STATE OF MINNESOTA

IN SUPREME COURT

A15-2052

Court of Appeals

Hudson, J.
Dissenting, Gildea, C.J., and Anderson, J.

Joseph W. Frederick,

Appellant,

vs.

Filed: February 7, 2018
Office of Appellate Courts

Kay L. Wallerich, et al.,

Respondents.

Patrick H. O'Neill, Jr., Stephanie L. Chandler, Larson King, LLP, Saint Paul, Minnesota, for appellant.

Kay Nord Hunt, Barry A. O'Neil, Bryan R. Feldhaus, Lommen Abdo, P.A., Minneapolis, Minnesota, for respondents.

Michael C. McCarthy, Erica A. Holzer, Maslon LLP, Minneapolis, Minnesota, for amicus curiae Minnesota State Bar Association.

Anne M. Honsa, Honsa & Associates, P.A., Minneapolis, Minnesota;

David L. Olson, Edina, Minnesota;

Mary Catherine Lauhead, Law Offices of Mary Catherine Lauhead, Saint Paul, Minnesota; and

Michael D. Dittberner, Linder, Dittberner, Bryant & Winter Ltd., Edina, Minnesota, for amicus curiae Minnesota Chapter of the American Academy of Matrimonial Lawyers.

William L. Davidson, Thomas D. Jensen, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota, for amicus curiae Professional Liability Defense Federation.

S Y L L A B U S

1. Multiple acts by the same lawyer may give rise to separate claims for legal malpractice. To determine when multiple acts by the same lawyer are independent acts of negligence, a fact-specific approach should be used that may include weighing whether the plaintiff's position was significantly worsened, whether the subsequent act involved the same type of conduct, whether the acts occurred at different times and during different transactions, whether the subsequent act was connected by a causal link to the first, and whether the subsequent act explicitly relied on the continued validity of the prior work.

2. The loss of an opportunity to control one's assets satisfies the "some damage" requirement for accrual of a legal-malpractice claim.

Reversed and remanded.

O P I N I O N

HUDSON, Justice.

At issue is whether appellant Joseph Frederick has filed a timely legal-malpractice claim under Minn. Stat. § 541.05, subd. 1(5) (2016). Frederick's attorney, respondent Kay Wallerich, prepared an antenuptial agreement for Frederick and his then-fiancée, Cynthia Gatliff, in 2006. The agreement did not include the statutorily required witness signatures, however, thus making it unenforceable. Frederick and Gatliff were married the next day. One year later, Wallerich drafted a will for Frederick, which incorporated the antenuptial agreement by reference. According to the will, Frederick did not leave any assets to Gatliff because the antenuptial agreement already specified the portion of his assets that she was to receive upon his death. When Gatliff filed for divorce after 6 years of marriage, she

alleged that the antenuptial agreement was invalid because it lacked the requisite witness signatures.

Later that year, Frederick commenced a lawsuit against Wallerich for legal malpractice. Although the invalid execution of the antenuptial agreement fell outside of the 6-year limitations period for malpractice claims, Frederick alleged that subsequent representations by Wallerich that the antenuptial agreement was valid—most significantly when Wallerich drafted his will 1 year later—were separate legal-malpractice claims that each triggered their own statute of limitations periods. Wallerich moved for judgment on the pleadings, which the district court granted, determining that all of Frederick's claims related to the antenuptial agreement were untimely filed. The court of appeals affirmed. Because we hold that Frederick has sufficiently alleged that Wallerich's will drafting formed the basis for a separate malpractice claim within the limitations period, we reverse and remand to the district court for further proceedings.

FACTS

On appeal from the district court's judgment on the pleadings, we must take all allegations of the complaint as true. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). We therefore rely principally on the allegations of the complaint for the factual record.

Beginning in 2006, Frederick retained Farrish Johnson Law Office for various family law and estate matters. In September 2006, Frederick consulted with an attorney at Farrish Johnson Law Office, Wallerich, to draft an antenuptial agreement before his wedding to Gatliff. Frederick's intent was that Gatliff would not receive his assets, or the

appreciation therefrom, if they divorced. Frederick and Gatliff signed the agreement on September 28, 2006, but the witness lines were left blank, making the agreement unenforceable. *See* Minn. Stat. § 519.11, subd. 2 (2016) ("Antenuptial . . . contracts . . . shall be in writing, executed in the presence of two witnesses and acknowledged by the parties . . . ."). Frederick and Gatliff married the next day, on September 29, 2006.

One year later, on September 12, 2007, Frederick again consulted Wallerich, this time to discuss the planning and drafting of a new will. Wallerich affirmatively assured Frederick at this meeting that the previously executed antenuptial agreement was valid and enforceable. The terms of Frederick's will show that he intended to incorporate the antenuptial agreement by reference, and implicitly relied on its validity in crafting the provisions of the will: "I have entered into an Antenuptial Agreement prior to executing this Will. I have intentionally omitted my spouse from taking under this Will as we have provided for bequests at our death by separate written instrument dated September 28, 2006."[1] On September 28, 2007, Frederick's will was executed.

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[1] The dissent argues that we incorrectly label the antenuptial agreement as "incorporated by reference" in the will. "Incorporation by reference" is a legal term that means "a method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." *Incorporation by reference*, *Black's Law Dictionary* (8th ed. 2004). Minnesota allows "[a]ny writing in existence when a will is executed [to] be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification." Minn. Stat. § 524.2-510 (2016). Here, the antenuptial agreement was in existence when the will was executed. Because the will specifically refers to the antenuptial agreement as the "Antenuptial Agreement" and the "separate written instrument dated September 28, 2006," it sufficiently identifies the antenuptial agreement and manifests an intent to incorporate the document.

Frederick continued to retain Wallerich for various estate and family law matters, including in January 2008, when Gatliff signed a consent to Frederick's will, acknowledging the enforceability of the antenuptial agreement incorporated within, saying "I have read and understand the provisions of the Antenuptial Agreement dated September 28, 2006, which make provision for me to consent to th[is] will." Further, Frederick consulted Wallerich in April 2010 and July 2011, when he executed codicils to his will.

In January 2013, Gatliff filed for divorce. She argued that the antenuptial agreement was unenforceable due to a lack of witness signatures. On September 10, 2013, while the dissolution proceeding was pending, Frederick commenced a legal-malpractice suit against Wallerich. Wallerich filed an answer and moved for judgment on the pleadings, arguing that Frederick's claims were untimely filed because more than 6 years had passed since the attempted execution of the antenuptial agreement. *See* Minn. Stat. § 541.05, subd. 1(5) (establishing a 6-year statute of limitations for negligence claims). Before Frederick filed his response, his legal-malpractice action was stayed pending resolution of the dissolution proceedings.

In the dissolution case, the district court ruled that the antenuptial agreement was unenforceable.[2] As a result of this ruling, Frederick and Gatliff stipulated to a division of marital property in which Frederick would give Gatliff a share of his assets, taking into account the appreciation of the assets during their marriage. After resolution of the

[2] Frederick appealed, but the parties settled their dispute in appellate mediation.

dissolution proceeding, the court lifted the stay of Frederick's legal-malpractice action against Wallerich. Responding to Wallerich's pre-stay motion for judgment on the pleadings, Frederick disagreed that his action was untimely. Rather, he asserted that Wallerich committed several acts of legal malpractice, with independent damages attributable to each. Specifically, Frederick argued that the September 2007 visits with Wallerich to draft a new will gave rise to an entirely new cause of action for legal malpractice apart from the mistakes made during the 2006 drafting of the antenuptial agreement. Thus, Frederick argued, his September 2013 complaint was filed within the 6-year limitations period.

In September 2015, the district court granted Wallerich's motion for judgment on the pleadings, dismissing all of Frederick's claims under the statute of limitations. In an unpublished opinion, the court of appeals affirmed. *Frederick v. Wallerich*, No. A15-2052, 2016 WL 4068931, at *1 (Minn. App. Aug. 1, 2016). Relying on *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006), the court of appeals reasoned that the statute of limitations begins to run when the cause of action accrues, which is "when the plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted." *Frederick*, 2016 WL 4068931, at *2 (quoting *Antone*, 720 N.W.2d at 335). The court noted that Minnesota follows the "some damage" rule, in which a "cause of action accrues when 'some' damage has occurred as a result of the alleged malpractice," with "some damage" defined as "any compensable damage." *Id.* (quoting *Antone*, 720 N.W.2d at 335–36). Tracking *Antone*, the court determined that Frederick's legal-malpractice cause of action accrued on the date of his marriage, because at that moment he

became subject to "some damage." *Id.* at *3. Because Frederick married on September 29, 2006, his claim filed on September 10, 2013, was therefore untimely. *Id.* The court similarly affirmed the dismissal of Frederick's remaining claims—breach of fiduciary duty, negligence, and reckless misrepresentation—because "they are within the penumbra of his legal-malpractice action." *Id.* at *4. Frederick appealed to this court, and we granted review to determine whether the multiple acts of alleged negligence in this case can give rise to independent causes of action that trigger separate statute of limitations periods.

ANALYSIS

"The construction and applicability of statutes of limitations are questions of law that [we] review[] de novo." *Benigni v. Cty. of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998). On appeal from a dismissal on a motion for judgment on the pleadings, we "review de novo whether 'the complaint sets forth a legally sufficient claim for relief,' " which includes the question of whether the complaint itself was timely filed. *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010) (quoting *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003)). We must "accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh*, 851 N.W.2d at 606. We also consider statements or documents incorporated as exhibits into the pleadings. Minn. R. Civ. P. 10.03 ("A copy of any written instrument which is an exhibit to a pleading is a part of the statement of claim or defense set forth in the pleading.").

The statute of limitations for a legal-malpractice claim[3] is 6 years. Minn. Stat. § 541.05, subd. 1 (5). We have previously determined that the statute of limitations period begins to run when a cause of action accrues for legal malpractice. *Antone*, 720 N.W.2d at 335. There is no dispute that a claim accrued on the date of the marriage, September 29, 2006, for the errors that Wallerich made when she failed to ensure that the antenuptial agreement was validly executed. *See id.* The claim based on that negligent act is unquestionably untimely because it was not filed by September 29, 2012. *See* Minn. Stat. § 541.05, subd. 1(5). Because Frederick filed his legal-malpractice claim on September 10, 2013, there must be a separate claim that accrued on or after September 10, 2007, for the filing to be timely.

"Accrual" is the point at which a plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim on which relief can be granted. *Antone*, 720 N.W.2d at 335 (citing *Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 584 (Minn. 1968)). If Frederick has accrued multiple causes of action for legal malpractice at different points in time, then some of the claims may be timely when others are not. *Cf. Honn v. Nat'l Comput. Sys. Inc.*, 311 N.W.2d 1, 2 (Minn. 1981) (holding that a separate limitations period runs from accrual of each separate cause of action in an installment contract). An analysis of when a claim accrues, which turns on whether it can survive a motion to dismiss,

[3] Although Frederick asserts that he has separate claims—malpractice, negligent and reckless misrepresentation, and breach of fiduciary duty—each of his claims is dependent on the resolution of a single issue: whether Wallerich's post-2006 acts were independent acts of negligence. *Cf. Antone*, 720 N.W.2d at 338 (dismissing all three of plaintiff's claims under the same accrual analysis).

necessarily involves consideration of *all* elements of the claim. *Dalton*, 158 N.W.2d at 584 ("Thus, the alleged negligence . . . *coupled with* the alleged resulting damage is the gravamen in deciding the date upon which the cause of action at law herein accrues." (emphasis added)).

To state a claim for legal malpractice, a plaintiff must allege "(1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; [and] (4) that but for the [attorney-]defendant's conduct the plaintiff would have been successful in the prosecution or defense of the action." *Antone*, 720 N.W.2d at 334 (first alteration added) (citing *Blue Water Corp. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983)). When the case involves a transactional matter, as here, the final element is necessarily modified; it turns on whether the attorney's conduct was the but-for cause of the failure to obtain *a more favorable result* rather than success or failure in litigation. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 819 (Minn. 2006). The showing that a plaintiff must make to survive a motion to dismiss on these elements "is minimal," but failure to satisfy any element defeats the entire claim. *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003); *see* Minn. R. Civ. P. 12.02(e).

It is undisputed that the facts alleged in this case satisfy the first element of a legal-malpractice claim, the existence of an attorney-client relationship. At issue are the remaining elements: whether negligent acts exist that were the proximate and but-for cause of Frederick's damages. To determine the remaining three elements we must consider: (1) whether Wallerich's failures to alert Frederick of the unenforceability of his

antenuptial agreement could be *independent acts of negligence* from the negligent execution of the antenuptial agreement itself; (2) whether Frederick suffered *damages caused by* these failures; and (3) whether those damages are independent of the damages attributable to the negligent execution of the antenuptial agreement. We address each in turn.

I.

We have not previously addressed whether, and when, multiple acts of legal malpractice can give rise to independent causes of action, each having a separate accrual date under an applicable statute of limitations.

A.

We first address whether multiple acts of legal malpractice can give rise to independent causes of action. The parties frame the issue in very different terms. Wallerich maintains that no cause of action has accrued separate from the 2006 execution of the antenuptial agreement based on a primary-right theory. In Wallerich's view, Frederick suffered one violation of one primary right—the errors in the drafting of his antenuptial agreement—and therefore all of the acts are part of a single claim that accrued on September 29, 2006, the date of the marriage. Frederick alleges that each time he sought legal advice from Wallerich after signing the antenuptial agreement in 2006, Wallerich committed an independent act of malpractice by failing to inform him of the antenuptial

agreement's invalidity.[4] Frederick argues that the 2007 will drafting, in particular, was an entirely separate negligent act that gave rise to an independent cause of action for legal malpractice that accrued separately on the date of its execution. We agree with Frederick.

Wallerich's primary-right framework is outdated. It is well established that a cause of action accrues for a legal-malpractice claim when "the cause of action will survive a motion to dismiss for failure to state a claim upon which relief can be granted." *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). Thus, the existence of a timely suit here rises or falls on Frederick's ability to demonstrate whether the elements of a legal-malpractice claim are satisfied by an act that occurred within the 6-year statute of limitations, not his ability to prove a violation of a separate primary right. *Dalton*, 158 N.W.2d. at 584; *see Herrmann*, 590 N.W.2d at 643 n.12.

Further, we have previously indicated that separate negligence causes of action *may* accrue independently within the same set of facts, and therefore can trigger separate accrual dates. *See, e.g.*, *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693–95 (Minn. 1980) (noting that the same attorney could have been negligent both for rendering advice without research and for failing to advise the same client on the applicable statute of limitations); *cf. Capitol Supply Co. v. City of St. Paul*, 316 N.W.2d 554, 555 (Minn. 1982) (determining that a complaint that alleged City negligence during the course of a 1970 road

[4] Frederick, importantly, is not asking us to adopt a "continuous-representation" theory to toll the statute of limitations. *See generally Carlson v. Houk*, No. A14-0633, 2014 WL 6090685, at *2–5 (Minn. App. Nov. 17, 2014) (reviewing the "continuous-representation doctrine" and noting that no Minnesota case has ever adopted or explicitly rejected the doctrine).

project presented two distinct causes of action: one for "negligent change in the grade of an established road" and another for "negligent design and construction," and applying two separate limitations periods). Our law therefore permits two separate transactions within the same set of facts to be reasonably characterized as separate acts that give rise to independent negligence claims.

B.

We next address when multiple acts are sufficiently independent to give rise to distinct causes of action for legal malpractice that trigger separate accrual dates.

The court of appeals rejected Frederick's contention that Wallerich's statements in 2007 regarding the antenuptial's validity were independent acts of negligence giving rise to a separate legal-malpractice claim. The court of appeals discussed its own reasoning in *Devereaux v. Stroup*, No. A07-0103, 2008 WL 73712 (Minn. App. Jan. 8, 2008). In *Devereaux*, the court of appeals correctly noted that we have not previously addressed how multiple acts of negligence may accrue independently, but had instead only addressed the issue of when the damages element of a negligence claim is satisfied to trigger the limitations period. *Id.* at *2–3 (noting that neither *Herrmann* nor *Antone* "involve[d] an attorney accused of two separate acts of negligence"). The *Devereaux* court determined that the two acts at issue *did* give rise to separate causes of action for negligence: the first act based on negligent tax advice that exposed the clients to "civil and criminal . . . [liability for] conversion and theft," and the second act based on negligent litigation advice that aggravated the negligent tax advice, worsened the couple's liability, and "increased their principal liability." *Id.* at *3.

Here, the court of appeals found two reasons to depart from its reasoning in *Devereaux*. Although it is undisputed that the 2006 antenuptial drafting was negligent, the court of appeals determined that Wallerich's subsequent actions involving the will "did not significantly worsen or enhance" Frederick's losses. *Frederick*, 2016 WL 4068931, at *2–3. Further, the court determined that Wallerich's subsequent acts were limited to the same type of misconduct as the first negligent act—"improper advice concerning the validity of the antenuptial agreement"—compared to the "wide-ranging and distinct forms of misconduct" in *Devereaux*. *Id.*

Although *Devereaux* does not control our analysis, its reasoning and the court of appeals' departure from it in this case are instructive. First, we disagree with the court of appeals that Frederick's position was not "significantly" worsened by Wallerich's failure to inform him of the invalidity of his antenuptial agreement in 2007. Frederick faced an additional 6 years of appreciation of his assets from 2007, when Wallerich incorporated the antenuptial agreement into the new will, to Gatliff's divorce filing in 2013. Contrary to the dissent's argument that all of Frederick's damages accrued at the time of marriage, had Frederick known that the antenuptial agreement was invalid in 2007, rather than incorporating it into his will, he could have sought a new agreement or a divorce to avoid the 6 *additional* years of appreciation. Instead, Wallerich's failure to inform Frederick of the invalidity of the agreement in 2007 led to appreciation that resulted in $1 million in additional payments to Gatliff—a significant worsening of Frederick's position.

Second, although it is true that the improper advice in 2007 relates to the same legal issue as the 2006 negligence—that is, the validity of the antenuptial agreement—we

disagree with the court of appeals that Wallerich's negligent conduct in 2007 was the same "type" of negligent conduct as in 2006. Frederick's will was crafted in reliance on the enforceability of the antenuptial agreement, as evidenced by the will's explicit terms, and the antenuptial agreement was incorporated by reference into the will. Wallerich's negligent conduct in 2007—failing to advise Frederick of the invalidity of the antenuptial agreement—spanned multiple areas of law (estate planning and marital planning), and multiple legal projects (execution of a will and an antenuptial agreement).

Third, the alleged acts of negligence took place at different times and during different transactions, both of which are common-sense factors that the court of appeals has previously used as guidance in determining whether individual acts give rise to separate causes of action with different accrual dates. *See Nash v. Gurovitsch*, No. A10-1489, 2011 WL 1237546, at *2 (Minn. App. Apr. 5, 2011) (despite involving the same underlying legal issue, "the two acts occurred at different times, are not necessarily causally connected, and arose in legal representation concerning different proceedings" and were thus distinct acts with different accrual dates). Here, Frederick approached Wallerich in 2007 to execute a will, an entirely separate legal transaction from the antenuptial agreement prepared and executed 1 year earlier. Although we recognize that the legal issue underlying both transactions involves the same question—whether Wallerich acted negligently in failing to inform Frederick that the antenuptial agreement was invalid—nothing in our precedent dictates that an attorney's negligence in a prior transaction *precludes* a client from recovering for a subsequent negligent act in a separate transaction.

Fourth, the two acts are not connected by a sufficient causal link that would necessitate a conclusion that the two acts flowed from the same negligence. *Id.*; *see Gearin v. Bailey's Nurseries, Inc.*, No. A11-0595, 2012 WL 34035, at *2 (Minn. App. Jan. 9, 2012) (analyzing whether two separate acts gave rise to distinct causes of action based on whether the subsequent alleged "acts" were a "progression" that causally flowed from the initial act). Although the incorporation of the invalid antenuptial agreement into the will in 2007 would not have occurred without the 2006 negligent execution of the antenuptial agreement, it does not follow that the 2006 act *prevented* Wallerich from meeting the duty of care in the 2007 transaction. In fact, given that statutes and case law are subject to change, depending on the client, the area of law, and the scope of work, the standard of care for an attorney may require verification of the quality of prior work.

Accordingly, because (1) Frederick's position significantly worsened; (2) Wallerich's subsequent acts did not involve the same type of conduct as the 2006 acts; (3) the acts occurred at different times and, importantly, during different transactions; (4) the subsequent act was not connected by a sufficient causal link to the first act; and (5) the subsequent act specifically and explicitly incorporated and relied on the continued validity of Wallerich's prior work, we conclude that Frederick has made a minimal showing that the 2007 will drafting was an independent act of negligence, separate from the 2006 execution of the antenuptial agreement.[5]

[5] Although we found these facts helpful in our analysis here, we do not suggest that these are the exclusive considerations, nor that these considerations will be helpful in every case.

Wallerich cautions that if we determine that Frederick's claim survives, "a plaintiff could maintain in perpetuity a malpractice action premised on the improper drafting of an executed document by telephoning the attorney every few years and asking the lawyer's opinion whether the document could cause him harm in the future." For two reasons, we are not convinced that such a result inevitably flows from our decision. First, this case involves a completely separate and substantial attorney work product than the initial negligently executed antenuptial agreement. Frederick did not merely ask to be reassured of the validity of the antenuptial agreement; he asked for a separate legal document to be drafted. That document, his will, relied on and incorporated the antenuptial agreement. Wallerich billed Frederick for the time she took to review the antenuptial agreement and to draft the will that incorporated it. It is unlikely that either party believed that Wallerich was being financially compensated simply to provide reassurance to the client. Rather, a reasonable client would expect that he or she was paying Wallerich for her work in drafting a new legal document.

Second, Wallerich's hypothetical ignores the fact that a separate and independent cause of action exists only if the remaining elements of a legal-malpractice claim—independent damages and causation—are *also* present. Further, although the burden to *allege* those elements to survive a motion to dismiss is minimal, the requirement to *substantiate* those elements is more demanding.

In adopting this fact-specific approach to determine when multiple acts are sufficiently distinct to give rise to separate legal-malpractice claims, we also specifically reject the rule proposed by Frederick. Frederick contends that a lawyer owes a professional

and fiduciary duty to a client to consult the law and learn the facts "*each time*" the lawyer provides legal advice to the client. (Emphasis added.) We disagree.

As the amicus Minnesota State Bar Association points out, lawyers must be afforded adequate discretion to make judgment calls when clients seek to revisit previously completed projects. Lawyers must, based on context, discern whether the client simply wants reassurance that the project was completed, a reminder of the outcome, assurance that the outcome was favorable, or additional legal research on the question. We agree with the Minnesota State Bar Association and note that Frederick's rule is too broad because it assumes that every client, in revisiting previous work, prefers the last option: to have the attorney conduct new research and analysis every time a client asks a question. We therefore reject Frederick's proposed bright-line rule.[6]

A more fact-specific approach, as we adopt today, permits us to conclude that *this* subsequent act—a failure to verify the validity of the antenuptial agreement before incorporating it into additional work—may, if proven, give rise to a separate cause of action for negligence. Our ruling today is better suited to the realities of the practice of law and the dynamics of the attorney-client relationship, and leaves room for clients and lawyers to revisit completed projects and re-establish confidence in previous work through a variety of approaches without resulting in additional liability for the attorney.

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[6] Frederick also proposes that we adopt a "second lawyer" rule. Frederick argues that if he had retained a different lawyer for his will drafting, the second lawyer would be subject to a malpractice claim for failing to inform him that the antenuptial agreement was invalid, and therefore, Wallerich, too, is automatically subject to malpractice liability. Because we conclude that Frederick has sufficiently alleged a claim for legal malpractice against Wallerich, it is unnecessary to analyze the merits of this proposal.

II.

Because we conclude that Frederick has sufficiently alleged that the will drafting in 2007 was an independent act of negligence, we must now consider the remaining elements of Frederick's legal-malpractice claim: whether the 2007 will drafting was the proximate cause of Frederick's damages, and whether Wallerich's negligence was the but-for cause of Frederick's failure to obtain a more favorable result.

A.

We must first analyze whether Frederick has alleged damages that were proximately caused by Wallerich's alleged negligence in 2007. Unlike the negligent-act element considered in Part I, we have previously discussed how to determine whether there are separate compensable damages arising out of a subsequent negligent act.

In general, we have held that damages accrue, and thus begin the running of the statute of limitations, once *any* compensable damages occur. *Antone*, 720 N.W.2d at 336 ("[T]he statute of limitations begins to run, on the occurrence of any compensable damage, whether specifically identified in the complaint or not."). This is known as the "some damage" rule. *See generally id.* at 335–36 (discussing our adoption of the "some damage" rule over the "occurrence" and "discovery" rules). "Some damage" is defined broadly to include any damage, regardless of whether that damage was alleged in the complaint. *Id.*

We have twice addressed the "some damage" rule in the context of a legal-malpractice claim. We first did so in *Herrmann*. 590 N.W.2d at 641. Then in *Antone*, we specifically addressed the "some damage" rule in the context of an antenuptial agreement, similar to the facts presented here. 720 N.W.2d at 335. In *Antone*, we determined that

"some damage" occurred when each member of the couple lost the right to protect his or her premarital assets. *Id.* at 337–38 (concluding that "exposure" to "a claim upon a portion of any appreciation in [the] premarital property" constituted "an injury that resulted in some damage"). In *Antone*, that "exposure" occurred at the point of marriage.

Wallerich argues that, as in *Antone*, we must similarly hold that "some damage" accrued when Frederick and Gatliff were married in 2006. As Frederick accurately points out, however, only one act of negligence was at issue in *Antone*. *Id.* at 335 ("[T]he only disputed element here is . . . damages . . . ."). Here, Frederick adequately alleges two distinct acts of negligence, as we concluded in Part I. Thus *Antone* may provide guidance, but it does not resolve the question presented in this case. Although *Antone* established a rule that any damage associated with the drafting or execution of an antenuptial agreement accrues at the time of marriage, it did not, by necessary implication, foreclose the possibility that *subsequent* independent acts of negligence could cause *separate* damages.

Our conclusion is supported by *Antone* itself, which established a rule that "some damage" occurred at the "point of no return," when Antone was "expos[ed]" to "a claim upon a portion of any appreciation of his premarital property." *Id.* at 337–38. Although this "point of no return," on *Antone*'s facts, was the date of marriage, *Antone* does not imbue marriage with any broader significance. The question before us, then, is whether distinct compensable damages—that is, an exposure to a claim of a portion of any appreciation of Frederick's premarital assets—accrued when Wallerich drafted and executed Frederick's will in 2007.

The district court reasoned that "to 'split up' [Frederick's] claims to try to establish different time periods in order to extend or toll the statute of limitations is, as a practical and policy matter, contrary to the whole purpose of having a statute of limitations." The district court went on to hold that Frederick "has not, and cannot, plead damages separate and distinct from the original alleged negligence—the preparation and unwitnessed signing of the defective Agreement." The court of appeals agreed. Relying on the facts of *Antone* for the proposition that the cause of action accrued on the date of marriage because "on that day[, Antone] lost his nonmarital-property protections," the court of appeals similarly determined that Frederick's claim accrued at marriage. *Frederick*, 2016 WL 4068931, at *3 (citing *Antone*, 720 N.W.2d at 337–38). The court of appeals did not squarely address Frederick's claim that a *new* cause of action, and thus an independent claim for damages, arose in 2007 when the will was drafted and executed.

Frederick alleges that he incurred additional compensable damages, separate and apart from the failure to adequately execute the antenuptial agreement, because he could not protect the appreciation on his premarital assets that specifically resulted from Wallerich's failure to inform him that the antenuptial agreement was unenforceable in 2007. This failure to protect his assets, Frederick alleges, cost him an additional $1 million in asset appreciation that otherwise would not have been awarded to Gatliff. Conversely, Wallerich argues that *Antone* established a "bright line" rule that *all* damages arising out of a negligently executed antenuptial agreement accrue at the time of the marriage. We agree with Frederick.

It is undisputed that the damages from the first negligent act—the failed execution of the antenuptial agreement—accrued on the date of the marriage. But *Antone* neither forecloses nor even addresses the ability of a client to bring a separate claim based on an allegation of damages flowing directly from a separate negligent act—here, the 2007 failure to ensure the antenuptial's enforceability before its incorporation into Frederick's will. In the dissent's view, Frederick lost his ability to shield any appreciation of his premarital assets on the date of marriage. But the dissent correctly recognizes that Frederick's damages "represent missed opportunities for him to reduce the damages" from Wallerich's 2006 negligence. Under *Antone*, compensable damages include a loss of opportunity to mitigate *additional* damages—a loss that Frederick experienced here as a result of Wallerich's failure to inform him of the antenuptial agreement's invalidity in 2007. *See Antone*, 720 N.W.2d at 338. Although it is true that "some damages" accrued on the date of marriage, it is also true that "some damages" accrued in 2007 when Frederick lost the opportunity to avoid, and was exposed to, an additional $1 million payment due to the appreciation of his premarital assets. Given the "minimal" showing required to meet our standard for claim accrual, *Noske*, 670 N.W.2d at 742, Frederick has sufficiently alleged that he suffered "some damage" again in 2007.

Frederick has also adequately alleged that the $1 million in damages due to the asset appreciation from 2007 to 2013 was proximately caused by Wallerich's negligence in 2007, rather than Wallerich's negligent antenuptial agreement drafting in 2006. Wallerich argues that Frederick's alleged damages are all attributable to the failure to draft an enforceable antenuptial agreement in 2006. In Wallerich's view, no new damages arose

out of Wallerich's subsequent failure to inform Frederick of the unenforceability of the antenuptial agreement when drafting and executing his will in 2007, even if that failure was an independent act of negligence.

Wallerich's formulation of legal causation, however, is not consistent with our case law. "In the context of general tort liability, such as negligence actions, we long ago defined a proximate cause of a given result as 'a material element or a substantial factor in the happening of that result.' " *Osborne v. Twin Bowl, Inc.*, 749 N.W.2d 367, 372 (Minn. 2008) (quoting *Peterson v. Fulton*, 256 N.W. 901, 903 (Minn. 1934)). Thus, the question is whether Frederick sufficiently alleged that Wallerich's failure to accurately advise him in 2007 regarding the validity of the 2006 antenuptial agreement was a "substantial factor" in incurring an additional $1 million in damages.[7]

Accepting, as we must, the allegations in Frederick's complaint as true, Frederick has sufficiently alleged that Wallerich's negligence in 2007 was at least a "substantial factor" in the additional $1 million in damages that Frederick suffered. The very fact that Frederick could have taken unilateral steps in 2007 to avoid having to share additional appreciation of his assets with Gatliff shows that Wallerich's negligence was a "substantial factor." Accordingly, we are satisfied that Frederick has adequately alleged that Wallerich's 2007 negligence proximately caused his $1 million in damages.

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[7] We note that this is a different question than whether Wallerich's subsequent acts were a "superseding cause" that would break the causal chain arising out of Wallerich's original negligent act. *See Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112–14 (Minn. 1992). Here, Frederick only needs to reasonably allege that the second act was a "substantial factor."

B.

But alleging proximate cause of damages is not enough. Frederick must also show that Wallerich's 2007 negligence was the but-for cause of his failure to obtain a more favorable result—that is, avoiding the additional $1 million in damages. In other words, Frederick must sufficiently allege that his damages were solely attributable to the 2007 act of negligence (the will drafting), rather than the 2006 act (the execution of the antenuptial agreement). *Jerry's Enters., Inc.*, 711 N.W.2d at 819.

Frederick claims that, had he been properly informed of the antenuptial agreement's deficiencies in 2007 ("but for" Wallerich's alleged negligent omission), he would have taken steps to protect his assets and prevented an additional 6 years of appreciation that occurred from 2007 to 2013. He identifies multiple steps that were either foreclosed, or that he was prohibited from taking, as a direct result of Wallerich's negligent failure to inform him of the antenuptial agreement's unenforceability: he could have asked Gatliff to sign a postnuptial agreement; he could have divorced Gatliff if she did not sign the postnuptial agreement; and finally, he would have been able to sue Wallerich earlier for legal malpractice for the 2006 act within the statute of limitations.

Most clearly, Frederick's claim that he would have divorced Gatliff sufficiently alleges a course of action that he may have *unilaterally* taken to protect his assets. *Antone*, 720 N.W.2d at 337 (holding that a claim accrued when Antone lost the right to unilaterally protect the appreciation of his premarital assets). Because initiating a divorce is a concrete action that was directly foreclosed by Wallerich's failure to review the antenuptial agreement, Frederick has a colorable claim that Wallerich's 2007 negligence is the but-for

cause of his compensable damages. Indeed, but for Wallerich's 2007 negligence, Frederick would have obtained a more favorable result: keeping the $1 million of asset appreciation.

In sum, we conclude that Frederick has sufficiently alleged a timely legal-malpractice claim sufficient to survive a motion to dismiss based on Wallerich's 2007 will drafting. Our holding in this case is heavily dependent on its procedural posture. Again, as we must, we accept the allegations in Frederick's complaint as true and acknowledge that the facts that Frederick must allege to survive a motion to dismiss for failure to state a claim—the standard for claim accrual in legal malpractice—are "minimal." *Noske*, 670 N.W.2d at 742. Whether, after additional discovery, the facts support Frederick's claim is a different matter that is not before us. And whether the other acts that Frederick alleges give rise to independent causes of action is a matter that we leave for the district court to consider at an appropriate time. Because we conclude that Frederick has a timely claim, the district court's dismissal of his complaint on the pleadings was erroneous.[8] We therefore reverse the decision of the court of appeals and remand this matter to the district court for further proceedings consistent with this opinion.

[8] Although Frederick's breach of fiduciary duty claim and negligent and reckless misrepresentation claims also involve consideration of whether Wallerich's post-2006 acts were independent acts of negligence, we only decide today that, for purposes of Wallerich's motion to dismiss, Frederick has sufficiently alleged a timely legal-malpractice claim. *See Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 584 (Minn. 1968) (explaining that an analysis of when a claim accrues requires consideration of all elements of the claim). We remand to the district court to determine the accrual date of Frederick's other claims consistent with this opinion.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand the case to the district court for further proceedings.

Reversed and remanded.

D I S S E N T

GILDEA, Chief Justice (dissenting).

In 2006, we reaffirmed the "some damage" rule for accrual of a cause of action and accordingly held that a cause of action for attorney malpractice based on an antenuptial agreement accrues on the date of the marriage. Today, the majority holds that this clear, straightforward, rule is inapplicable when the attorney and the client continue to have a professional relationship following the marriage. In its place, the majority sets forth a complicated and unworkable multi-factor framework that will lead to confusion and uncertainty regarding the limitations period for attorney-malpractice actions generally. Furthermore, the majority misapplies the standard it announces.

No new test is necessary to resolve this case. Under Minnesota law, appellant's cause of action accrued at the time he incurred "some damage" from respondent's alleged malpractice—that is, at the time of the parties' marriage. Respondent's later failures to remedy her original error were not independent acts of negligence giving rise to new and separate damages. Accordingly, I respectfully dissent.

FACTS

In September 2006, appellant Joseph Frederick and his then-fiancée Cynthia Gatliff met with respondent Kay Wallerich, an attorney at respondent Farrish Johnson Law Office. Frederick had retained Farrish Johnson to draft an antenuptial agreement in advance of his wedding to Gatliff, with the intent that Gatliff would not receive his assets, or any of the appreciation therefrom, upon divorce. Frederick and Gatliff signed the agreement on September 28, 2006, but the agreement was not witnessed, a statutory requirement for its

enforceability. *See* Minn. Stat. § 519.11, subd. 2 (2016). The next day Frederick and Gatliff married. More than 6 years later, in January 2013, Gatliff filed for divorce, and it soon became clear that the antenuptial agreement was unenforceable due to the lack of witness signatures. The parties eventually stipulated to a division of property by which Frederick would pay Gatliff a share of his assets as well as their appreciation. On September 10, 2013, before resolution of Gatliff's and Frederick's dissolution action, Frederick filed the current lawsuit, asserting legal malpractice and related claims against Farrish Johnson and Wallerich (collectively "Wallerich"). The district court granted Wallerich's motion to dismiss based on the 6-year statute of limitations, *see* Minn. Stat. § 541.05, subd. 1(5) (2016), and the court of appeals affirmed. *Frederick v. Wallerich*, No. A15-2052, 2016 WL 4068931 (Minn. App. Aug. 1, 2016).

ANALYSIS

The question presented in this case is whether Frederick's malpractice action was timely filed under the 6-year statute of limitations applicable to attorney-malpractice actions. In my view, *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006), controls and under *Antone*, Fredrick's claim was untimely filed. But even if *Antone* were not dispositive, I would still conclude that Fredrick's claim was untimely and would affirm.

I.

I turn first to *Antone*. The plaintiff, Richard Antone, retained an attorney, Israel Mirviss, to draft an antenuptial agreement. Antone and his spouse were married in December 1986, and he filed for divorce in 1998, at which time he first discovered that the antenuptial agreement failed to protect his interest in the marital appreciation of his

premarital property. After we ruled that the appreciation of premarital property is itself marital property, *see Antone v. Antone*, 645 N.W.2d 96, 102–03 (Minn. 2002), Antone filed suit against Mirviss, alleging that Mirviss was negligent when drafting the antenuptial agreement. The district court granted Mirviss's motion to dismiss,[1] reasoning that Antone suffered damages—and the statute of limitations began to run—either as soon as he was married or as soon as his nonmarital property began to appreciate. The court of appeals reversed, holding that the damages required for accrual of Antone's cause of action occurred only when he sustained the money damages that formed the basis for his legal malpractice lawsuit. We reversed the court of appeals, concluding that Antone's cause of action accrued when he suffered some damages due to Mirviss's alleged malpractice, which occurred when the couple married. 720 N.W.2d at 337–38.

In reaching this conclusion, we discussed the three types of accrual rules that courts have applied. First, we discussed the traditional "occurrence" rule, "which assumes that nominal damages occur, the cause of action accrues, and the statute of limitations begins to run, simultaneously with the performance of the negligent or wrongful act," *id.* at 335, and noted that we had already rejected it, *id.* (citing *Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 585 (Minn. 1968)). Next we discussed the "discovery" rule, "under which the cause of action accrues and the statute of limitations begins to run only when the plaintiff knows or should know of the injury," *id.* at 335, noting that "a significant disadvantage of the

[1] Because the parties presented matters outside the pleadings, we reviewed the grant of the motion to dismiss as a grant of summary judgment. *See* 720 N.W.2d at 334 n.4.

discovery rule is that it provides 'open-ended liability,' " *id.* (quoting 3 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 22.15, at 420 (2006)), and that we had previously rejected that rule as well. *Id.* Finally, we discussed the "damage" rule of accrual, "under which the cause of action accrues and the statute of limitations begins to run when ' "some" damage has occurred as a result of the alleged malpractice.' " *Id.* at 336 (quoting *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999)). We reaffirmed that Minnesota follows the "some damage" rule of claim accrual. *Id.*

Consistent with the "some damage" rule, we reasoned that the statute of limitations on Antone's legal malpractice claim began to run "on the occurrence of any compensable damage, whether specifically identified in the complaint or not." *Id.* And we concluded that "[w]hen Antone entered his marriage[,] . . . he passed a point of no return with respect to the laws of marital and nonmarital property and he did so without the legal shield he retained Mirviss to provide," *id.* at 337, "result[ing] in some damage sufficient to survive a motion to dismiss," *id.* at 337–38. Responding to a dissent, we reasoned that the loss Antone had suffered on the date of his marriage "was not a mere seed planted" at that date, but "was a fully-matured briar patch." *Id.* at 338. Accordingly, we held that Antone's attorney-malpractice claims were time-barred.

The facts of this case, and the facts and holding of *Antone*, are strikingly similar, and in my view, our analysis in *Antone* is dispositive of the statute of limitations issue raised here. This case is not quite the same as *Antone*, of course. No doubt with the lesson of *Antone* in mind, Frederick did not end his allegations with an assertion that Wallerich negligently failed to secure an effective antenuptial agreement, because *Antone* clearly

holds that a claim of that sort would be time-barred. Instead, Frederick alleged that on several occasions after the marriage Wallerich negligently failed to inform him that the previously executed antenuptial agreement was invalid.

Specifically, in Frederick's complaint, the allegations of which we are required to accept as true upon a motion to dismiss, *see Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008), Frederick alleged that he met with Wallerich (1) on September 12 and 28, 2007, regarding drafting a new will for Frederick disinheriting Gatliff; (2) on January 8, 2008, in connection with obtaining Gatliff's consent to the will;[2] and (3) on April 9, 2010, and July 15, 2011, in connection with codicils to the will. Wallerich billed for all this time under the matter number associated with the antenuptial agreement. Throughout this period, Frederick alleges,

> Wallerich did not warn or advise that the September 28, 2006 Antenuptial Agreement was not valid or could not be enforced in the event of a termination of the marriage by dissolution. In fact, Wallerich advised and represented that the September 28, 2006 Antenuptial Agreement was valid and enforceable in the event of a termination of a marriage by dissolution.

That is, Wallerich failed to advise Frederick, at a later time, of Wallerich's original error.

Frederick further alleges that if he had known the antenuptial agreement was not enforceable, he would have made other arrangements to protect his property rights, including entering into a post-nuptial agreement or, if Gatliff refused, promptly filing for divorce; and that Wallerich's negligence within the 6-year limitations period preceding

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[2] A will disinheriting a spouse is subject to the surviving spouse's right to an elective share under Minn. Stat. § 524.2-202 (2016) unless that right is validly waived. *See* Minn. Stat. § 524.2-213 (2016).

September 10, 2013 deprived him of an opportunity to take either of these actions. He argues that if he had been provided the opportunity, he would have taken these actions, and therefore he would, at the least, have been able to protect a portion of the appreciation of his premarital assets from his now-former spouse, leading to new and separate damages from Wallerich's later acts of negligence.

In my view, these allegations do not distinguish this case from *Antone*. Frederick's allegations against Wallerich involve just one error: the failure to be aware of the witness requirements for antenuptial agreements in Minn. Stat. § 519.11, subd. 2, resulting in an antenuptial agreement that did not protect Frederick's interests. This is the same type of error at issue in *Antone*, and thus *Antone* should govern the result.

To be sure, Frederick alleges that Wallerich made this error several times, and argues that the later instances fell within the statute of limitations. But for all practical purposes, Frederick alleges merely one error that was repeated: Wallerich failed to secure an enforceable antenuptial agreement, and then she later failed to verify that the agreement she had secured was in fact enforceable. Frederick does not, and cannot, allege separate damages flowing from the later errors; all of the damages that Frederick alleges flowed from Wallerich's original failure to secure an enforceable antenuptial agreement. The most that can be said about the damages that Frederick claims he suffered, based on the non-time-barred acts of negligence, is that they represent missed opportunities for him to reduce the damages that he suffered from Wallerich's original error by taking action to shield from his spouse a portion of the appreciation of his premarital assets. But Frederick lost the opportunity to shield the appreciation of his premarital assets from his spouse at the time

of his marriage—indeed, just as in *Antone*, to obtain such a shield was one of the main reasons he sought an antenuptial agreement. As we stated in *Antone*, "the consequences [of the failure to secure an appropriate antenuptial agreement] were both immediate and *irremediable* as of the date of the marriage." 720 N.W.2d at 337 (emphasis added). Thus, Frederick's *entire* claim for malpractice accrued at the time he suffered some damage, namely on the date of the marriage. Just as in *Antone*, the appreciation of Frederick's premarital assets had not yet occurred at that time and might have been avoided, and just as in *Antone*, that fact makes no difference to the result. As we said in *Antone*, "[a]n attempt to divide different damages resulting from one error into 'separate' causes of action is illogical and antithetical to the purpose of a statute of limitations." *Id.* at 336 (quoting 3 Mallen & Smith, *supra*, § 22.12, at 368).

Based on our analysis in *Antone*, I would affirm the court of appeals.

II.

Attempting to distinguish this case from *Antone*, the majority asserts that "[o]ur law therefore permits two separate transactions within the same set of facts to be reasonably characterized as separate acts that give rise to independent negligence claims." The majority concludes that Frederick has adequately alleged separate, non-time-barred malpractice claims, reasoning, in part, that he has alleged independent acts of malpractice. I disagree.

I agree with the majority that we have never established a method for determining when acts are sufficiently independent to give rise to distinct causes of action for legal malpractice that trigger different accrual dates. In my view, we need not establish a general

standard in this case, because it is clear on the facts alleged that Wallerich's later acts were *not* independent from her earlier ones. Rather, they were essentially the same error: Wallerich failed to secure an enforceable antenuptial agreement, and then she failed to verify that the agreement she had secured was in fact enforceable. Under any reasonable test, these alleged facts compel a conclusion that Wallerich's later acts were not independent from her original ones.

Although the majority does not itself establish a general test for independence,[3] it concludes that Wallerich's later actions connected to the drafting and execution of the will were independent acts of malpractice, separate from her original failure to have the antenuptial agreement witnessed, reasoning that (1) Frederick's position significantly worsened because of these failures; (2) Wallerich's subsequent acts were not the same type of conduct as her pre-marriage conduct; (3) the acts occurred at different times and during different transactions; (4) there was no causal link between the errors; and (5) the subsequent event "specifically and explicitly incorporated and relied on the continued validity of Wallerich's prior work." The majority's analysis is faulty.

With respect to the first factor the majority identifies, the court of appeals reasoned that Wallerich's later conduct "did not significantly worsen or enhance his losses." *Frederick*, 2016 WL 4068931, at *3. The majority disagrees, noting that Frederick alleges appreciation of his nonmarital assets resulting "in $1 million in additional payments to

[3] The majority concedes that the considerations on which it relies are neither exhaustive nor generally applicable.

Gatliff—a significant worsening of Frederick's position." The majority is wrong. It is true that the value of the nonmarital assets increased during the parties' marriage, but Wallerich's alleged negligence in drafting the will did not cause that increase. Frederick was in exactly the same position after consulting with Wallerich about the will as he was before. In short, Frederick's position was not worsened; it was unchanged.

Much of the majority's analysis of the other factors it identifies relies heavily on the proposition that the antenuptial agreement was incorporated by reference into, or relied on by, the will. The majority's analysis proceeds from a false premise. Although the antenuptial agreement is *mentioned* in the will, it is neither incorporated by reference nor explicitly relied upon by the will; in fact, the opposite is true. The will states:

> I have entered into an Antenuptial Agreement prior to executing this Will. *I have intentionally omitted my spouse from taking under this will* as we have provided for bequests at our death by separate written instrument dated September 28, 2006 [the antenuptial agreement]. *Should such instrument be deemed void pursuant to law, it is my intent to omit my spouse from taking under this Will.*

(emphasis added). That is, the will specifically states that regardless of whether the antenuptial agreement is valid and enforceable, Gatliff takes nothing under the will. Put yet another way, the validity of the antenuptial agreement is irrelevant to Frederick's intentions under the will. Nevertheless, the majority explicitly and erroneously relies on the will's (non-existent) dependence on the antenuptial agreement as one of the factors supporting its conclusion that Wallerich's non-time-barred acts were independent of her original error.

For example, in assessing whether Wallerich's subsequent acts were the same type of conduct as her pre-marriage conduct (factor 2), the majority recognizes that "it is true that the improper advice in 2007 relates to the same legal issue as the 2006 negligence—that is, the validity of the antenuptial agreement." Standing alone, this suggests that Wallerich's subsequent acts *were* the same type of conduct as her original negligence. But the majority concludes differently because "Frederick's will was crafted in reliance on the enforceability of the antenuptial agreement," and the antenuptial agreement was purportedly incorporated by reference into the will. Because there was neither reliance nor incorporation by reference, this factor underscores that Wallerich's subsequent acts were not independent from her original negligence.

III.

As stated above, in my view, *Antone* governs the result of this case. But even on the majority's terms, Frederick has failed to allege a separate cause of action based on Wallerich's later failure to discover her original mistake. Assuming the majority is correct that Wallerich's later failures were independent errors that led to separate damages, I would still affirm the lower courts. *Antone* provides a clear bright line for the date of accrual for an attorney-malpractice action related to the failure of an attorney to secure an effective antenuptial agreement: it is the date of the marriage. The majority's framework allows a plaintiff to elude *Antone*, at least in part, by alleging a second cause of action based on subsequent actions that an attorney took that failed to lead to the discovery of the earlier negligence. The majority's framework is inconsistent with the "some damage" rule we adopted in *Antone*, and a step backwards in the direction of the "discovery" rule that we

rejected in *Antone*. Specifically, the majority's framework is a step toward a rule of open-ended liability, which we noted in *Antone* was one reason we rejected the discovery rule in the first place. *See* 720 N.W.2d at 335 ("Some legal commentators have noted that a significant disadvantage of the discovery rule is that it provides 'open-ended liability.' " (quoting 3 Mallen & Smith, *supra*, § 22.15, at 420)). Accordingly, even if the result here were not already controlled by *Antone*, I would hold that *Antone* should be extended to cover the facts of this case, one in which a client alleges that his attorney's subsequent failure to identify an earlier error leads to a separate claim of malpractice.

CONCLUSION

For the foregoing reasons, I respectfully dissent.

ANDERSON, Justice (dissenting).

I join in the dissent of Chief Justice Gildea.