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Attorneys--Malpractice--Statute of Limitations Extended

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CASE COMMENTS

ATTORNEYS—MALPRACTICE—STATUTE OF LIMITATIONS EXTENDED

Family Savings and Loan, Inc. brought an action in May 1969 against Arthur T. Ciccarello, an attorney retained by plaintiff, charging him with making a negligent title examination in November 1966 of property on which plaintiff had made a loan secured by a note and a deed of trust. The defendant certified the title as good and marketable based entirely on a certificate of title prepared by another attorney. The title opinion did not mention a special use limitation contained in a deed of the subject property to the purchaser's predecessor in title. This special limitation required the removal of houses on the property within six months by the grantee, or the property would revest in the grantor. The purchaser defaulted in July 1968 and in foreclosure proceedings conducted by counsel other than the defendant, this limitation was discovered. Plaintiff demanded damages as a result of the defendant's negligent title examination, alleging that since the houses had been removed the security for the loan was worthless.[1] Defendant claimed that the suit was barred by the statute of limitations.[2]

The circuit court of Kanawha County affirmed the common pleas court that had granted defendant's motion for summary judgment, and the case was appealed to the West Virginia Supreme Court of Appeals. *Held*, reversed and remanded. Extending the discovery rule to promote "justice and right," the court held that the statute of limitations began to run when the plaintiff discovered the defective title, not when the defective certificate of title was delivered. *Family Savings & Loan, Inc. v. Ciccarello*, 207 S.E.2d 157 (W. Va. 1974).

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[1] The plaintiff made the loan to the purchaser based on both the value of the lots and the houses subject to the special use limitation. After the loan was made, the houses were removed in accordance with the limitation, and the purchaser defaulted and left West Virginia. The plaintiff, therefore, could not look to either the value of the houses or to the purchaser to recover its loan.

[2] The defective certificate of title was delivered to the plaintiff in 1966, but the action was not commenced until 1969. The defendant contended that the statute of limitations began to run from the time the certificate of title was delivered in 1966 and that the action was thus barred by the statute of limitatations for actions in tort. *See* note 4 *infra*.

In order to select the applicable statute of limitations, the court had to determine from an examination of the pleadings whether the action was instituted in contract or in tort. Since the plaintiff used the words "negligently, carelessly, and unskillfully" in the complaint and did not expressly allege a breach of contract,[3] the court decided that the basis of the action was negligence and that the plaintiff's action was in tort with a one year statute of limitations.[4]

In actions for professional malpractice, a majority of jurisdictions have adopted the rule that the statute of limitations begins to run from the time the negligent act was committed, not from the date of its discovery.[5] A minority of jurisdictions, however, have applied the discovery rule,[6] particularly in cases where the

[3] Recognizing that the statute of limitations could be critical to its case, the plaintiff, on appeal, attempted to assert an action for breach of contract that carries a ten year statute of limitations for actions on written contracts. W. VA. CODE ANN. § 55-2-6 (1966). The court determined that although the plaintiff could have originally instituted an action for breach of contract, the initial complaint was based on a tort claim of negligence, and an action for breach of contract would not be allowed. 207 S.E.2d at 160. Since the certificate of title had been delivered more than three years prior to the commencement of the action, the plaintiff realized that the only way to avoid the statute of limitations for tort actions was to persuade the court that the statute of limitations should not begin to run until the plaintiff discovered the defective certificate of title.

[4] W. VA. CODE ANN. § 55-2-12 (1966) provides:

> Every personal action for which no limitation is otherwise provided shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

Finding that the action was not one for damage to property or for personal injury, the court determined that subsection (c) contained the appropriate statute of limitation for this action. 207 S.E.2d at 160.

[5] 207 S.E.2d at 161. *See* Annot., 18 A.L.R.3d 996, 1012 (1966). *See also Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200 (1950).

[6] The discovery rule evolved from the gradual merger of law and equity. Historically, equity exercised flexibility in applying limitations to actions as illustrated by the doctrine of laches, whereas actions at law contained more rigid statutes of limitations. As a result of the merger some of the flexibility with respect to limitations on actions in equity was extended to actions at law in the form of the discovery rule that prevented a statutory bar to a cause of action until discovery by the plaintiff of his right to bring the action. *See Developments in the Law, supra* note 5, 1213-19; Sherwood v. Sutton, 21 F. Cas. 1303 (No. 12,782) (C.C.D.N.H. 1828).

negligent act remained hidden and the resulting harm did not become manifest until long after the act had been committed.[7]

The discovery rule has also been applied to other situations. When a surveyor made a negligent survey that resulted in loss of property to the plaintiff, the cause of action accrued when the defect in the survey was discovered, not when the survey was made.[8] Similarly when an abstractor's certificate of title failed to reveal a prior conveyance, the statute of limitations did not begin to run against the plaintiff's cause of action until this prior conveyance was discovered.[9] The discovery rule has been applied to cases involving fraud, mistake, or breach of confidence in many jurisdictions.[10]

The West Virginia Supreme Court of Appeals first adopted the discovery rule in connection with subterranean coal mining in order to protect land owners from encroachments by coal mining operations.[11] The court held that the statute of limitations did not begin to run until the land owner discovered the trespass.[12] More recently the West Virginia court has applied the discovery rule to medical malpractice. In *Morgan v. Grace Hospital, Inc.*[13] a physician left a sponge in a patient's abdomen following surgery. The court held that the statute of limitations did not begin to run until the patient learned, or by exercising reasonable diligence should have learned, of the presence of the sponge.[14]

In actions by a client charging his attorney with negligence, however, the generally recognized rule has been that the client's cause of action accrues at the time of the negligent act.[15] As a result

[7] Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965), applied the discovery rule in a medical malpractice action when a sponge was left in the patient's abdomen following surgery. Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967), held that in an action for negligence against an accountant, the statute of limitations did not begin to run until the plaintiff suffered legal injury. Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967), applied the discovery rule in an action against an architect for preparing a negligent design of plaintiff's home. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).

[8] Mattingly v. Hopkins, 254 Md. 88, 253 A.2d 904 (1969).

[9] Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612 (1912).

[10] *Developments in the Law, supra* note 5, at 1213.

[11] Petrelli v. West Virginia-Pittsburgh Coal Co., 86 W. Va. 607, 104 S.E. 103 (1925).

[12] *Id.* at 614, 104 S.E. at 106.

[13] 149 W. Va. 783, 144 S.E.2d 156 (1965).

[14] *Id.* at 793, 144 S.E.2d at 162.

[15] *E.g.*, Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.Cir. 1967); Annot., 18 A.L.R.3d 974 (1968).

of *Ciccarello*'s more inclusive application of the discovery rule, negligence actions against attorneys in West Virginia are now treated like negligence actions against other professionals with respect to the statute of limitations. The West Virginia court recognized that in a majority of jurisdictions the discovery rule does not apply to legal malpractice actions, but expressly refused to equate this "overwhelming number of cases to the contrary with justice and right."[16]

Courts have used two general approaches to justify applying the discovery rule. One approach emphasizes the nature of the negligent act and the circumstances under which it was committed, concentrating primarily on the defendant's conduct. Decisions reflecting this view often find fraudulent conduct by the defendant or look to a breach of confidence as the basis for applying the discovery rule. The rule is applied punitively to expose or reprimand a defendant when his conduct falls below acceptable standards for his particular profession.[17]

The other approach emphasizes the effect of the negligent act on the wronged plaintiff. It concentrates not on the defendant's conduct but rather on the resulting harm to the plaintiff and the extent to which the defendant' conduct has put the plaintiff at an unfair disadvantage. The discovery rule functions in a protective capacity to diminish the effect of the statutory bar to a cause of action where justice and right dictate otherwise.[18]

The *Ciccarello* court rejected the first approach in favor of the latter approach and looked to when the plaintiff was actually harmed. The court found that with respect to the running of the

[16] 207 S.E.2d at 161. The court, adhering to the rationale of the *Morgan* decision, recognized that the modern trend was toward a more liberal application of the discovery rule. By extending the application of the rule to legal malpractice, the court adopted the minority view, note 5 *supra*, stating it to be the better reasoned rule. *Contra*, Griffith v. Zavlaris, 215 Cal. App. 2d 826, 30 Cal. Rptr. 517 (Dist. Ct. App. 1963). There a California court refused to apply the discovery rule to legal malpractice stating that if the time-honored rule to the contrary were to be changed, it should be changed by the legislature and not by the courts.

[17] *Cf.* Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612 (1912). The Idaho court applied the discovery rule in an action against an abstractor for failing to reveal that property had been previously sold for taxes. Although the plaintiff did not allege or attempt to prove fraud by the defendant, the court inserted it as a basis for applying the discovery rule.

[18] *Cf.* Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965). The discovery rule was applied to avoid a harsh and unrealistic result that would have placed an undue burden on the plaintiff.

statute of limitations, the plaintiff was harmed when the defective title was discovered, not when the certificate of title was delivered.[19] Using this approach, the court extended the discovery rule as applied to medical malpractice cases in *Morgan* to legal malpractice by equating a patient's physical injury resulting from a physician's negligence to a client's "legal injury" resulting from his attorney's negligence. Thus, the court used the discovery rule as the tool to bring legal malpractice within the generally recognized rule for other forms of common law negligence actions, namely, that the statute of limitations begins to run when the injury resulting from the defendant's negligence occurs.

In deciding when the statute of limitations should begin to run, many courts examine the facts of each case[20] to determine if the discovery rule is needed to equalize the relative positions of the parties. Similarities in fact situations emerge that seem to trigger the application of the discovery rule in situations where the statute of limitations would normally begin to run at the time of the negligent act. When the defendant's negligence is inherently unknowable or could easily escape detection, the running of the statute of limitations has been delayed pending discovery by the plaintiff.[21] This is illustrated in cases where a patient is under anesthesia during negligently conducted surgery,[22] where a mine shaft is extended silently underground to encroach on a plaintiff's property,[23] or where "legalese" obscures a hidden defect in a deed to all but a skilled attorney.[24] Negligence by one in a superior position by virtue of training or education is another factor relevant to the application of the discovery rule. This factor has emerged in cases involving physicians, attorneys, and surveyors on whose services the public must rely to protect their lives and property.[25] The payment of money to obtain a professional service is another important factor leading to the application of the discovery rule. When fees are charged in exchange for expert or technical service, a duty

[19] 207 S.E.2d at 162.

[20] Historically, when the facts of a case disclose mistake, breach of fiduciary duty, fraud, or undue influence and duress, limitations on actions have often been held to commence from the time the plaintiff learned of the wrong. *Developments in the Law, supra* note 5, 1213-19.

[21] *Id.* at 1203. .

[22] 149 W. Va. 783, 144 S.E.2d 156 (1965).

[23] Knight v. Chesapeake Coal Co., 99 W. Va. 261, 128 S.E. 318 (1925).

[24] *Cf.* 207 S.E.2d at 159.

[25] *See, e.g.*, Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959).

arises to perform the service in a professional, non-negligent manner.[26] When society grants specialized occupations the privilege to collect fees, a high degree of competency is expected in return. When certain basic interests are placed in jeopardy by the negligence of another, the "discovery rule" has been more liberally applied. This factor is relevant in cases where the plaintiff stands to lose health or property and may be subject to financial or physical injury if his remedy is barred by a premature application of the statute of limitations.[27]

Although no one factor or combination of factors is present in every case, when certain of them exist the likelihood that the discovery rule will be applied increases. Faced with a situation containing several of these factors, the *Ciccarello* court applied the discovery rule without hesitation. It resolved the question on the basis of justice to the plaintiff, because a traditional application of the statute of limitations would deprive the plaintiff of protection against possible loss of property.

Historically, the courts have freely exercised their discretion in applying the myriad of statutes of limitations.[28] To the extent this discretion will be utilized in the future remains to be seen, but the *Ciccarello* court has made a significant step in exercising it to promote "justice and right." It has extended greater protection to the public against negligent conduct by those on whom the public must rely for the protection of certain basic interests. Finally, the West Virginia court has taken a step to restore confidence in the judicial system by diminishing a statutory bar to action that at times has worked a disadvantage to deserving plaintiffs.

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[26] *See* 207 S.E.2d at 163.

[27] *See, e.g.*, Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966).

[28] *Developments in the Law, supra* note 5, at 1177.