentions before the District Court may be presented for appellate review. *Alaska Marine Pilots v. Hendsch*, 950 P.2d 98, 109 (Alaska 1997).

With respect to Deloitte's contention that the *due process* and *equal protection* argument was not "adequately brief" that, too, is incorrect. The "adequacy" of the briefing depends upon the complexity or the legal issues involved and the disparate treatment between tax accountants and tax attorneys inherent in the District Court's ruling is not a matter that requires extensive briefing. Tax accountant and tax attorneys are equally qualified to provide tax advice and complete tax returns. Consequently, it is unconstitutional to treat them differently for purposes of limiting their potential liability to their respective clients. *See, e.g., Berry By and Through Berry v. Beech Aircraft*, 717 P.2d 670, 678 (Utah 1985) (setting forth cases in which numerous jurisdictions had struck down statutes of repose on state and federal *equal protection* ground because these statutes prohibited suits against some tortfeasors but not others).

PUBLIC POLICY WEIGHS HEAVILY IN FAVOR OF THE CLARKS' POSITION THAT THEIR CLAIM AGAINST DELOITTE DID NOT ACCRUE UNTIL THEIR TAX LIABILITY BECAME FIXED

In their *Opening Brief*, the Clarks pointed out that if a taxpayer challenging the IRS additional tax assessment were required to bring a malpractice action against his or her accountant prior to conclusion of the Tax Court proceeding, it would give rise to a host of a problems. There would be, for example, the possibility of inconsistent verdicts, a waste of judicial resources, a difficulty of proof, and the serious evidentiary problems of contending in a malpractice action that tax advice was below the standard of care while at the same time asserting before the Tax Court that that same advice was in accordance with existing tax laws. (*Op. Br.*, pp. 18-22). The Clarks argued, therefore, that when the taxpayer elects to proceed to litigate the issue of his or her tax liability in the Tax Court, the better policy is to find that the cause of action does not accrue until after the Tax Court had fixed the injury. But Deloitte argues that the public policy arguments put forth by the Clarks are either incorrect legal assumptions. (Deloitte, *Br.*, pp. 17-21). Once more, Deloitte is simply wrong on these matters.

With respect to Deloitte's contention that there is no harm or problem with a taxpayer pursuing at the same time both an action in Tax Court and a claim for accountant malpractice, that is a problem which numerous Courts have recognized, including the Utah Supreme Court. The Florida Supreme Court in *Peak, Marwick, Mitchell*, for instance, stated that requiring a taxpayer to simultaneously assert these two legally inconsistent positions in order to maintain a cause of action for professional malpractice was both "**illogical and unjustified**." (*Peat, Marwick, Mitchell*, 565 So.2d at 1326) (emphasis added). The Oregon Supreme Court in *Davies* was even more critical of Deloitte's proposal of simultaneous lawsuits:

> **[I]t does not seem wise to encourage the filing of such provisional actions. More important, it could prove to be a disaster to a plaintiff's defense of the action brought against him and, thus, perhaps disastrous to his former legal advisors as well. In the present case, plaintiffs . . . would have been defending one suit or action, claiming he had acted in conformance with the law, while simultaneously maintaining an action against defendants, claiming that he had not acted in conformance with the law because of faulty advice from defendants. Such an inconsistent position would have given rise to impeachment of . . . [plaintiff] in his defense of the action brought against him, but certainly is not desirable from either of the present party's point of view.**

(*Davies*, 548 P.2d at 970) (emphasis added). The danger of suing on speculative or premature claims was also one of the factors that apparently influenced the Utah Supreme

Court in *Seale*, *See* 923 P.2d at 1365-66 (discussing the ill effects of requiring injured parties to sue on premature actions).

Seale holds that damages in the form of a patient's enhanced risk of cancer are not sufficient to start the running of the statute of limitations. The *Seale* Court characterized this ruling as not only being consistent "**with generally accepted principles of tort law, but also minimizes the filing of speculative suits, thus saving judicial time and resources**." (*Id.* at 1364) (emphasis added). The *Seale* Court went on to consider and reject the argument by defendants that a medical malpractice plaintiff whose only injury is the risk of reoccurrence of cancer should sue immediately with the following reasoning relevant to the Clarks' situation:

> **[I]f we were to adopt defendants' position, plaintiffs who are not exhibiting any actual physical harm but are facing the running of the limitations period would be forced to bring an action for injuries that may or may not occur in the future. However, many of these plaintiffs will be able to produce the necessary evidence to show that the future harm is more likely to occur than not. Yet if the harm, such as the reoccurrence of cancer, actually later occurs, the plaintiff would be precluded from recovery for devastating injuries by reason of having acquired an earlier claim for purely speculative ones. We believe that the better approach is wait until the potential harm manifests itself, allowing for more certain proof and fewer speculative lawsuits.**

(*Id.* at 1365-66) (emphasis added).[6] Thus, contrary to Deloitte's suggestion, the policy in Utah is against speculative suits and needless expenditure of judicial resources.

<u>A HOLDING THAT THE CLARKS' CAUSE OF ACTION DID NOT ACCRUE UNTIL THE TAX COURT DECISION WOULD NOT VIOLATE THE POLICY AGAINST STALE CLAIMS UNDERLYING THE STATUTE OF LIMITATIONS</u>

Deloitte argues that the fundamental purpose of the statute of limitations is to prevent litigation of stale claims and that this policy would be grossly violated if, as the Clarks contend, their cause of action did not accrue until the Tax Court decision became final. To bolster this argument, Deloitte insists that there was no reason for the Clarks to stop at the Tax Court level but that they could have and perhaps should have appealed that decision. (Deloitte *Br.*, p. 2 fn. 1). This argument reflects a very basic misunderstanding of both Tax Court proceedings and the effects of a judgment handed down by the United States Tax Court.

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[6] Deloitte suggests that the proper approach would have been for the Clarks to have filed a malpractice action while pursing the Tax Court review and then move to stay the malpractice action until the Tax Court decided the issue of their tax liability. (Deloitte's *Br.*, p. 18). While this suggestion may seem plausible, it is not legally sound. It is not legally sound because one of the crucial elements required for a lawsuit is that "the issues between the parties must be ripe for decision." *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983). If the issues are not ripe, the District Court must dismiss the lawsuit. *See Salt Lake County v. Bangerter*, 928 P.2d 384, 386 (Utah 1996). Unless and until the Tax Court decision was handed down, the Clarks' claims were not ripe. *See Colonia Insurance Co.*, 941 F.Supp. at 608; *Boerger*, 812 F.Supp. at 565. Such a "**premature**" lawsuit would be, in other words, subject to dismissal for lack of jurisdiction, which means the District Court would have no authority to enter a stay. *See Bronstein*, 414 N.E.2d at 98; *K.J.B.*, 811 P.2d at 1307; *Amfac*, 673 P.2d at 792; *Golden*, 374 So.2d at 245; *Marchand*, 151 So.2d at 375; *Wright*, 217 N.Y.S.2d at 238.

The *30-Day Letter* and *90-Day Letter* which the Clarks received from the IRS were only that agency's assessment of the Clarks' additional tax liability. This assessment would not become collectible unless the Clarks waived their right of review, which they did not. Instead, the Clarks proceeded to try the tax deficiency claim by the IRS before the United States Tax Court. It is important to emphasize the Tax Court is a "**trial court**." *See Flight Attendants Against UAL Offset v. C.I.R.*, 165 F.3d 572, 577 (7th Cir. 1999). Because it is a trial court, the Tax Court decides cases on the testimony of witnesses, both fact and expert, exhibits, etc. Moreover, following such trials, the Tax Court makes findings of fact, conclusions of law, and enters judgments. *See Missouri River Sand Co. v. C.I.R.*, 774 F.2d 334, 337 (8th Cir. 1985). The Tax Court decision becomes a "final judgment" within 90 days after entry unless an appeal is taken. 26 U.S.C. § 7483. An appeal from a Tax Court decision, however, is a very serious matter for a taxpayer and not one to be taken lightly.

To begin with, like any appeal the potential taxpayer appellant must be concerned about his or her chances of success. Penalties and interest accrue during the appeal process and are a part of the judgment if the appeal is unsuccessful. Thus, the taxpayer gains nothing by appealing an adverse Tax Court decision and losing that appeal. In fact, he or she is saddled with additional interest on the judgment. Appeals also cost money and, unlike deep pocket players such as Deloitte, the cost of an appeal is an important factor to the ordinary taxpayer, especially retired taxpayers like the Clarks. Furthermore, the appeal is to the United States Court of Appeals and the scope of review before the Court of Appeals is "**in the same manner and to the same extent as decisions of the District Court in civil**

actions tried without a jury . . ." 26 U.S.C. § 7482(a)(1). Stated otherwise, while the Court of Appeals reviews the Tax Court's decision on questions of law *de novo*, the Tax Court's findings of fact can only be disturbed if they are clearly erroneous. *See Smith v. C.I.R.*, 926 F.2d 1470 (6th Cir. 1991). This standard and the attendant cost of an appeal would certainly give a taxpayer pause to consider whether the appeal of an adverse Tax Court decision would be in his or her best interest. But the taxpayer has added impedance to carefully consider undertaking the appeal of an adverse Tax Court decision because the Court of Appeals is empowered "**to impose damages in any case where the decision of the Tax Court is affirmed and it appears that the notice of appeal was filed merely for delay**." (26 U.S.C. § 7482(c)(4)) (emphasis added). It is thus not true, as Deloitte contends that taxpayers, including the Clarks, could opt to drag out the tax review process with appeal after appeal. It is similarly not true as, Deloitte contends, that the Tax Court decision is of no consequence.[7]

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[7] Another disingenuous argument put forth by Deloitte is the "windfall" argument which it raises by implication. The Clarks had a duty to mitigate their damages, which they did by eventually compromising and settling their tax liability with the IRS for approximately $65,000.00. (*Rec.* p. 336). Deloitte suggests that it would be in the taxpayers' best interest to sue for accountant malpractice before completing their Tax Court challenge because they might be able to collect the full amount of the assessment from the accountant yet eventually resolve their tax liability for considerably less, thereby realizing a windfall. (Deloitte *Br.*, p. 7 fn. 7). The Clarks dare to say, however, that if they in fact had sued Deloitte and recovered the full amount of their tax liability which eventually approached $500,000 with interest (*Rec.* p. 336) and then settled that liability for $65,000.00, Deloitte would be before the District Court seeking an amendment to the judgment or other relief. If anything, the fact that Clarks were eventually able to reduce, post-Tax Court decision, their tax liability to $65,000 would support an argument that the statute of limitations did not actually commence to run against these particular taxpayers until they paid the assessment.

Not only is the Tax Court's decision a binding, final judgment, but this fact clearly refutes Deloitte's claim that allowing the taxpayer to go through this process results in presentation of stale claims in violation of the policy underlying the statute of limitations in which evidence has been lost and witnesses' memories have faded. In this case, Deloitte is not prejudiced by the lag between when the statute of limitations would otherwise have run and when this action was eventually commenced. Deloitte knew almost as soon as the Clarks that there was a problem with both the tax advice and the 1986 tax return. The Clarks consulted Deloitte's employee, Vernon Calder, on the tax audit and that employee advised the Clarks to contest the IRS determination because the tax advice was "accurate." (*Rec.* p. 188, ¶ 20). Moreover, during this entire tax review process, the Clarks continued to seek out Calder for advice as to how they should proceed and each time they were "assured" by Calder that the tax advice and corresponding tax return preparation were correct and that they should continue to contest the assessment. (*Rec.* p. 189, ¶ 23).

Additionally, by commencing and continuing the tax review process to and including a decision by the Tax Court, the Clarks not only preserved the essential evidence in this case, but that Tax Court decision conclusively established two of the elements which the Clarks need to prove in order to prevail on a malpractice claim against Deloitte. These elements are: (1) that the tax advice was "bad" or otherwise inconsistent with the law; and (2) that the Clarks have been damaged as a result of that advice. Until the Tax Court ruled that the additional taxes and penalties were owing, Deloitte was free to contend that its advice had been accurate and consistent with the law. Likewise, until the Tax Court ruled that the additional taxes and penalties were owing, the Clarks' malpractice claim against Deloitte were not "**ripe**." Under these circumstances, the policy (avoidance of stale claims) by an application of the statute of limitations simply does not exist since the crucial evidence was preserved through the Tax Court trial process.

THE FACT DRIVEN DISCOVERY AND EQUITABLE ESTOPPEL PRONGS OF THE DISCOVERY RULE WAS NOT APPROPRIATE FOR DECISION ON A *MOTION TO DISMISS*

The discovery rule functions as an exception to the normal application of a statute of limitation. There are three situations in which the discovery rule applies: (1) when mandated by statute; (2) when the plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and (3) when the case presents exceptional circumstances so that the application of the general rule would be irrational or unjust. *See Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 578 (Utah App. 1996).

The Clarks concede there is no relevant statute that mandates or requires the discovery rule be applied in this case. Hence, they are relying upon the last two prongs of the discovery rule to toll the statute of limitations. These last two aspects of the discovery rule are essentially equitable estoppel, whereby the victim of malpractice claim does not accrue until he or she discovers both the injury and that the injury is or may be attributable to negligence and/or a defendant who causes a delay in the plaintiff's bringing of a cause of action is estopped from relying upon the statute of limitation as a defense to that action. As is true in all cases of equitable estoppel, for the doctrine to be invoked a plaintiff must show that, under the circumstances, he or she acted in a reasonable manner. *See Warren v. Provo*

City Corp., 838 P.2d 1125, 1129-30 (Utah 1992). More importantly, whether the Clarks acted reasonably under the circumstances in contesting the IRS's tax assessment or when they discovered or should have discovered both their injury and the possibility of negligence are questions of fact for the trier of fact. *See Brenda v. Langford*, 914 P.2d 45, 51 (Utah 1996). This is especially true since the Clarks only embarked upon the tax review process because of the advice given to them by Deloitte, and other Courts faced with an accountant's similar advice to "fight" the IRS assessment have found that the statute of limitations is tolled during the actual review process. *See Winn v. Estate of Holmes*, 815 P.2d 1231, 1235 (Okl. App. 1991) (accountant's advice to taxpayers to protest IRS assessment tolls statute of limitations); *Peat, Marwick, Mitchell*, 565 So.2d 1326 (holding that because the accountants had "continued to assert that its advice was correct" the case was clearly distinguishable from other actions involving accountant malpractice and the statute of limitations).[8] *Cf. Day v. Rosenthal*, 170 Cal. App.3d 1125, 217 Cal. Rptr. 89, 114-116

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[8] Advising the Clarks to contest the IRS tax deficiency assessment also raises the possibility of a claim for breach of fiduciary duty, which the Clarks have alleged. (*Rec.* pp. 190-91, ¶ 26). A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise, and does have an exercise to influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. In a fiduciary relationship, the property, interest, or authority of the other is placed in the charge of the fiduciary. *See First Security Bank v. Banberry Development*, 786 P.2d 1326, 1333 (Utah 1990). A fiduciary relationship clearly existed between Deloitte and the Clarks. *See Squyres v. Christian*, 242 S.W.2d 786 (Tex. Civ. App. 1951) (holding that a public accountant was a fiduciary as a result of, among other things, providing tax advice to and preparing tax returns for the client). If Deloitte knew that its tax advice to the Clarks was illegal or otherwise inaccurate, it had a duty to advise them of this fact instead of recommending that they contest the IRS tax deficiency. Whether Deloitte in fact had such knowledge requires a factual record that can only be developed through discovery. But if discovery were to show that Deloitte was aware of its "bad advice" to the Clarks, yet still

(1985) (a tax attorney's **advice to his clients to challenge the IRS assessment** tolls the statute of limitations); *Jackson Jordan Inc. v. Lydig, Voitn, Mayer*, 633 N.E.2d 627, 632 (Ill. 1994) (equitable estoppel applied to prevent the running of the statute of limitation against attorney malpractice claims because the attorneys had given "**reassurances**" to the clients that the legal advice was sound).[9]

CONCLUSION

The Court should reject the District Court's determination that the receipt of a *90-Day Letter* is the date on which all taxpayers' claims against their accountants for bad tax advice accrue. The selection of the *90-Day Letter*, especially when the taxpayers are contesting the additional tax assessment and penalties is inconsistent with holdings in *Seale* and *Merkley*. Rather than a date certain for all taxpayers such as the Clarks, their respective causes of action could and should accrue at varying dates depending upon the facts involved

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told the Clarks to start and continue through the tax review process, this would support a claim for breach of fiduciary duty. More importantly, because the fiduciary's duty of disclosure is continuing, the Clarks' cause of action would have accrued well beyond the date of the September 19, 1991, *90-Day Letter*. Equally important, the possibility of such a claim is clearly to the issues involved in this appeal. *See Coleman v. Utah State Land Board*, 795 P.2d 622, 624 (Utah 1990) (granting of a *Motion to Dismiss* is only appropriate if it clearly appears that the plaintiff can prove no set of facts in support of his claim).

[9] Before the District Court, Deloitte attempted to argue that Calder was no longer one of its employees as of June 1, 1987, thereby implying that it could not be charged with Calder's "bad" advice to the Clarks to contest the IRS assessment. Whether Calder was in fact employed by Deloitte after that time is properly the subject of discovery and not an issue of any relevance to the *Motion to Dismiss,* which is directed at the allegations of the pleading. Furthermore, even if true, the fact that Calder left Deloitte's employment would not relieve the latter of responsibility for his subsequent actions or relieve Deloitte of the duty to correct misrepresentations either it or its employees had made to the Clarks. *See Restatement (Second) Torts,* § 551(2)(c).

in each case. If, for instance the taxpayer accepts the assessment upon receipt of the *30-Day Letter*, his or her cause of action accrues at that point in time. But so long as the taxpayer is challenging the legality of the IRS assessment, the claims are not **ripe**, and the statute of limitations does not commence to run. In the case of the Clarks, their claims did not accrue and the statute of limitations did commence to run until the Tax Court decision became final. But even if a taxpayer's claims against his or her accountant are determined by this Court to automatically accrue upon receipt of the *90-Day Letter*, the statute of limitations was tolled in this case by Deloitte's advice to the Clarks to contest or fight that assessment. For these reasons, the District Court's dismissal of the Clarks' *Amended Complaint* with prejudice should be reversed and this matter should be remanded to the District Court for further proceedings. In the alternative, this matter should be remanded to the District Court with instructions to made a determination as to when the cause of action accrued[10] and the

[10] Deloitte argues that the District Court did identify a specific date on which the Clarks' claims accrued. (Deloitte's *Br.* p. 22). According to Deloitte, this determination was made when the District Court stated that "although the Plaintiffs' claims may have accrued much earlier, for purposes of this *Motion*, the Court finds that Plaintiffs' claims accrued at the latest in September, 1991, when the Plaintiffs received the statutory notice of deficiency from the Internal Revenue Service." (*Mem. and Order* at 4-5). But there are several things wrong with this contention. To begin with, the *Memorandum Decision and Order* was prepared by Deloitte's counsel (*Rec.* p. 294) and signed without change by the District Court over Clarks' objection. (*Rec.* pp. 304-310, 353-360). That was improper and it makes those findings Deloitte's rather than the District Court's. *See Everaard v. Hartford Accident & Indemnity Co.*, 842 F.2d 1186, 1193 (10th Cir. 1988) ("when the District Court adopts a party's proposed findings of fact wholesale or verbatim, resulting findings are not the original product of a disinterested mind"). Furthermore, if the District Court did in fact find that the receipt of the *90-Day Letter* was the moment at which the Clarks' claim against Deloitte accrued, such a finding is arbitrary and not supported by the evidence. There is nothing in the District Court's *Memorandum and Order* nor in the factual record before the District Court to distinguish the date of the *90-Day Letter* from any other of the possible

both before the District Court through post-judgment *Motions* and, if unsuccessful, on appeal. Finally, the Clarks request such other and further relief as to this Court seems just and merited under the circumstances.

DATED this 23rd day of February, 2000.

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nothing in the District Court's *Memorandum and Order* nor in the factual record before the District Court to distinguish the date of the *90-Day Letter* from any other of the possible dates for accrual of the Clarks' cause of action with the sole exception of the date on which the Tax Court decision became final.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2000, I caused two true and correct copies of the above and foregoing to be mailed, first-class U.S. postage prepaid, to:

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