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Wisconsin Court of Appeals
District IV

Arrowhead Systems, Inc. and
Thomas J. Young,

Plaintiffs-Appellants,

v. Appeal No.: 2019AP002268

Grant Thornton LLP and
Lawrence M. Bovee,

Defendants-Respondents.

On appeal from a final judgment entered on November 21, 2019 by the Circuit Court of Dodge County, the Honorable Joseph G. Sciascia, presiding, in Circuit Court Case No. 2016CV623

Plaintiffs-Appellants' Brief

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Statement of Issues Presented

The following issues are presented for review in this appeal:

First Issue Presented for Review: Did the circuit court err by dismissing one plaintiff's claims for lack of standing, raised for the first time in a summary judgment reply brief, based on a determination that he suffered no damages despite evidence in the record showing his damages?

Answer By Circuit Court: No, implicitly.

Standard of Review: De novo. *Marx v. Morris*, 2019 WI 34, ¶ 21, 386 Wis. 2d 122, 925 N.W.2d 112, *reconsideration denied*, 2019 WI 84, 388 Wis. 2d 652, 931 N.W.2d 538 ("Whether a party has standing is . . . a question of law for our independent review.").

Second Issue Presented for Review: Did the circuit court err when it interpreted contractual clauses to apply to Plaintiffs' claims when the court also found the dispute did not arise from that contract?

Answer By Circuit Court: No, implicitly.

Standard of Review: De novo. *See McAdams v. Marquette Univ.*, 2018 WI 88, ¶ 20, 383 Wis. 2d 358, 914 N.W.2d 708 ("The only dispute before us is the proper interpretation of a contract. This presents a question of law, which we review de novo.").

Third Issue Presented for Review: Did the circuit court err when it granted summary judgment and dismissed as untimely claims that were filed

within the six-year Wisconsin limitations period even after the defendants intentionally misrepresented to plaintiffs the magnitude of their harm to deter them from filing suit?

Answer By Circuit Court: No, implicitly.

Standard of Review: De novo. *See McAdams*, 2018 WI 88, ¶ 19 ("We review the disposition of a motion for summary judgment de novo, applying the same methodology the circuit courts apply."); *Paul v. Skemp*, 2001 WI 42, ¶ 10, 242 Wis. 2d 507, 625 N.W.2d 860 (reviewing legal question of interpretation of statutory limitations period de novo); *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2006 WI 67, ¶ 21, 291 Wis. 2d 259, 715 N.W.2d 620 ("In general, when the facts are undisputed, or when the facts are disputed and the circuit court's factual findings are not clearly erroneous, this court reviews the application of equitable estoppel de novo. Because we are reviewing a grant of summary judgment, however, if the facts are disputed, then summary judgment is improper." (citations omitted)).

Fourth Issue Presented for Review: Did the circuit court err when it dismissed the plaintiffs' alternative claim for fraud on summary judgment when the record included facts showing intentional misrepresentation on which the plaintiffs relied, causing them harm?

Answer By Circuit Court: No, implicitly.

Standard of Review: De novo. *See McAdams*, 2018 WI 88, ¶ 19.

Statement on Oral Argument and Publication

Oral argument is not necessary in this appeal. The material facts are easy to understand and are primarily undisputed for purposes of this appeal, and the relevant law relating to the issues under review will be fully addressed in the parties' briefs. Oral argument would likely offer little, if anything, to assist the Court in deciding this appeal, and the Court's limited resources would likely be better utilized on other matters.

The Court's opinion in this appeal also likely will not meet the criteria for publication. The issues primarily involve the application of well-settled legal principles—such as the summary judgment standard, contract interpretation, and criteria for equitable estoppel—to the facts of the case.

Statement of the Case

I. Nature of the Case

This case involves professional malpractice and fraud claims against an accountant and his accounting firm for failing to advise their clients, the Plaintiffs, about a well-known favorable tax strategy referred to as an IC-DISC. After this failure was discovered, Plaintiffs allege Defendants concealed the magnitude of the harm they caused by presenting a deliberately false statement of missed benefits with the stated intention of deterring Plaintiffs from filing suit.

In their summary judgment motion, Defendants Larry Bovee and Grant Thornton LLP did not dispute that they failed to advise Plaintiffs

Arrowhead Systems, Inc. and Thomas Young about the IC-DISC strategy. Instead, Defendants argued a series of Grant Thornton engagement letters signed by Arrowhead shielded them from liability. Specifically, they asked for dismissal on the basis of a contractual statute of limitations and contractual limitations on liability, even though those contracts were limited to specific services provided by Arrowhead. The circuit court dismissed all of Plaintiffs' claims, resulting in this appeal.

II. Statement of Facts

The Parties

Arrowhead Systems, Inc. is a successful Wisconsin manufacturer and exporter that provides material handling services and equipment to businesses both locally and internationally. R.83 at 1. Arrowhead is treated as an S corporation under the federal tax code (specifically, subchapter S of the Internal Revenue Code, 26 U.S.C. §§ 1361 to 1379). R.83 at 4. Accordingly, its income and losses pass through to Thomas Young, its sole shareholder, who pays any tax liability from the company's income. R.83 at 4; R.99 at 1-2, App.184-85.

Both Arrowhead and Mr. Young individually were clients of Grant Thornton, one of the leading accounting firms in the country. R.99 at 1-2, App.184-85; R.76 at 1; R.23 at 7. Grant Thornton began working for Plaintiffs in 2003. R.76 at 1. Grant Thornton was specifically chosen as Arrowhead's accounting firm based on prior consulting work it had done for

Mr. Young and his companies related to acquisitions and business structure. R.89 at 10.

Larry Bovee is a CPA who works at Grant Thornton's office in Appleton, Wisconsin. R.75 at 61-62. Mr. Bovee served as Plaintiffs' primary point of contact at Grant Thornton. R.75 at 62.

Defendant Larry Bovee charges a rate of $750 per hour. R.91 at 2. Since just 2008, Plaintiffs has paid over a million dollars in fees for Grant Thornton's services. R.96 at 2.

The Parties' Relationship

Defendants provided a complete panoply of accounting services to Plaintiffs. Mr. Bovee and his team prepared tax returns for both Arrowhead and Mr. Young. R.99 at 1-2, App.184-85; R.83 at 4. Grant Thornton also audited Arrowhead's financial statements on a yearly basis. R.99 at 1, App.184. But Defendants' services went above and beyond those discreet tasks. Defendants also frequently advised Plaintiffs on a number of issues, including minimizing tax liability. R.99 at 1-2, App.184-85; R.89 at 11, 22, 31, 41-45, 47.

Mr. Young expressly asked Mr. Bovee to look after Mr. Young's best interests and the best interests of Arrowhead, including through tax planning and tax strategies. R.99 at 2, App.185; R.89 at 15, 45. Mr. Young specifically asked Mr. Bovee and other Grant Thornton accountants, "Are you going to bring your A game? Are you going to take care of my companies? Are you

going to take care of me? . . . Are you going to give me your all, your best, not screw up, take care of me, yes or no?" R.89 at 15; R.104 at 8. Everyone present during that conversation, including Mr. Bovee, answered yes. R.89 at 15; R.104 at 8.

Strategic Planning Services Provided

Though they failed to recommend the IC-DISC strategy at issue in this case, Mr. Bovee and others at Grant Thornton were retained for other strategic tax planning advice to Plaintiffs. For example, Mr. Bovee and his colleagues gave advice on how to structure the ownership of Arrowhead and its subsidiaries and related companies, how to take advantage of tax credits, and how to handle various potential sales, joint ventures, and acquisitions that arose over the years. R.89 at 12, 16, 48-49, 50; R.91 at 12, 18. Mr. Bovee and others at Grant Thornton also routinely gave advice to Arrowhead on how best to structure smaller transactions, including how to determine and characterize profit from intercompany sales with its subsidiaries. R.89 at 49. Mr. Bovee also directly advised Mr. Young about personal tax issues unrelated to Arrowhead, such as when he consulted Mr. Young on the tax impact of renting out land for farming. R.91 at 27.

Indeed, whenever Arrowhead or Mr. Young had questions about tax issues or how to get the most favorable tax situation, they would contact Mr. Bovee and his team. R.89 at 29-30, 39. Sometimes Arrowhead's requests were more specific and sought information about whether certain

transactions would be advantageous for tax planning purposes, like when Arrowhead's former CFO, Marty Rogers, asked for Mr. Bovee's input on lease options for tax breaks based on an article he had read. R.89 at 25; R.91 at 10, 12. Other times, Arrowhead would ask more general questions, like whether there were creative ways to structure a transaction in a tax-deductible way. R.91 at 12. Mr. Bovee routinely answered these tax planning questions and others like it. R.89 at 24, 31; R.91 at 13.

Arrowhead even repeatedly asked specifically whether Mr. Bovee and his colleagues had suggestions for minimizing taxes. Arrowhead's corporate controller would routinely ask Grant Thornton employees whether they knew of anything Arrowhead could do to minimize Mr. Young's tax burden, especially around the end of each tax year. R.89 at 36, 51. This was a long-standing practice—as just one example, in 2006, Mr. Rogers sent an e-mail to Mr. Bovee stating:

> What we need to make sure is, that we have done as many creative things from a tax planning perspective for 2006. I do not want to get to December, and find out I could have taken advantage of things that I was not aware of. . . .

R.93 at 1. Consistent with his practice, Mr. Bovee agreed to discuss it. R.89 at 24; R.91 at 9. During Mr. Rogers's tenure with Arrowhead, he repeatedly asked Mr. Bovee and others at Grant Thornton to try to find creative, clever ways to minimize Plaintiffs' tax burden. R.89 at 23-24. No one at Grant Thornton ever told Mr. Rogers that providing such advice was outside the

scope of services they would provide or refused to provide such advice. R.89 at 24, 31.

Defendants also gave unsolicited tax planning advice. When there were changes in the tax laws or new tax credits available, Mr. Bovee and his colleagues would reach out to Wendy Carlo, Arrowhead's corporate controller, to provide an explanation of the changes and how to take advantage of credits. R.89 at 37, 48; R.91 at 14.

Plaintiffs paid handsomely for this comprehensive service. Any time Grant Thornton gave advice, answered a question, or researched something, it sent Plaintiffs an invoice for that work. R.89 at 39. Grant Thornton's own invoices to Plaintiffs show numerous times when Defendants performed "professional tax consulting," "tax consulting," and "consulting projects." R.91 at 18, 19, 21-25, 27; R.93 at 6-75. Moreover, the total fees charged to Plaintiffs on invoices from the tax team at Grant Thornton far exceeded the estimates of the cost of just preparing tax returns, such as in 2009, when Grant Thornton's tax team charged Arrowhead for services more than twice the estimated cost of preparing tax returns. R.74 at 10, App.104; R.76 at 26, App.174; R.91 at 29; R.93 at 6-75. Since just 2008, Plaintiffs has paid over a million dollars in fees for Grant Thornton's services. R.96 at 2.

Engagement Letters

Between 2007 and 2012, Grant Thornton prepared a series of six form engagement agreements related to tax return preparation (collectively, the

"Engagement Letters," located in the Appendix at App.100-83), which Defendants described as covering "a specific and limited purpose: to prepare federal and state tax returns for Arrowhead." R.73 at 3. Arrowhead signed these form agreements without change. R.91 at 7; R.96 at 1. Arrowhead and related entities also signed engagement letters for other similarly discreet projects, such as the independent audits of Arrowhead's financial statements and the preparation of Canadian tax returns. R.89 at 45; R.94 at 1-8; R.95 at 47-57.

Thomas Young was not a party to the Engagement Letters, but it is undisputed that Grant Thornton (including Mr. Bovee specifically) prepared his personal tax returns and performed other work for him. R.99 at 1-2, App.184-85; R.89 at 22, 25.

Each Engagement Letter, drafted exclusively by Grant Thornton, carefully limits the scope of the agreement to cover the provision of "Services," a defined term in the letters. R.74 at 7, 10, 20, 23, 32, 35, 45, 48, App.101, 104, 114, 117, 126, 129, 139, 142; R.76 at 5, 8, 11, 20, 23, 26, App.153, 156, 159, 168, 171, 174; R.91 at 7.

The defined term "Services" refers to those services described in the statements of work that are part of each of the Engagement Letters. Specifically, the term "Services" is defined in the following sentence: "The purpose of this Statement of Work is to describe the scope of services ("Services") the Company is requesting Grant Thornton to perform, and to

set forth the agreed fee, timing and other matters related to the Services." R.74 at 10, 23, 35, 48, App.104, 117, 129, 142; R.76 at 8, 11, 23, 26, App.156, 159, 171, 174. Defendants' expert witness agrees—as he states in his report: "The scope of services is defined in an attached Statement of Work." R.23 at 8.

Between 2009 and 2011, the Services were solely the preparation of tax returns, extension calculations, and applicable forms. R.74 at 10, 23, 35, App.104, 117, 129. In 2008, the Services additionally included the preparation of book to tax calculation. R.76 at 8, 11, 23, 26, App.156, 159, 171, 174. In 2012, Grant Thornton broadened the scope of the Services slightly, by adding the answering of "routine time-to-time tax consulting services for assignments individually" that were provided "upon [Arrowhead's] request" to the statement of work. R.74 at 48, App.142.

The use of the term "Services" throughout the Engagement Letters makes it crystal clear that the scope of the Engagement Letters was intended to be limited to the defined set of Services. For example:

- GT's responsibilities under the statement of work "extends ***only to Services*** we expressly agree to provide herein." R.74 at 10, 23, 35, 49, App.104, 117, 129, 143; R.76 at 11, 26, App.159, 174 (emphasis added).
- The merger clause in the Engagement Letters states the agreement is the "entire understanding between and among the parties ***regarding the Services***." R.74 at 18, 30, 42, 56, App.112, 124, 136, 150; R.76 at 18, 34, App.166, 182 (emphasis added).
- The provision regarding raising disputes requires asserting claims "***arising out of the Services***" within two years of a certain time. R.74 at 14-15, 26-27, 39, 53, App.108-09, 120-21, 133, 147; R.76 at 15, 31, App.163, 179 (emphasis added).

- The limitation of liability clauses limit damages only "[w]ith respect ***to the Services*** and this Agreement." R.74 at 14, 26, 38, App.108, 120, 132; R.76 at 15, 30, App.163, 178 (emphasis added).

Tax consulting, strategic advising, and advisory services are not part of preparing tax returns. R.91 at 6, 24-25. In fact, it would not be necessary to perform any consulting services to prepare Plaintiffs' tax returns, and the distinctly separate services could be provided by entirely separate firms. R.91 at 24-25. Moreover, in each of the Engagement Letters, research and consultation is explicitly excluded from the scope of Services—Defendants stated their "responsibility under this Statement of Work extends only to Services" and "does not include . . . research or consultation with respect to nonrecurring items or other matters of tax significance." R.74 at 10, 23, 35, 49, App.104, 117, 129, 143; R.76 at 8, 11, 23, 26, App.156, 159, 171, 174.

IC-DISC

This case involves Defendants' failure to identify, recommend, or implement the interest charge domestic international sales corporation (IC-DISC) tax strategy to Plaintiffs as a way to minimize their tax burden. R.1. The IC-DISC strategy is a well-known strategy—in fact, Grant Thornton issued publications on the topic and promoted itself as a leader in the area. R.19 at 15. The strategy is so well known and popular that Defendants even recommended an IC-DISC to other manufacturing businesses in Wisconsin before Grant Thornton was even hired as their accountant. R.94 at 14; R.92 at 3-4.

The purpose of the IC-DISC program is to help small American companies that export goods that are manufactured locally. R.19 at 3-5. Under the IC-DISC program, the commissions from exported manufactured products are taxed at the dividend income rate (at most, 20%), rather than the higher ordinary income rate (which can be as high as 39.6% for individuals). R.19 at 4; R.55 at 1-2, App.187-88. Because of the substantial difference in those tax rates, lower taxes are paid on the income under the IC-DISC, categorized as dividend income, which would otherwise be ordinary income to Arrowhead. R.19 at 4; R.55 at 1-2, App.187-88. This program allows manufacturers to compete on an international market against competitors that may be taxed at a lower rate. R.19 at 2-5.

Defendants undisputedly failed to advise Plaintiffs about the IC-DISC tax strategy. R.104 at 25. Instead, Plaintiffs learned about the IC-DISC strategy by chance through a conference attended by an Arrowhead employee in fall 2013. R.89 at 17. Plaintiffs' expert calculates the damages from this error to be over a million dollars. R.19 at 13.

Concealment by Defendants

After learning of the IC-DISC strategy independently in late 2013, Plaintiffs asked Defendants to perform an analysis showing the amount Plaintiffs would have saved in taxes had Grant Thornton implemented the IC-DISC strategy in 2003, when Arrowhead first engaged Grant Thornton. R.99 at 2, App.184-85. Defendants sent this analysis to Mr. Young on

February 24, 2014. R.75 at 2-4, App.189-91. Specifically, the harm to Plaintiffs was represented to be $124,459—well below a reasonable estimate of the cost of litigation against a large accounting firm. *See* R.75 at 2-4, App.189-91.

Only later did Plaintiffs discover that this number was intentionally lowered to deceive Plaintiffs into refraining from filing suit. *See* R.75 at 17-29, App.192-201; R.91 at 37-38, 40-41, 43, 44. Internal correspondence between Defendant Lawrence Bovee and fellow Grant Thornton employees Kyle Brandon and Jennifer Potter, obtained by Plaintiffs during discovery in this case, showed the effort to keep Plaintiffs from filing suit. R.75 at 17-29, App.192-201.

Mr. Bovee and his colleagues exchanged a series of versions of the IC-DISC analysis, with each in the series reflecting a total net cash savings to Plaintiffs that was lower than the prior version. R.75 at 17-29, App.192-201. This was achieved through a variety of inaccurate modifications based on false information, such as falsely excluding 10% of Arrowhead's export sales and falsely representing the amount of fees required to perform the work. R.91 at 37-38, 40-41, 43, 44. Grant Thornton's witnesses admitted to making all of those modifications. R.91 at 37-38, 40-41, 43, 44.

The first version, prepared by Mr. Brandon, who had significant familiarity with the IC-DISC program, showed a net cash savings to Plaintiffs of $563,083. R.75 at 23-26, App.192-95. When Mr. Brandon sent

this initial calculation to his colleagues on February 13, 2014, he joked, "Hope the client is going to go after us for this lost benefit!" R.75 at 23, App.192; R.91 at 124.

This initial calculation is, in itself, intentionally designed to be lower than the savings Grant Thornton could have provided for a client who implemented the IC-DISC strategy. That is because, rather than applying one method (the "4% method") to all sales in a year, the person calculating the savings can look at each transaction and choose the most favorable method for each individual transaction, as this maximizes the tax savings. R.19 at 10-11; R.91 at 37. For "simplification," Mr. Brandon did not take this extra step to calculate Plaintiffs' true savings. R.75 at 23-26, App.192-95; R.91 at 38.

Then began a series of internal modifications to the calculation with the stated goal of minimizing the total number as much as possible, in order to deceive Plaintiffs into believing their damages were minimal. Later the same day, after adjusting the calculations for two of the years downward based on the taxable income to the company in those years, Mr. Brandon then prepared a revised spreadsheet showing a net cash savings to Mr. Young of $465,227 over 10 years. R.75 at 17-18, App.196-97. But for at least one of those years, 2008, a truthful analysis would have shown that the IC-DISC could have been used due to the relationship between Arrowhead and one of its related entities, making the downward revision to the analysis inaccurate. R.91 at 41-43.

The next day, on February 14, 2014, Jennifer Potter, a senior associate that worked with Mr. Bovee, further reduced the figure to $322,616 by reducing the savings in yet another year based on taxable income. R.75 at 28-29, App.198-99. As Ms. Potter explained in her internal email to Mr. Brandon that day, "We are working on minimizing this number as much as possible . . . ." R.75 at 28, App.198.

Even ignoring that each of these prior figures was objectionable, on February 20, 2014, Mr. Bovee sent a revised spreadsheet to his colleagues showing a net cash savings of $217,266, less than half the amount Mr. Brandon originally calculated. R.95 at 20-21. Mr. Bovee achieved this result in three ways. First, he inflated the fees Grant Thornton would charge for preparing and filing IC-DISC returns from $8,500 per year to $15,000 per year. R.75 at 64. Second, he added an internal cost to Arrowhead for having staff gather information (even though the information was gathered for this analysis at no additional cost to Arrowhead). R.91 at 32. Third, Mr. Bovee arbitrarily decided that only 90% of Arrowhead's exports would qualify, rather than 100%. R.91 at 40-41. However, on February 21, 2014, an Arrowhead employee confirmed to Mr. Bovee that 100% of exports would qualify, but Mr. Bovee intentionally left the inaccurate numbers in the final version of the spreadsheet. R.91 at 43; R.75 at 2-4, App.189-91.

In the final version of the calculation, which Mr. Bovee sent to Mr. Young on February 24, 2014, the number had been reduced further still to

$124,459, the number on which Plaintiffs relied. R.75 at 2-4, App.189-91. The final change to this document from the prior version was the complete removal of 2013 from the calculation. R.75 at 77. This was purportedly done because Arrowhead implemented the IC-DISC strategy in 2013, but the implementation process did not even begin until November 2013, meaning over 10 months of missed IC-DISC benefits were omitted from the final calculation without any possible justification. R.91 at 44.

Subsequent Implementation of IC-DISC

In November 2013—around the same time Plaintiffs asked Defendants for a calculation of their harm and soon after learning about the IC-DISC program generally—Plaintiffs decided to try the IC-DISC strategy and began the steps necessary to implement it by setting up the separate company. R.55 at 1, App.187. Arrowhead's first tax return reflecting the IC-DISC was filed in September 2014. R.55 at 2, App.188. Because the strategy had been in place for only a short time in 2013, the tax impact reflected in fall 2014 was very low. R.55 at 2, App.188. Subsequently, the two returns filed in 2015 and 2016 showed progressively greater tax benefits due to Mr. Young paying a lower tax rate on the IC-DISC commissions of $509,333 and $1,224,611, respectively. R.55 at 2, App.188. By late 2016, after receiving substantial tax benefits from only a little over two years of having the IC-DISC in place, Plaintiffs began to suspect Defendants' representations had

been false. R.55 at 2, App.188. As a result, Plaintiffs decided to pursue their claims against Defendants. R.55 at 2, App.188.

III. Procedural Status and Disposition in the Circuit Court

Plaintiffs filed their complaint stating claims for negligence and breach of fiduciary duty and an alternative cause of action for breach of contract on December 14, 2016. R.1. Defendants filed an answer and counterclaim for a declaratory judgment seeking interpretation of the Engagement Letters. R.4. After engaging in discovery, Plaintiffs were granted leave to file an amended complaint adding an additional alternative cause of action for fraud. R.48, R.50.

Defendants filed a motion for summary judgment on April 1, 2019. R.72. After briefing and oral argument, on October 22, 2019, the circuit court issued an order granting Defendants' motion and dismissing Plaintiffs' claims in their entirety. R.105, App.001-16.

Defendants agreed to voluntarily dismiss their counterclaim seeking a declaratory judgment, resulting in the order directing entry of judgment and the corresponding judgment dated November 21, 2019. R.107; R.109, App.017; R.110, App.018. Plaintiffs filed a notice of appeal the next day. R.111.

Legal Argument

For purposes of this appeal, it is undisputed that Defendants failed to identify, recommend, and implement the IC-DISC strategy. R.104 at 25.

Defendants' sole arguments in their summary judgment brief, and the only issues on appeal, relate to their attempt to hide behind the Engagement Letters as a shield against the consequences of their wrongdoing.

I. Tom Young Was Harmed and Has Standing to Pursue His Claims.

In Defendants' opening brief in support of summary judgment, they raised no arguments addressing any basis to dismiss Tom Young's claims, instead focusing entirely on the Engagement Agreements signed by Arrowhead. *See* R.73. Mr. Young was not a party to any of the Engagement Letters, which were issued to Arrowhead. R.74 at 6-57, App.100-51; R.76 at 4-35, App.152-83. Mr. Young is not mentioned in the Engagement Letters, and he did not even sign them on behalf of Arrowhead. R.74 at 6-57, App.100-51; R.76 at 4-35, App.152-83. He cannot be bound by their terms. *See, e.g.*, *Maciolek v. City of Milwaukee Employes' Ret. Sys. Annuity & Pension Bd.*, 2006 WI 10, ¶ 22, 288 Wis. 2d 62, 709 N.W.2d 360 ("Wisconsin courts have long recognized that one cannot enforce a contract against an entity that is not a party to it."). They are entirely inapplicable to Mr. Young's claims.

Only on reply did Defendants challenge Mr. Young's standing to bring his claims. R.103 at 8-10. Defendants admitted they had not sought dismissal of Mr. Young's claims, and the circuit court acknowledged the matter had not been fully briefed and that he may request more briefing.

R.117 at 2, 79-80, App.020, 097-98. However, in the order granting summary judgment in Defendants' favor on Arrowhead's claims, the circuit court dismissed Mr. Young's claims for lack of standing. R.105 at 15-16, App.015-16. The circuit court erroneously concluded "[t]he existence or lack thereof of the IC-DISC is not a matter directly affecting Mr. Young's tax liability." R.105 at 16, App.016.

This was clear error. Even though Defendants first raised the issue of standing in reply, the record clearly shows Mr. Young was indeed harmed by Defendants' failure to identify, recommend, and implement the IC-DISC strategy for one very simple reason: *Mr. Young* paid all of the excess taxes that were caused by Defendants' error. R.83 at 4; R.99 at 1-2, App.184-85.

At all relevant times, Arrowhead was treated as an S corporation under the federal tax code. *See* R.83 at 4. As a result, its income and losses passed through to Tom Young, its sole owner, who paid the tax liability that arose from the company's income. *See* R.83 at 4; R.99 at 1-2, App.184-85; *see also* 26 U.S.C. § 1366. This means the vast majority of the damages in this case were incurred by Mr. Young, and Mr. Young alone. Moreover, Mr. Young was himself a client of Mr. Bovee and Grant Thornton, and Mr. Bovee and other Grant Thornton employees agreed to look out for Mr. Young's best interests. R.99 at 1-2, App.184-85; R.89 at 15. As such, Defendants owed Mr. Young a duty to recommend and implement the popular and well-known

IC-DISC program as a way to lower Mr. Young's tax burden, and breached that duty.

At least one court has addressed the issue of the standing shareholders of S corporations have to raise claims like Mr. Young's. *Miller v. Taryle*, 2013 WL 12205851 (C.D. Cal. Sept. 10, 2013). That court ruled that *only* the shareholder, and not the company, had standing to file suit against an accountant for errors that increased that shareholder's tax liability. *Id.* at *3-4 ("Only an S Corporation's shareholders, not the corporation itself, have standing when the proper payment of income taxes is at issue."). This Court need not try to parse out which Plaintiff suffered which damages—that should be left for the circuit court to resolve. The undisputed fact that Mr. Young suffered harm in the form of paying excess taxes is sufficient to reverse the circuit court's ruling that Mr. Young lacked standing for having suffered no damages.

This is not a derivative action, as Defendants seemingly contended for the first time in their summary judgment reply brief. R.103 at 8-9. Derivative actions, typically against a director or officer of a corporation, involve a shareholder seeking to redress an injury to a corporation: "[W]here an individual's injury results *from the corporation's injury*, the resulting claim is derivative and the individual lacks standing to raise it in a direct action." *Park Bank v. Westerburg*, 2013 WI 57, ¶ 43, 348 Wis. 2d 409, 832 N.W.2d 539 (emphasis added).

In Wisconsin, the test for determining whether a claim is an individual claim or a derivative claim is whether the alleged injury is primarily to the individual or to the corporation. *See, e.g.*, *Rose v. Schantz*, 56 Wis. 2d 222, 228-29, 201 N.W.2d 593 (1972). A classic example of injury to the corporation rather than the individual is an injury the stockholder feels solely by a reduced stock value. *E.g.*, *id.* at 229. Conversely, where a shareholder feels an injury distinct from the injury to the company, he has standing to pursue that claim as a direct action. *See, e.g.*, *Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, ¶ 23, 316 Wis. 2d 640, 764 N.W.2d 904.

Mr. Young's injury—specifically, paying excess taxes that would not have been due if Defendants had recommended and implemented the IC-DISC structure—was not an injury felt by Arrowhead. Arrowhead pays no income tax. All of its income passes through to Mr. Young, its shareholder, who is responsible for any tax liability. R.83 at 4; R.99 at 1-2, App.184-85. Mr. Young has standing to pursue his claims for this harm he uniquely suffered, and the circuit court erred as a matter of law when dismissing his claims for lack of standing.

II. The Engagement Letters Do Not Govern this Dispute.

The Engagement Letters contain a number of terms that apply only to claims arising from those agreements or from the Services provided under the agreements. Arrowhead's claims, unrelated to the limited scope of the Engagement Letters, are not subject to the agreements.

Indeed, the circuit court correctly ruled Plaintiffs' claims do not come within the scope of the Engagement Letters. R.105 at 5, App.005. Logically, this ruling means the Court agreed Plaintiffs' claims do not involve the provision of Services, as that is the very scope of the Engagement Letters. Yet, inexplicably, the circuit court made a sweeping conclusion, untethered from the text of the Engagement Letters, that some boilerplate terms, including the choice-of-law provision and limitations on liability, were intended to apply more broadly: "The Court finds that the purpose of the engagement letters is to set the ground rules for the relationship between the parties. The various terms of the agreement such as choice of law, statute of limitations, limitations of damages, cover all work performed by Grant Thornton whether specifically identified in the description of services or not." R.105 at 3, App.003. This conclusion cannot be squared with the text of the Engagement Letters.

It is a fundamental contract interpretation principle that contract terms must be interpreted according to their plain and unambiguous language, as a matter of law. *See, e.g., Topolski v. Topolski*, 2011 WI 59, ¶¶ 28-32, 335 Wis. 2d 327, 802 N.W.2d 482. As the Wisconsin Supreme Court recently explained,

> Contract interpretation generally seeks to give effect to the intentions of the parties. However, subjective intent is not the be-all and end-all of contract interpretation. Rather, unambiguous contract language controls the interpretation of contracts. This court construes contracts as they are written.

Horizon Bank, Nat'l Ass'n v. Marshalls Point Retreat LLC, 2018 WI 19, ¶ 51, 380 Wis. 2d 60, 908 N.W.2d 797 (citations omitted). Grant Thornton's one-sided purpose or intent behind the Engagement Letters is irrelevant.

A. The Engagement Letters are limited in scope to cover specific Services.

The yearly Engagement Letters for completing tax returns were limited in scope. In fact, Defendants' expert reached the same conclusion, opining, "[t]he scope of services is defined in an attached Statement of Work." R.23 at 8. Defendants themselves described the Engagement Letters as covering "a specific and limited purpose: to prepare federal and state tax returns for Arrowhead." R.73 at 3.[1]

That specific and limited scope is reflected throughout the Engagement Letters. From the very first paragraph, it is clear the document intends to be limited—all of the Engagement Letters include language similar to the following, with minor variation:

> Grant Thornton LLP ("Grant Thornton," "Firm," or "we") is pleased to provide tax services (the "Services") to Arrowhead Systems, Inc. (the "Company," "Client," or "you"). The purpose of this letter, Attachment A, and any related Statement(s) of Work (collectively, the "Agreement"), as defined below, is to confirm the scope and terms of our engagement.

[1] In 2012, the definition of Services was broadened slightly, by adding the answering of "routine time-to-time tax consulting services for assignments individually" that were provided "upon [Arrowhead's] request.". R.74 at 48, App.142. This does not change the analysis. It adds only the advice rendered when Arrowhead called with routine tax-specific questions during the year, and still specifically excluded consultation and research. R.74 at 48, App.142. Even if this added language in 2012 were found broad enough to encompass the omission that is the subject of Plaintiffs' claims, that still only applies to Plaintiffs' claim as it relates to conduct after January 21, 2013, when that Engagement Letter was signed by Arrowhead. R.74 at 47, App.141. It cannot act as a retroactive release.

R.76 at 5, App.153; *see also* R.74 at 7, 20, 32, 45, App.101, 114, 126, 139; R.76 at 20, App.168.

Services is more specifically defined in the statements of work attached to each Engagement Letter. Each statement of work includes the following language: "The purpose of this Statement of Work is to describe the scope of services ("Services") the Company is requesting Grant Thornton to perform, and to set forth the agreed fee, timing and other matters related to the Services." R.74 at 10, 23, 35, 48, App.104, 117, 129, 142; R.76 at 8, 11, 23, 26, App.156, 159, 171, 174.

In the circuit court, Defendants took a broader view of the defined term "Services," and argued it means all tax services that could have been provided. R.103 at 2-3. In particular, Defendants point to one line in the lengthy documents that states, "This Agreement will cover all Services rendered whether or not the parties execute a Statement of Work." R.76 at 5, App.153; *see also* R.74 at 7, 20, 32, 45, App.101, 114, 126, 139; R.76 at 20, App.168. But this argument is circular and makes no sense. Just because Grant Thornton may provide other services that come within the definition of Services without a separate statement of work does not mean that everything Grant Thornton could have been asked to do at any point falls within the definition of Services and is covered by the Engagement Letters.

The Engagement Letters, written solely by Grant Thornton, reflect the unmistakable intent to carefully craft the scope of the terms of the

agreements. If they covered all of the services Grant Thornton could ever provide, or even just the tax services (however one would define them) Grant Thornton could provide, there would be no reason to enter into multiple engagement letters—either for successive years or for other projects.

Rather, the Engagement Letters plainly provide terms related only to the specific defined Services—the preparation of tax returns and forms for each specific year. R.74 at 10, 23, 35, 48, App.104, 117, 129, 142; R.76 at 8, 11, 23, 26, App.156, 159, 171, 174. Grant Thornton explicitly excludes research and consulting from those Services. R.74 at 10, 23, 35, 49, App.104, 117, 129, 143; R.76 at 8, 11, 23, 26, App.156, 159, 171, 174.

Preparing tax returns is a discreet task. Tax consulting, strategic advising, and advisory services are not part of preparing specific tax returns and forms, are unnecessary to preparing tax returns, and the distinctly separate services could be provided by entirely separate accounting firms. R.91 at 24-25. The Services described in the Engagement Letters stand in stark contrast with the extensive consulting services Mr. Bovee and his team provided. The Engagement Letters were always intended to cover only the limited purpose of defining the discreet task of preparing tax forms, and did not govern the entire relationship between Arrowhead and Grant Thornton. This relationship included a plethora of other services, big and small, solicited and unsolicited, subject to other engagement letters and not. Those

additional services included consulting and strategic planning. Thus, the Engagement Letters do not apply.

If the Court finds any ambiguity in the definition of Services or the scope of the Engagement Letters, this ambiguity should be construed against the drafter, Grant Thornton. *See MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust*, 2015 WI 49, ¶ 38, 362 Wis. 2d 258, 864 N.W.2d 83; *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 368 (Ill. 1998). Moreover, when a contract is ambiguous, its interpretation is a question of fact to be decided by the fact-finder. *See, e.g.*, *Jones v. Jenkins*, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979).

B. The choice-of-law clause in the Engagement Letters does not apply, leaving Wisconsin law as the proper law to apply.

The Engagement Letters specifically state Illinois law was chosen to govern only issues relating to the Engagement Letters themselves, and Plaintiffs' claims do not arise out of the Engagement Letters in any way.

The choice-of-law clauses in each of the Engagement Letters states: "This Agreement, including its formation and the parties' respective rights and duties and all disputes that might arise from or in connection with this Agreement or its subject matter, shall be governed by and construed in accordance with the laws of Illinois, without giving effect to conflicts of laws." R.74 at 18, 30, 41, 56, App.112, 124, 135, 150; R.76 at 18, 34, App.166, 182.

The choice-of-law clause plainly does not apply. Plaintiffs' malpractice and fraud claims against Defendants are unrelated to formation of the Engagement Letters or the parties' rights and duties under the Engagement Letters. The claims do not arise from the Engagement Letters or its subject matter, the preparation of tax returns. Plaintiffs' claims arise from Defendants failure to identify, recommend, and implement the popular IC-DISC tax strategy. This tax advising and consulting is not within the scope of Services, and is not the subject matter of the Engagement Letters.

The choice-of-law provision in the Engagement Letters is unambiguously limited in application to disputes arising out of those Engagement Letters and the provision of Services. However, to the extent any ambiguity can be found in the provision, this ambiguity too should be construed against Grant Thornton or resolved by a fact-finder. The circuit court's ruling that the choice-of-law clauses in the Engagement Letters required the application of Illinois law in this case was erroneous as a matter of law.

In the absence of a contractual choice-of-law provision, Wisconsin's conflict of laws principles apply. *See generally Conklin v. Horner*, 38 Wis. 2d 468, 473-74, 157 N.W.2d 579 (1968) (describing interest-oriented choice-of-law analysis for tort claims); *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 446–47, 177 N.W.2d 328 (1970) (describing grouping-of-contacts approach to choice-of-law analysis for contract claims). "The first rule in

Wisconsin choice of law rules is that the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance." *State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31, ¶ 51, 251 Wis. 2d 561, 641 N.W.2d 662 (internal quotation marks omitted).

In addition to the presumption that Wisconsin law should apply, the relevant acts and omissions all took place in Wisconsin by employees of the Appleton branch of Grant Thornton and the Wisconsin-based Arrowhead. R.75 at 61; R.83 at 1. Further, in the circuit court, Defendants failed to identify any conflicting laws that could apply or a state with greater interests in this dispute, with the sole exception of a Florida limitations period it raised for the first time in reply, which will be addressed separately below. As such, if the Court agrees the contractual choice-of-law provision is inapplicable, Wisconsin law should be applied to the issues in this appeal.

C. The limitations on liability in the Engagement Letters do not apply.

The circuit court's dismissal of Arrowhead's claims was based on its conclusion that the limitations period expired. R.105 at 10, App.010. However, the circuit court also analyzed issues related to limitations of liability contained in the Engagement Letters, and erroneously concluded they provide an independent basis to dismiss Arrowhead's claims.

For much the same reason the contractual choice-of-law clause does not apply, the limitations of liability in the Engagement Letters also do not apply. Each of the Engagement Letters contains a limitation of liability that Defendants attempt to hide behind. However, in each of the Engagement Letters, the provision begins with the following language: "With respect to the Services and this Agreement generally, ..." R.74 at 14, 26, 38, App.108, 120, 132; R.76 at 15, 30, App.163, 178. If, as the circuit court correctly found, Defendants' provision of (and failure to provide) advice on tax strategy is outside the scope of the Engagement Letters, the limitations of liability cannot apply. To the extent ambiguity can be found, once again, this ambiguity should be construed against Grant Thornton.

Because Plaintiffs' claims do not relate to the provision of Services, or to the Engagement Letters generally, the limitations on liability in those documents do not apply.

III. Plaintiffs' Claims Were Timely Filed.

Under the six-year Wisconsin statute of limitations, Plaintiffs' claims were timely filed. Moreover, regardless of which state's limitations period applies, Defendants are estopped from raising a limitations defense due to their fraudulent concealment of the harm to Plaintiffs.

A. The applicable limitations period is six years.

The Wisconsin statute of limitations applicable to claims against accountants provides for six years to bring a claim. Wis. Stat. § 893.66(1).

However, it provides a complete exception for "any person who commits fraud or concealment in the performance of professional accounting services." Wis. Stat. § 893.66(4).[2] As explained below, Defendants engaged in both fraud and concealment, rendering this limitations period inapplicable.

Under the statutory 6-year limitations period, Plaintiffs' claims were still timely. The circuit court found Plaintiffs' cause of action accrued in February 2014. R.105 at 9, 10, App.090-10. Plaintiffs filed the lawsuit in December 2016, less than 3 years after the cause of action accrued, and well within the 6-year Wisconsin limitations period.

In their reply brief in the circuit court, Defendants raised, for the first time in the case, a claim that the Florida statute of limitations should apply to Mr. Young's claims through Wisconsin's borrowing statute, Wis. Stat. § 893.07. This is unsupported by the law and unsupported by the facts.

Legally, the residence of the plaintiff is not the test for determining whether a cause of action comes within the borrowing statute. The statute provides:

> (1) If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies has expired, no action may be maintained in this state.
>
> (2) If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies to that action has not expired,

[2] Wisconsin case law describes this law as a statute of repose, and the limitations periods otherwise applicable to Plaintiffs' causes of action also apply. However, because the limitations period for injury to property claims and breach of contract claims in Wisconsin is also six years, *see* Wis. Stat. §§ 893.52, 893.43, and they accrue on discovery of the cause of action, they do not impact the analysis.

> but the applicable Wisconsin period of limitation has expired, no action may be maintained in this state.

Wis. Stat. § 893.07.

What constitutes a "foreign cause of action" can involve consideration of several different facts, depending on the nature of the claim. In personal injury cases involving a one-time injury, the Wisconsin Supreme Court has found an action to be a "foreign cause of action" when the plaintiff was involved in an accident outside the state of Wisconsin. *See Guertin v. Harbour Assur. Co. of Bermuda, Ltd.*, 141 Wis. 2d 622, 629-32, 415 N.W.2d 831 (1987). In cases involving harm over a longer time, the Wisconsin Supreme Court recently focused on the "first injury," and if that location is unknowable, the borrowing statute does not apply. *Paynter v. ProAssurance Wis. Ins. Co.*, 2019 WI 65, ¶¶ 72-74, 387 Wis. 2d 278, 929 N.W.2d 113. The Seventh Circuit, when grappling with a case involving harm to a plaintiff in multiple states, concluded:

> As it stands, the Wisconsin statute asks one question: did the injury occur inside Wisconsin? The answer here is yes, if not exclusively. That is enough, we are persuaded, to remove the case from the operation of the borrowing statute.

Faigin v. Doubleday Dell Pub. Grp., Inc., 98 F.3d 268, 272 (7th Cir. 1996).

Factually, Defendants' only support for the argument that Mr. Young's cause of action was a foreign cause of action was Plaintiffs' pleadings in the case, in which Mr. Young pleaded, *as of 2016* and after, that he was a Florida resident. Nowhere in the record is there any evidence of Mr.

Young's location or residence(s) at the relevant times when he was injured or of any other factors relevant to determining whether a cause of action is a "foreign cause of action" under Wis. Stat. § 893.07.

Defendants alone are to blame for the underdeveloped record. This is exactly why parties cannot wait until a summary judgment reply brief to raise an issue for the first time. The possibility of a limitations period in Florida applying to Mr. Young's claims was not raised at any prior point in the case. Defendants moved for summary judgment based solely on the terms of the Engagement Letters between Arrowhead and Grant Thornton. R.73 at 1-20. This argument should be found waived, but even if this Court does not find Defendants waived this argument, Defendants cannot show the borrowing statute applies to Mr. Young's claims.

B. Defendants are estopped from asserting a limitations defense by their fraudulent representations.

In any event, regardless of which state's limitations period could be considered to apply, Defendants' fraudulent concealment of the magnitude of Plaintiffs' harm should preclude them from raising a limitations defense. Whether called equitable estoppel, equitable tolling, or fraudulent concealment, every state whose limitations period could apply to Plaintiffs' claims in this case recognizes that a party who causes a plaintiff to delay filing suit cannot benefit from that misconduct.

Wisconsin law recognizes inequitable or fraudulent conduct that induces a plaintiff to delay in filing a cause of action is grounds for equitable estoppel. *See, e.g.*, *Hester v. Williams*, 117 Wis. 2d 634, 644, 345 N.W.2d 426 (1984). "By definition, equitable estoppel is based upon the fraudulent or other wrongful conduct on the part of the party asserting the statute of limitations and upon the detrimental reliance on such fraudulent or wrongful conduct by the aggrieved party." *Id.* "[T]he test for equitable estoppel consists of four elements: '(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment.'" *Vill. of Hobart v. Brown Cty.*, 2005 WI 78, ¶ 36, 281 Wis. 2d 628, 698 N.W.2d 83.

"The primary reason for applying equitable estoppel to bar a defendant from asserting the statute of limitations is when 'the conduct and representations of [the defendant] were so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions.'" *Wosinski v. Advance Cast Stone Co.*, 2017 WI App 51, ¶ 40, 377 Wis. 2d 596, 901 N.W.2d 797 (quoting *Hester*, 117 Wis. 2d at 645). The Wisconsin Supreme Court has provided six rules for courts to apply to this issue:

> (1) The doctrine may be applied to preclude a defendant who has been guilty of fraudulent or inequitable conduct from asserting the statute of limitations;

> (2) The aggrieved party must have failed to commence an action within the statutory period because of his or her reliance on the defendant's representations or act;
>
> (3) The acts, promises or representations must have occurred before the expiration of the limitation period;
>
> (4) After the inducement for delay has ceased to operate, the aggrieved party may not unreasonably delay;
>
> (5) Affirmative conduct of the defendant may be equivalent to a representation upon which the plaintiff may rely to his or her disadvantage; and
>
> (6) Actual fraud, in a technical sense, is not required.

Hester, 117 Wis. 2d at 644-45.

Similarly, in Illinois, "[a] defendant is estopped from asserting the limitations bar if the plaintiff's failure to act within the statutory period results from reasonable reliance on the defendant's conduct or representations." *Brummel v. Grossman*, 103 N.E.3d 398, 412 (Ill. App. Ct. 2018), *appeal denied*, 108 N.E.3d 821 (Ill. 2018).

Florida law recognizes a form of this doctrine, as well. "Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001). "The doctrine of estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury." *State ex rel. Watson v. Gray*, 48 So. 2d 84, 88 (Fla. 1950).

In fact, this principle is recognized in common law across the country. In one instructive case, a man injured his eye while riding on the defendant company's streetcar. *Pashley v. Pacific Elec. Co.*, 153 P.2d 325, 326 (Cal. 1944). The defendant provided the services of its employed physician to examine the eye, who falsely told the man the injuries were not serious, and he would make a full recovery. *Id.* In reality, as the physician knew, the eye would develop a cataract and eventually go blind. *Id.* Upon discovering the magnitude of his injury several years later, the man sued the streetcar owner. *Id.* The Supreme Court of California extensively analyzed the fraudulent concealment issue, and ultimately held as follows:

> Whether in itself it is an actionable fraud or merely suffices to toll the statute on the original obligation, the breach of a duty to disclose known facts with the intention to and which does hinder commencement of an action until the action would be outlawed, is a fraud practiced upon the plaintiff which in conscience estops the defendant's reliance on the statute of limitations.

Id. at 328. The duty to disclose the facts arose from the physician's undertaking to inspect the injury. *Id.* at 330 ("Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure.").

Equitable estoppel and fraudulent concealment clearly apply to bar Defendants from asserting a limitations defense in this case. In finding

estoppel did not apply, it appears the circuit court fundamentally misunderstood the fraud that supports equitable estoppel. The circuit court seemed to be operating under the mistaken belief that the fraud occurred between fall 2013 and February 2014. R.105 at 10, App.010 (stating the fraudulent concealment "occurred prior to February 24, 2014"). In actuality, it was the fraudulent and inequitable conduct that *began* in February 2014—the series of ever-decreasing damages numbers based on false assumptions and intentionally deflated calculations that decreased the calculation of harm by 80%—that estops Defendants from claiming a limitations defense. Mr. Bovee and his colleagues scrupulously worked to turn a calculation of Plaintiffs' harm from over half a million dollars into less than a reasonable estimate of the costs of litigation, all with the stated intent of deceiving Plaintiffs. R.75 at 17-29, App.192-201; R.91 at 37-38, 40-41, 43, 44. On February 24, 2014, Defendants sent their fraudulently altered analysis to Plaintiffs, stating the harm to Plaintiffs from Defendants' failure to implement the IC-DISC strategy was $124,459—less than a reasonable estimate of the cost of litigation against a large accounting firm. R.75 at 2-4, App.189-91.

The intent of Mr. Bovee and his colleagues is unmistakable. In one email, Ms. Potter explained, "We are working on minimizing this number as much as possible . . . ." R.75 at 28, App.198. In another, Mr. Brandon joked,

"Hope the client is going to go after us for this lost benefit!" R.75 at 23, App.192. These are smoking guns revealing Defendants' motives.

The falsity of the numerical representation is also clear. The representation made to Mr. Young on February 24, 2014, was the product of Mr. Bovee and his colleagues having calculated the tax implications using the least favorable method, deleted the final 10 months of missed IC-DISC benefits for no reason, cut off 10% of Arrowhead's exports even though Arrowhead's controller confirmed to Mr. Bovee that 100% of exports would qualify, falsely lowered the benefits for one tax year, and deducted an inflated amount of expenses to implement the strategy. R.75 at 17-29, App.192-201; R.91 at 37-38, 40-41, 43, 44.

After evaluating the likely costs of litigation against the potential damages Plaintiffs could recover, Plaintiffs made the rational business decision to forego filing suit in the face of a net loss. It was only after realizing substantial and sustained tax benefits after implementing the IC-DISC that Plaintiffs had reason to suspect Defendants' concealment. One good year could easily have been a fluke, but two years of successively larger tax savings gave Plaintiffs a basis to believe Defendants' representation had been false.

The intentional misrepresentations by Defendants led Plaintiffs to reasonably conclude there was no real recovery available to them, as the costs of litigation would well exceed the recovery, resulting in a net loss. A litigant

should not be punished for making a rational business decision based on a misrepresentation by its adversary. Thus, equitable estoppel and fraudulent concealment should apply.

The circuit court ruled, additionally, that the fraud was discovered within the limitations period, barring application of the fraudulent concealment doctrine. R.105 at 7-9, App.070-09. This, too, was error. It was not until late 2016 that Plaintiffs had enough information to believe the fraudulent representations of harm made by Defendants were false. At that point, Plaintiffs had seen two back-to-back years of tax savings that dwarfed Defendants' representation. Plaintiffs promptly filed suit, but at that point, the two-year limitations period Defendants contend applies had already run.

Defendants acted by admittedly intentionally reducing the number on a calculation of the harm Plaintiffs suffered. Plaintiffs reasonably relied on this calculation, to their detriment, by delaying filing suit. Defendants are thus estopped from asserting a limitations period as a defense to Plaintiffs' claims. As a result of the related doctrines of equitable estoppel and fraudulent concealment, Plaintiffs' claims should be deemed timely.

IV. Even If Plaintiffs' Other Claims Were Deemed Untimely, They Have a Claim for Fraud.

If Defendants prevail in their statute of limitations defense, they simply jump out of the frying pan and into the fire. If Defendants are right in their assertion that their fraudulent concealment cannot apply to bar a

limitations defense unless the fraudulent conduct concealed the cause of action itself, then Plaintiffs' only remedy for the fraud committed by Defendants is through an independent cause of action for fraud.

It cannot be that Plaintiffs' harm from Defendants' fraud merely goes unremedied, as every wrong must have a remedy. In fact, Article I, Section 9 of the Wisconsin Constitution provides that "[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character . . . ." This constitutional provision guarantees a remedy for every wrong. See *Breier v. E.C.*, 130 Wis. 2d 376, 389, 387 N.W.2d 72 (1986) ("[A]rt. I, Sec. 9 of the Wisconsin Constitution . . . provides that there shall be a remedy for every wrong."); *Schier v. Denny*, 12 Wis. 2d 544, 550, 107 N.W.2d 611 (1961) ("[A] remedy should be provided for every wrong. . . ."). Therefore, there must be some remedy available to Plaintiffs for their harm from Defendants' egregious fraudulent conduct.

If Plaintiffs' claims were found time-barred, all of the elements of fraud would be satisfied. "At common law, a plaintiff alleging fraud must prove: 1) a representation of material fact; 2) the representation's falsity; 3) the intent to deceive (or reckless disregard for truth or falsity); 4) intent to defraud or to induce action; 5) justifiable reliance by the deceived party." *State v. Abbott Labs.*, 2012 WI 62, ¶ 52, 341 Wis. 2d 510, 816 N.W.2d 145;

see also Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, ¶ 12, 283 Wis. 2d 555, 699 N.W.2d 205.

In February 2014, Defendants intentionally made a false statement—that Plaintiffs would have saved only $124,459 had Defendants implemented the IC-DISC in 2003. R.75 at 2-4, App.189-91. As explained in Section III above, not only was this number false, but this number was intentionally reduced over a series of versions, each making unjustifiable reductions to the number, to cause Plaintiffs not to file suit. Defendants' own correspondence at the time admitted that they could face a lawsuit and the number from their analysis should be minimized. R.75 at 23, 28, App.192, 198. Mr. Bovee and his colleagues plainly intended to defraud Plaintiffs. In reliance on this false representation, Plaintiffs forbore from filing suit within the time limit Defendants contend applies. If Plaintiffs' claims are found time-barred, they will have been damaged by losing the opportunity to pursue these claims due to Defendants' false representations. This shows all of the elements are satisfied. Even if Defendants contend any of these facts are disputed, they must be resolved by the fact-finder. The circuit court erred in dismissing Plaintiffs' fraud claim on summary judgment.

Most certainly, believing a claim against a large accounting firm to be worth only $124,459 would result in a different analysis of whether to pursue the claim through litigation, compared with knowledge that the claim is actually in excess of $500,000. Plaintiffs cannot be punished for making a

rational business decision, in light of the costs of litigation, that the false number provided by Defendants was below Plaintiffs' break-even point and did not justify the risk of filing suit.

Of course, Plaintiffs contend their claims are not time-barred. For that reason, their fraud claim is pleaded in the alternative. It arises only if their other claims are dismissed. If the delay induced by Defendants' false statement caused Plaintiffs any harm in this lawsuit, that harm is appropriately remedied by relief on Plaintiffs' fraud claim.

Conclusion

In a series of errors as a matter of law, the circuit court got it wrong when dismissing all of the claims in this case. The Engagement Letters Mr. Bovee and Grant Thornton wish to use as a shield from their mistakes are limited to the narrow scope of preparing tax returns, and Mr. Young is not bound by them in any event. Plaintiffs' claims were timely, but even if they were not, it was a direct result of Defendants' intentional concealment of their errors—a wrong which can be remedied through Plaintiffs' remaining cause of action for fraud. For all of the reasons stated in this brief, the circuit court's judgment should be reversed.

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Certification of Compliance with Rule 809.19(8)(b), (c)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b) and (c) for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of maximum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,300 words.

Dated this _____ day of _____, 2020.

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