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Summary of Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc., 130 Nev. Adv. Op. 68

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Nevada Law Journal

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Recommended Citation

Wise, Ashleigh, "Summary of Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc., 130 Nev. Adv. Op. 68" (2014). *Nevada Supreme Court Summaries*. 809.

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TORT LAW: LITIGATION MALPRACTICE TOLLING RULE

Summary

The Court determined that NRS 11.207(1)², in regards to the two-year statute of limitations, is tolled against a cause of action for attorney malpractice pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred. The Court did not address whether the four-year time limitation may be tolled, because that time limitation had not expired when the malpractice action at issue was filed.

Background

The facts, underlying litigation, and malpractice

New Albertson's and Farm Road Retail, LLC, agreed to maintain a shared common area. Their agreement stated Farm Road, LLC would compensate New Albertson's if Farm Road breached the agreement and that breach ultimately resulted in New Albertson's suffering from negative legal outcomes. This agreement applied when a woman fell on a flight of stairs at New Albertson's and the claimant sued New Albertson's and Farm Road. New Albertson's retained Brady, Vorwerck, Ryder & Caspino (BVRC) for the lawsuit.

New Albertson's denied all liability in their answer to the complaint while also filing a cross-claim against Farm Road. New Albertson's alleged Farm Road did not compensate New Albertson's according to their agreement. The claimants on the liability suit served New Albertson's with requests for admission. BVRC untimely served deficient responses to the claimants. The claimants filed a motion to compel and the district court ordered New Albertson's to re-file the responses, which they did.

After New Albertson's re-filed the responses, the claimants filed a motion for partial summary judgment and the judge granted the motion. The motion established New Albertson's liability for the claimant's damages because the district court deemed the deficient responses as admitted. New Albertson's and the claimants eventually settled on January 5, 2008. This led to the district court granting summary judgment in favor of Farm Road regarding the cross-claim because New Albertson's settlement was a result of abuses from New Albertson's in the discovery process and not a breach from Farm Road. New Albertson's appealed the determination but eventually settled with Farm Road in April 2009.

The attorney malpractice action before the federal district court

¹ By Ashleigh Wise.

² NEV. REV. STAT. 11.207(1) (2014), as amended by 1997 Nev. Stat. ch. 184, § 2, at 278, states:

An action against an attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.

On January 22, 2010, New Albertson's filed an attorney malpractice suit against BVRC. This date was two years after the settlement with the claimants in the liability suit but less than two years after the settlement with Farm Road. BVRC filed a motion for summary judgment stating New Albertson's untimely filed the action and should have filed the action on January 5, 2008, when New Albertson's settled with the claimants. The court denied the motion stating that New Albertson's timely filed the action and that the time limitation did not begin until May 27, 2009, which was the date the court dismissed the appeal regarding the cross claim.

After being amended in 1997, NRS 11.207(1) has imposed two potential attorney malpractice actions. The first is a four-year limitations period beginning "after the plaintiff sustains damage," and the second is a two-year limitations period beginning "after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier."

Discussion

NRS 11.207(1)'s codification of the discovery rule

There are various tolling theories that delay the statute of limitations for attorney malpractice actions.³ The two rules at issue in this case are the discovery rule codified as NRS 11.207(1) in 1981, and the litigation malpractice tolling rule appearing in Nevada caselaw.⁴ NRS 11.207(2), also stated the time limitation for a malpractice action is tolled when the attorney conceals his or her actionable conduct. Thus, NRS 11.207 required claimants to sustain damages for the four-year time limitation to start; however, the four-year limit did not start until the claimants discover the necessary facts for a claim. In 1997, the Legislature amended the statute and included the two-year limit to the four year limit with the first time limitation to expire governing the timeliness of the malpractice action.

The discovery rule, the litigation malpractice tolling rule, and the application of the latter to the former in Nevada before NRS 11.207(1) was amended in 1997

Jurisdictions differ on when the tolling begins on the statute of limitations. Various jurisdictions start tolling the statute of limitations when there is the accumulation of some, but not all, damages.⁵ These jurisdictions do not require a finality of damages in order to bring an attorney malpractice action. Other jurisdictions state the triggering of the statute of limitations occurs when there is finality to the damages amount and the litigation has ended.⁶

³ See *Moon v. McDonald, Carano & Wilson L.L.P.*, 129 Nev. ____, ____, 306 P.3d 406, 407, 409 (2013); 3 RONALD E. MALLIN ET AL., *LEGAL MALPRACTICE* §23:1, at 320 (2013).

⁴ The discovery rule "starts the statute of limitations when the claimant discovers, or reasonably should have discovered, the material facts for the action, including the damages" and the litigation malpractice tolling rule "provides that the damages for a malpractice claim do not accrue until the underlying litigation is complete and, thus, a malpractice claim does not accrue and its statute of limitations does not begin to run during a pending appeal of an adverse ruling from the underlying litigation." *Id.*

⁵ See, e.g., *Laird v. Blacker*, 828 P.2d 691, 693–96 (Cal. 1992); *Riemers v. Omdahl*, 687 N.W.2d 445, 449 (N.D. 2004); *Fritzeen v. Gravel*, 830 A.2d 49, 52, 54 (Vt. 2003).

⁶ See, e.g., *Amfac Distribution Corp. v. Miller*, 673 P.2d 795, 796 (Ariz. Ct. App. 1983); *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998).

The 1981 statute applied the litigation malpractice tolling rule to the discovery rule for attorney malpractice actions.⁷ Therefore, the prior statute applied when the underlying litigation ended. The statute of limitations was triggered when there was a final accumulation of damages.

The ongoing relevance and applicability of the litigation malpractice tolling rule to NRS 11.207(1)

The Legislature codified the discovery rule language in the 1981 version of the statute. The 1981 statute applied the litigation malpractice tolling rule to the discovery rule language and determined that the statute of limitations began to toll after the litigation ended.

After the amendment of NRS 11.207(1), there has been little discussion between the litigation malpractice tolling rule and the attorney malpractice statute of limitations. However, some cases have stated that the discovery rule does not accrue until the plaintiff knows of all of the necessary facts to prove the elements of attorney malpractice and the damage is final.⁸ One case created a narrow exception where the plaintiff does not forfeit his or her right to file a malpractice action if that plaintiff does not choose to file a pointless appeal.⁹

Other cases have discussed the two-year statute of limitations and its potential tolling, but those cases dealt with non-adversarial portions of a bankruptcy proceeding. The Court determined that non-adversarial portions of bankruptcy proceedings are not litigation in regards to the tolling of the statute of limitations.¹⁰

The 1997 amendment of NRS 11.207(1) did not negate the usage of the litigation malpractice tolling rule. The tolling rule is needed because it allows damages to become certain before bringing a malpractice action; therefore, Nevada begins the tolling period for the statute of limitations on attorney malpractice claims after the end of the litigation and when the damages are final.

Conclusion

NRS 11.207(1) requires the final resolution of damages and the end of litigation before the tolling begins on the statute of limitations for attorney malpractice claims. This prevents a waste of judicial resources when the claim for damages may be reduced or cured during litigation. The Court affirmed the certified question of the federal district court and left the federal district court to apply the law as discussed in the opinion.

⁷ Clark v. Robison, 113 Nev. 949, 951, 944 P.2d 788, 789-90 (1997).

⁸ Hewitt v. Allen, 118 Nev. 216, 43 P.3d 345 (2002).

⁹ *Id.*

¹⁰ Moon v. McDonald, Carano & Wilson L.L.P., 129 Nev. ____, ____, 306 P.3d 406, 407, 409 (2013).