NEW MEXICO COMMON LAW DEVELOPMENTS IN THE AREA OF PROFESSIONAL LIABILITY

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STATUTE OF LIMITATIONS:

Legal malpractice: Sharts v. Natelson, 118 N.M. 721, 885 P.2d 642 (1994). Limitation period for legal malpractice commences when: (1) the client sustains injury and (2) the client discovers, or through reasonable diligence should discover, the facts essential to the cause of action. 118 N.M. at 724.

4 year statute: New Mexico Public Schools Insurance Authority v. Arthur J. Gallagher & Co., 2008-NMSC-067.

When does the statute really start to run? "Actual injury" is defined as the "loss of a right, remedy or interest, or the imposition of a liability." Sharts, 118 N.M. at 724.

Examples:

Purported beneficiary of a negligently drafted will suffered an actual injury when the will took effect, which happened upon the testator's death. Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979);

In the case of negligently drafted restrictive covenants, an attorney's client was actually injured when the deeds containing those covenants took effect. Sharts, 118 N.M. at 72.

Where a professional's negligence in drafting a document results only in the imposition of a liability to a third party, the client is not injured until that liability is imposed, and the statute of limitation begins to run at that time. New Mexico Public Schools Insurance Authority v. Arthur J. Gallagher & Co., 2008-NMSC-067.

Brown v. Behles & Davis, 2004-NMCA-028. In 1985, clients hired defendants who were bankruptcy attorneys. Clients claimed that they were assured that all judgment liens would avoided or forgiven through the bankruptcy process. In 1997, the clients, the Browns, attempted to refinance the mortgage on their home and discovered liens on their residence from the bankruptcy. The Browns sued their attorneys for the 1985 bankruptcy on June 22, 2001. The district court dismissed the legal malpractice lawsuit on the basis that the four year statute of limitations had run.

Issue: When should the Browns have discovered, or through reasonable diligence should have discovered the facts essential to their claim and who decides this issue?

Discussion: The district court held that Browns: (1) knew or should have discovered that the liens had not been avoided within four years of their discharge from bankruptcy, which the court determined was the date of the actual injury; (2) the Browns were charged with a duty as landowners to be aware of the status of publicly recorded documents affecting title to real estate; or (3) the Browns were on constructive notice of publicly recorded documents, including the liens, by operation of NMSA 1978 Section 14-9-2 (1953).

The Court of Appeals disagreed. The Court of Appeals noted that they could not find any principle of law which imposed a duty on landowners to be cognizant of the status of their title at all times. Imposing such a duty on landowners would be unreasonable after they had hired attorneys to do take care of just this problem. The Court noted:

Given the complex nature of bankruptcy proceedings, by concluding that this affirmative duty charges the Browns with the discovery of their cause of action, the district court might also effectively require the Browns to hire additional counsel to investigate the existence of any possible errors in the Browns' bankruptcy discharge. Imposing such obligations on claimants is contrary to our professional malpractice law, which recognizes that a plaintiff may not always be qualified to ascertain an injury or source of an injury; for example, the law does not require a patient to seek a second medical opinion in order to discover whether the first doctor made mistakes.

Id. at ¶13. Emphasis added. With respect to the remaining conclusions of the district court the Court of Appeals found that the rulings would "require the Browns to immediately hire additional counsel to investigate the bankruptcy proceedings to discover any possible malpractice claims, without an objective reason to do so. As we stated above, our professional

malpractice law does not charge a layperson with the knowledge of a professional and does not foster such distrust of our legal profession." ¶14.

The Court held that an actual injury occurs when the attorney's acts or omissions result in the loss of a right, loss of a remedy, loss of an interest, or the imposition of a liability, regardless of whether the permanency of the injury might be affected by future events. ¶ 9 – 11.

ACCOUNTANT:

Begins to run when the IRS issued its written assessment of tax deficiency. Wiste v. Neff & Co., 1998-NMCA-165. The two part test in Sharts is not applicable to this type of accountant malpractice because the notice of deficiency imposes liability on the taxpayer and also informs the taxpayer of his or her negligently prepared tax return. *See* LaMure v. Peters, 1996-NMCA-099.

However, where accountant failed to file tax returns, the statute of limitations began to run when the client acquired knowledge that his tax returns had not been filed. "We hold that a notice of deficiency or equivalent IRS document is not the *sine qua non* of discovery and inquiry and the existence of a cause of action for accountant malpractice." Haas v. Davis, 2003-NMCA-143.

HEALTH CARE PROVIDERS:

Statutes which may be applicable:

NMSA 1978 Section 37-1-8 (1976) (general personal injury statute of limitations);
NMSA 1978 Section 41-5-13 (1976) (Medical Malpractice Act)
NMSA 1978 Section 41-4-16 (1976) (Tort Claims Act)

Roberts v. Southwest Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992) (discovery rule applied to non-qualified health care providers, "the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause." Id. at 257).

Cummings v. X-Ray Associates of N.M., 1996-NMSC-035 (occurrence rule applies to qualified health care providers).

Discovery rule focuses on the date the injury was discovered. The occurrence rule "fixes the accrual date at the time of the act of medical malpractice even though the patient may be oblivious of any harm." Cummings, 1996_NMSC-035, ¶47.

Maestas v. Zager, 2007-NMSC-003. (Discovery rule applies to Tort Claims Act cases which "requires that a cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause." ¶20.)

Note: Meza v. Topalovski, 2012-NMCA-002, 268 P.3d 1284 (filing an application with the Medical Review Commission) as to one provider cannot toll the limitations period as to another provider who was not named in the original application and for whom the statutory period in which to file a cause of action has passed.)

However, also on the issue of the Medical Review Commission and the statute of limitations, *see* Pacheco v. Cohen, 2009-NMCA-070, 146 N.M. 643 (restatement of complaint after review commission decision)

EXCEPTIONS TO STATUTE OF LIMITATIONS:

CONTINUOUS TREATMENT DOCTRINE:

Ealy v. Sheppeck, 100 N.M. 250, 669 P.2d 259 (Ct. App. 1983). Continuous treatment doctrine discussed and applied but rejected under the facts of that case that the physician had not provided "continuous medical service." Continuous treatment doctrine is defined as follows:

If the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated.

Juarez v. Nelson, 2003-NMCA-011, ¶11.

However, the continuous treatment doctrine is incompatible with the public policy of the New Mexico Malpractice Act. Juarez v. Nelson, 2003-NMCA-011. Therefore, the continuous treatment doctrine will not toll the statute of limitations for qualified health care providers.

FRAUDULENT CONCEALMENT DOCTRINE:

"Fraudulent conduct has always provided equitable grounds for relaxing a statutory time limit." Kern v. Saint Joseph's Hospital, 102 N.M. 452, 456 (1985). In order to toll the statute of repose based on the physician's fraudulent concealment, the plaintiff "has the burden. . . of showing. . . that the physician knew of the alleged wrongful act and concealed it from the patient or had material information pertinent to its discovery which he [or she] failed to disclose." Id.

In Tomlinson v. George, 2005-NMSC-020 the Supreme Court held that fraudulent concealment is based upon the principle that a defendant who has prevented the plaintiff from bringing suit within the statutory period should be estopped from asserting the statute of repose as a defense based on equitable estoppel principles. ¶14. If a plaintiff discovers the injury within the time limit, fraudulent concealment does not apply because the defendant's actions have not prevented the plaintiff from filing the claim within the time period and the equitable remedy is not necessary. In Tomlinson, the plaintiff discovered the act of malpractice with another two years and eight months before the statute of repose expired. The cause of action is barred by the statute of repose because plaintiff had an adequate period of time to file a claim after the discovery of the fraudulent concealment.

CONFLICTS:

Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995) Conservator for minor son sued attorneys who had handled a claim for the wrongful death of the child's father. Attorneys paid all of the proceeds from the case to the decedent's mother who was the personal representative of the estate. PR dissipated the proceeds and the child recovered a fraction of the total. Leyba, the conservative, maintained that the attorneys owed her son a duty to ensure that he received the proceeds and that they had breached that duty.

Court concluded that an attorney owes a duty to a non-client if the attorney and the client intended to benefit the non-client. "The very nature of a wrongful death action is such that we will imply in law a term in every agreement between an attorney and personal representative that the agreement is formed with the intent to benefit the statutory beneficiaries of the action." Id. at 776.

Perry v. Williams, 2003-NMCA-084 (holding that a parent who fails to support a child may not benefit from a wrongful death recovery).

Spencer v. Barber, 2011-NMCA-78. Attorney represented wrongful death estates on behalf of mother/grandmother (one person) of decedents. Attorney sued by father/grandfather claiming that he was misled by attorney regarding a settlement agreement concerning his entitlement to proceeds from the wrongful death estate.

Issue: What is the lawyer's duty to this statutory beneficiary.

Discussion: Leyba does not apply because Leyba envisioned that attorney for a wrongful death estate as having the usual attorney duties toward his or her client and, in addition, a duty of reasonable care toward the estate's beneficiaries, so long as the interests of the client and the nonclients are consistent. Once a conflict arises, the attorney is obligated to notify the non-client beneficiaries of the conflict and of the fact that the attorney can no longer act for the benefit of the nonclients.

Rather the adversarial exception set forth in Leyba applies. Attorney told the father that he was acting on behalf of the mother and the father indicated that he understood this. Malpractice case dismissed but whether the settlement agreement was enforceable was sent back to the district court for further review.

See also, NMRA 16-107 (Rule of Professional Conduct relating to conflicts)

LIABILITY:

Rancho del Villacito Condos, v. Weisfeld, 121 N.M. 52, 908 P.2d 745 (1995) In a suit for legal malpractice, "a plaintiff must prove three essential elements: (1) the employment of the defendant attorney; (2) the defendant attorney's neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the plaintiff." When the attorney's negligence involved failure to take certain action, the client must show that if the attorney had acted then the client would not have suffered damage, at least not to some degree. Akutagawa v. Laflin, 2005-NMCA-132 ¶11.

Andrews v. Saylor, 2003-NMCA-132.

"We see no need for treating legal malpractice any differently than other types of professional malpractice."

Background: Lawyer was sued for failing to include pension in divorce settlement. Client discovered the mistake many years later and hired a new attorney who tried, unsuccessfully, to amend the settlement. Original lawyer argued that the subsequent attorney should have appealed the court's refusal to amend and that the viability of the appeal could only be decided by a judge, not a jury.

Issue: Who decides the question of causation in a legal malpractice case that may involve legal issues?

Answer: The jury. "We are confident that a jury, aided by the testimony of experts versed in the relevant area of the law, is capable of making a prediction as to the outcome of a hypothetical appeal with the degree of certainty required by a preponderance-of-the-evidence standard of proof."

Comment: The court is focused on making sure that lawyers are treated the same as other members of public who may be subject to liability. "We are concerned that our adoption of a special rule that insulates malpracticing lawyers from jury scrutiny of their conduct would give the public the impression that we are simply lawyers protecting other lawyers." *See also* Akutagawa v. Laflin, 2005-NMCA-132 (court reiterated the concern that lawyers not have the benefit of "a special rule" insulating them from liability).

DAUBERT/ALBERICO:

Parkhill v. Alderman-Cave Milling & Grain Co., 2010-NMCA-100 (note: cert has been granted and case is currently at the New Mexico Supreme Court).

Background: Following State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993) the Court of Appeals announced a four-part test governing the exclusion of expert testimony which includes: (1) the theory or technique has been tested; (2) the theory or technique was subject to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique; and (4) the theory or technique has been generally accepted in the particular scientific field.

Issue: Among other concerns, what is the reach of this case. Does it apply, for example, to physician's testifying in medical malpractice cases? In many medical cases, there will not be studies or publications but, rather the physician will rely on his/her own knowledge and experience and the use of a differential diagnosis.

Compare: Parkhill v. Alderman the treating physicians opined that monensin, an antibiotic that is a common additive to livestock feed, induced symptoms in the plaintiffs. Court found that the physicians were not qualified to provide this opinion. "As our Supreme Court has declared, a treating physician in a workers' compensation case is uniquely qualified to give an opinion regarding his or her diagnosis of the disease causing the patieent's symptoms. . . On the other hand, in many cases, including toxic tort cases like the one before us, the determination of the external cause of a patient's disease is a complex process that is unrelated to diagnosis and treatment, and which requires specialized scientific knowledge regarding the external agents involved." Physicians had never heard of monensin prior to this case, did not know how the drug was handled, what constituted the minimum harmful dose for a human being or what constituted a minimum harmful dose for an animal. Court concluded that these doctors were unqualified to talk about a substance they knew nothing about.

Zia Trust v. Aragon, 2011-NMCA-076. Doctor testified about the decedent's chances of survival from fatal injuries after being struck by a car. The evidence showed that the decedent's spine was exposed and that part of his skull and brain matter were missing. No autopsy was performed but the medical records revealed a number of other injuries including, but not limited to fractures, abdominal injury, cardiac arrest. The court concluded that the doctor's opinion was merely conjecture because the doctor did not have "significant information concerning decedent's internal injuries and cause of death." For example, the testifying physician did not know the decedent's respiratory rate, his blood pressure or the Glasgow Coma Scale.

CASES FROM OTHER JURISDICTION ON DAUBERT:

Bitler v. Smith, 400 F.3d 1227 (10th Cir. 2004). Expert's methodology, not his conclusions, are to be evaluated under Daubert. In Bitler, the court reviewed a fire investigator's testimony to see if his opinions met the Daubert test:

Employing his experience and knowledge as a fire investigator, Boh [the expert] observed the physical evidence at the scene of the accident and deduced the likely cause of the explosion. Although such a method is no susceptible to testing or peer review, it does constitute generally accepted practice as a method for fire investigators to analyze the cause of fire accident.

400 F.3d at 1235. The expert, while not a physician, based his opinions on what he termed a "differential diagnosis". The Tenth Circuit agreed that his opinions met the Dauber test and then noted: "In the medical context, differential diagnosis is a common method of analysis, and federal courts have regularly found it reliable under Daubert." 400 F.3d at 1237.

Ford v. Eicher, 250 P.3d 262 (Co. 2011). Medical practice case involving the birth of a baby. Baby was injured during the birthing process. Doctor's expert testified that the injuries were caused by intrauterine forces rather than the physician's negligence. Trial court excluded the expert's testimony on the basis that the expert's opinion was "not testable" and that the expert's opinion "really boils down to offering a possible alternative explanation without giving the jury the tolls to decide whether that explanation is more likely than not the correct one." 250 P.3d at 268.

Testability and error rate concerns should not exclude the intrauterine contraction theory as a possible cause of the injuries when one considers the totality of the circumstances in this particular case. Here, the record shows that each party intended to present experts on causation who would offer untestable theories. The Estate's expert testified that excessive traction caused the injuries. That theory, like the intrauterine contraction theory, is not ethically subject to testing or error rate assessment. Concerns raised by the trial court regarding the inability to test the intrauterine contraction theory or assess error rates are the same issues inherent in the excessive traction theory. These concerns are adequately addressed by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof. Concerns about the reliability of the theory go to weight of the expert testimony.

250 P.3d at 269. Citations omitted.

Easum v. Miller, 92 P.3d 794 (Wy. 2004). Physician presented medical opinion that the Plaintiff's condition was caused by receiving a significant number of electrical shocks over a sustained period of time. Physician's opinion was unsupported by medical literature, peer-reviewed articles, clinical trials or studies. Instead, physician relied on a differential diagnosis to determine the cause of plaintiff's condition. Wyoming Supreme Court concluded that the doctor's methodology (the use of the differential diagnosis) was reliable and the testimony should be allowed to be presented at trial. The court further found:

- It would have been unethical to perform studies in this area;
- Differential diagnosis is a "tested methodology" which meets Daubert;
- "A medical expert's causation conclusion should not be excluded because he or she has failed to rule out every possible alternative cause of a plaintiff's illness. The alternative causes suggested by the defendant affect the weight that the jury should give the expert's testimony and not the admissibility of that testimony." Id. at 803.

Note: Expert testimony required where a lay person, without guidance, could not knowledgeably decide the material issue. Grassie v. Roswell Hospital, 2010-NMCA-NMCA-024, ¶78.

DAMAGES:

Emotional Distress

Damages for emotional distress in ordinary negligence actions are not permitted in New Mexico. Flores v. Baca, 117 N.M. 306, 871 P.2d 962 (1994). However, recovery for emotional distress coverage is permitted when a defendant intentionally or reckless causes severe emotional distress through extreme and outrageous conduct, Jaynes v. Strong-Thorne Mortuary, Inc., 1998-NMSC-004 ¶18, or under a theory of bystander recovery. ¶21.

See complete discussion for application of emotional distress damages (or lack of the availability of such damages) in legal malpractice cases in Akutagawa v. Laflin, 2005-NMCA-132.

Punitive Damages

Clay v. Ferrallgas, Inc., 118 N.M. 266, 881 P.2d 11 (1994) Grassie v. Roswell Hospital, 2010-NMCA-NMCA-024. Culpable mental state needed for punitive damages can be shown circumstantially by cumulative conduct. In Clay, the Supreme Court found that the cumulative conduct did support a punitive damages award. Cumulative conduct may be based on "the actions of the employees [viewed] in the aggregate [in order] to determine whether [the employer corporation] had the requisite culpable mental state because of the cumulative conduct of the employees." Id. at 270, 881 P.2d at 15. In Grassie, the Court of Appeals noted that the Clay cumulative conduct analysis has been followed in at least two subsequent cases, Coates v. Wal-Mart Stores, Inc. 1999-NMCA-006, 136 N.M. 701, 104 P.3d 1092 and Atler v. Murphy Enterprises, Inc., 2005-NMCA-006.

Note: A corporation may be held liable for punitive damages for the misconduct of its employees. Chavarria v. Fleetwood Retail Corp. 2006-NMSC-046; Grassie, *supra*.

Discussion of New Mexico Unfair Practices Act. Section 57-12-1 to -26:

Grassie v. Roswell Hospital, 2010-NMCA-NMCA-024.* Case against hospital included claim for unfair trade practices premised on the hospital's advertising campaign (well-trained team of qualified health care providers in its ER 24 hours a day, 7 days a week). Court of Appeals concluded that if the UPA claims against the hospital or health care provider are not "conterminous" with or "indistinguishable" from her/her medical negligence claims, they may be viable.

OTHER ISSUES:

Claims Preclusion

Computer One Inc. v. Grisham and Lawless, 2008-NMSC-038. Attorney filed a charging lien. The question was whether a legal malpractice claim was a compulsory counterclaim that had to be brought at the time of the charging lien or could be brought subsequent to the charging lien.

Holding: While the client is precluded from re-litigating those issues material to the charging lien, *e.g.,* the validity of the fees, it is not precluded from bringing a malpractice claim.

Baker v. Hedstrom (Ct. App. No. 30,475)

This case involves a number of consolidated appeals from decisions of a number of district courts on whether medical business entities that are not licensed or certified as hospitals or outpatient facilities are 'health care providers' with the meaning of Medical Malpractice Act, and thus subject to the limitations on claims under the Act.

The district courts that have ruled on the question have come to different conclusions, and this case involves the consolidation of several appeals from the trial court.

POTENTIAL THEORIES OF LIABILITY:

See discussion in Thompson v. Potter, 2012, NMCA-014, 268 P.3d 57. The question posed was the nature of the duty owed by a consulting pharmacist that had contracted with a nursing facility to provide pharmaceutical services to the patients of a nursing facility. While the Court of Appeals affirmed the district court's decision granting summary judgment on behalf of the defendant, there is an excellent discussion of a variety of theories including contractual obligations to 3rd party beneficiaries, consideration of extrinsic evidence, voluntary assumption of duty, special relationship and negligence per se.

TRIAL BY JURY:

Blea v. Fields, 2005-NMSC-029, 120 P.3d 430. This was a medical negligence case where the issue was a party's entitlement to a jury trial in a case involving both legal and equitable claims. The Supreme Court held that when a case involves both equitable and legal claims, a trial judge may decide the equitable claims first if the equitable claims do not have any disputed fact issues in common with the legal claims. However, when equitable and legal claims present common issues of fact which are material to the disposition of both claims, the legal claims must be submitted to a jury before the equitable claims are decided. "Otherwise, the judge while deciding the equitable claims will have invaded the province of the jury by deciding disputed facts that are material to the legal claim." Id. at Para. 1.

INDEMNIFICATION:

For those of you interested in indemnification issues *see Christus St. Vincent v. Duarte-Afara,* 2011-NMCA-112, 267 P.3d 70 (hospital suing docs for indemnification).

ONE FINAL NOTE:

While not a malpractice case, there is an important reported disciplinary decision, In Re Estrada, 140 N.M. 492, 143 P.3d 731 (2006) which involved a discovery dispute and the introduction of forged evidence.

The case gave the Supreme Court the opportunity to discuss the professional and ethical issues that may occur when New Mexico attorneys must confer with out-of-state counsel for corporate clients involved in litigation in New Mexico. In such situations, attorneys licensed to practice in New Mexico have an independent duty to the New Mexico judiciary to obey New Mexico's ethical and discovery rules, regardless of the opinion of out-of-state counsel.

*See Tyler Atkins' discussion of Grassie in the May/June, 2011 NMTLA Journal