Developments in Professional Liability

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Judicial developments in the Indiana courts during the survey period have yielded a number of interesting decisions dealing with professional liability and responsibility.[1] However, there was a paucity of unique judicial determinations that resolved conflicts between the appellate districts or that established new law. This summary discussion is, therefore, intended as a forum to briefly inform legal practitioners and scholars of two cases involving the liability of attorneys.

I. Statute of Limitations

One important development during the survey period concerned the tolling of the statute of limitations in legal malpractice suits involving fraudulent concealment by an attorney. The First District Court of Appeals of Indiana confronted this issue in *Lambert v. Stark*,[2] a case which dealt with the tolling effect of a continuing attorney-client fiduciary relationship on the statute of limitations.

The Indiana Supreme Court's 1985 decision in *Whitehouse v. Quinn*[3] had settled the uncertainty as to which statute of limitations applied to a legal malpractice action. Prior to *Whitehouse*, there was a conflict among different districts of the Court of Appeals of Indiana as to which statute of limitations applied.[4] *Whitehouse* affirmed with apparent finality that a legal malpractice cause of action is limited by Indiana Code section 34-1-2-2.[5] Because an attorney's act of malpractice results in an injury to or a loss of a personal right or interest in property, a claim

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[1] *See, e.g.*, *In re* Stanton, 492 N.E.2d 1056 (Ind. 1986); *In re* Long, 486 N.E.2d 1031 (Ind. 1986); *In re* Duffy, 482 N.E.2d 1137 (Ind. 1985); Baily v. Martz, 488 N.E.2d 716 (Ind. Ct. App. 1986).

[2] 484 N.E.2d 630 (Ind. Ct. App. 1985).

[3] 477 N.E.2d 270 (Ind. 1985).

[4] *See* Jackson, *Indiana's Development of a Definitive Legal Malpractice Statute of Limitations*, 19 Ind. L. Rev. 275 (1986).

[5] Ind. Code § 24-1-2-2 (1982) provides in part:

> The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterward: (1) For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years . . . .

to compensate for such an injury must be commenced within two years after the occurrence of the injury.[6]

With the limitation period thus established, conditions for tolling the statute of limitations received judicial attention in *Lambert*. The Lamberts had sought the advice of counsel, Kesler & Stark, regarding financial problems. Kesler & Stark allegedly advised the Lamberts to dispose of certain property, which the Lamberts did. Kesler & Stark then filed a petition for bankruptcy on behalf of the Lamberts. A few months later, a creditor of the Lamberts objected to the discharge in bankruptcy, alleging fraud in the transfer of such property. Kesler & Stark informed the Lamberts that a complaint opposing their discharge had been filed. The attorneys continued to represent the Lamberts and responded to the creditor's complaint opposing the discharge. On March 19, 1982, the bankruptcy judge denied the Lamberts a discharge in bankruptcy, finding that they intentionally defrauded creditors by transferring property for less than adequate consideration within one year of filing the bankruptcy petition.[7]

Within two years after the denial of the discharge, the Lamberts filed suit against Kesler & Stark.[8] In response to the attorneys' motion for summary judgment asserting that the suit was barred by the statute of limitations, the Lamberts argued that the existence of a continuing fiduciary relationship with their attorneys tolled the commencement of the statute of limitations until they discovered that their attorneys' advice had been incorrect.[9]

There is no question that the statute of limitations period applicable to a legal malpractice cause of action may be tolled by reason of fraudulent concealment. The limitations period will not shield a person who conceals the fact that he is liable for an action.[10] Indiana's statutory basis for tolling the commencement of a limitations period based upon concealment[11] requires that the party actively and intentionally conceal the cause of action.[12]

A corollary to this concept of fraudulent concealment applies where a fiduciary relationship exists and where the fiduciary fails to disclose

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[6]*Whitehouse*, 477 N.E.2d at 274; Shideler v. Dwyer, 275 Ind. 270, 281, 417 N.E.2d 281, 288 (1981).

[7]*Lambert*, 484 N.E.2d at 631.

[8]*Id.*

[9]*Id.* at 632.

[10]IND. CODE § 34-1-2-9 (1982) provides:

> If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action.

[11]*Id.*

[12]*See, e.g.*, Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 38 N.E. 208 (1894); Keilman v. Hammond, 124 Ind. App. 392, 116 N.E.2d 515 (1953); Van Spanje v. Hostettler, 68 Ind. App. 518, 119 N.E. 725 (1918).

to the person to whom the fiduciary owes a duty of good faith and loyalty the possible existence of a cause of action against the fiduciary.[13] The Indiana appellate courts have had few occasions to determine whether an attorney's failure to disclose to a client the existence of a possible cause of action for malpractice tolls the commencement of the statute of limitations.[14] In *Lambert*, the First District Court of Appeals of Indiana made clear that in order "to avoid the bar of limitations by claiming fraudulent concealment, [clients must] show that they used due diligence to detect the fraud."[15] A naked assertion that the misconduct was not in fact discovered does not satisfy a client's burden of proving that even if he used reasonable care and diligence, he would not have discovered the possibility of actionable malpractice. Therefore, the Lamberts had the burden of showing they used reasonable care and diligence to detect their attorneys' fraudulent concealment. Because the Lamberts failed to meet this burden, they could not toll the commencement of the statute of limitations. Therefore, their claim for legal malpractice was barred, and summary judgment in favor of Kesler & Stark was proper.[16]

Judge Ratliff's dissent in *Lambert*[17] brings into focus the full ramification of this holding. Judge Ratliff wrote that "[a]lthough Kesler and Stark claim to have advised Lamberts of the petition to deny discharge, an inference could be drawn from the fact of their continued representation opposing the petition to deny discharge, that they were concealing their original malpractice."[18] Thus, in Judge Ratliff's view, where a third party alleges that an attorney's client acted improperly and the attorney continues to defend the propriety of his client's conduct that was based on the erroneous advice of the attorney, there is a sufficient factual basis to infer fraudulent concealment, if the client has no actual knowledge of the legal malpractice.[19] This is true at least for purposes of ruling on a motion for summary judgment.[20]

In contrast to the dissent, the majority in *Lambert* appears to require a client to at least question, if not investigate, possible acts of legal malpractice when the client is given information that may indicate that the attorney's legal advice was possibly in error. Thus, at least in the context of a summary judgment, *Lambert* holds that a client has the

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[13]Such a duty has long been recognized in the context of a physician-patient relationship. *See* Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956).

[14]*See* Keystone Distribution Park v. Kennerk, 461 N.E.2d 749 (Ind. Ct. App. 1984); Whitehouse v. Quinn, 443 N.E.2d 332 (Ind. Ct. App. 1982), *vacated and rev'd on other grounds*, 477 N.E.2d 270 (Ind. 1985).

[15]484 N.E.2d at 632.

[16]*Id.*

[17]*Id.*

[18]*Id.* at 634.

[19]*Id.* at 634-35.

[20]*Id.* at 635.

burden of showing that he used reasonable care and diligence to detect the fraud.[21] A mere showing that the legal advice was discovered to be in error after the attorney-client relationship ended is not sufficient.[22]

Formerly, in one line of Indiana cases, the statute of limitations was tolled if one who had a duty to disclose (as in a fiduciary relationship) failed to do so.[23] However, the *Lambert* court engrafted onto this rule the additional requirement of due diligence mentioned in another line of Indiana cases.[24] It now appears that a victim of legal malpractice who seeks to toll the statute of limitations must present evidence that he used reasonable care and diligence, and that even by the use of such diligence, the victim was not able to discover that the advice was incorrect in order for an attorney to be found guilty of fraudulent concealment. A showing of continued representation by the attorney will not be sufficient to prove fraudulent concealment and therefore to toll the statute of limitations. This result, while possibly harsh, appears to be consistent with the strong policy underlying the statute of limitations.[25]

II. Additional Client and Attorney Exposure

A second noteworthy development during the survey period was the expansion of vicarious liability in the context of the attorney-client relationship. In addition to expanding the potential for damages to be assessed against a client by a third party for the acts or omissions of an attorney, an attorney's total exposure to a client for such wrongful acts could be greater. In *United Farm Bureau Mut. Ins. Co. v. Groen*,[26] a case of first impression in Indiana, the Indiana Court of Appeals held an insurance company liable for the alleged negligence and abuse of process by its attorney in a subrogated claim brought on behalf of the insurer.[27]

The facts of *Groen* clearly illustrate the cause for concern. In *Groen*, the insurance company retained an attorney to bring suit to recover on a subrogated claim arising from an automobile accident. A default judgment was granted against Thomas Groen. When a copy of the default judgment was forwarded to the Bureau of Motor Vehicles by the insurer's attorney, Groen's license was suspended. Groen was later arrested for driving with a suspended license. Groen succeeded in setting the default judgment aside on the grounds that he was never served

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[21]*Id.* at 632.

[22]*Id.*

[23]Dotlich v. Dotlich, 475 N.E.2d 331 (Ind. Ct. App. 1985). *But see* Forth v. Forth, 409 N.E.2d 641 (Ind. Ct. App. 1980) (court held that there was no tolling).

[24]*See Keystone Distribution Park*, 461 N.E.2d 749; *Whitehouse*, 443 N.E.2d at 332.

[25]*See* Shideler v. Dwyer, 275 Ind. 270, 273, 417 N.E.2d 281, 283 (1981).

[26]486 N.E.2d 571 (Ind. Ct. App. 1985).

[27]*Id.*

with process and therefore the court never obtained jurisdiction over him. Groen filed suit against the insurance company and the attorney for negligence and abuse of process.[28] The insurance company was held to be accountable for damages caused by the negligence and abuse of process occasioned by the acts of its attorney.[29]

While in a representative capacity, an attorney has long been considered an agent of a client;[30] but no Indiana authority had fully considered the capacity in which an attorney serves a client in relation to notions of vicarious liability for tortious conduct. Traditional notions of vicarious liability are based upon the doctrine of respondeat superior and require determination of such issues as the power or right to control and the existence of a master-servant relationship.[31]

In *Groen*, the insurance company asserted that the doctrine of respondeat superior applied in order to determine a client's liability for the acts of its attorney.[32] Within this framework, the company argued that an attorney is an independent contractor whose acts are not under the immediate control of a client, and thus, a client should not be held liable for an attorney's tortious conduct.[33] The court, however, rejected the premise that a master-servant relationship was necessary to hold a client liable for the acts of its attorney.[34]

Without a great deal of analysis of the numerous policy considerations in this area, the court held:

> Because of the close identity of an attorney with the client he represents, we hold that neither the absence of a master-servant relationship nor the characterization of the attorney as an independent contractor is a bar to the liability of the client for the torts of the attorney acting within the scope of his authority.[35]

While such a result is not inconsistent with decisions in other states,[36] it represents a significant expansion of traditional notions of vicarious liability for tortious acts if it is applied to other than the attorney-client

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[28]*Id.* at 572.

[29]*Id.* at 574.

[30]*See* State *ex rel.* Peoples Nat'l Bank & Trust Co. v. Dubois Cir. Ct., 250 Ind. 38, 233 N.E.2d 177 (1968), *reh'g denied*, 250 Ind. 38, 234 N.E.2d 859 (1968); Kreite v. Kreite, 93 Ind. 583 (1883).

[31]*See, e.g.*, Railway Express Agency, Inc. v. Bonnell, 218 Ind. 607, 33 N.E.2d 980 (1941); Trinity Lutheran Church v. Miller, 451 N.E.2d 1099 (Ind. Ct. App. 1983); Gibbs v. Miller, 152 Ind. App. 326, 283 N.E.2d 592 (1972); RESTATEMENT (SECOND) OF AGENCY §§ 212-67 (1957); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY (1964).

[32]486 N.E.2d at 573.

[33]*Id.*

[34]*Id.* at 573-74.

[35]*Id.* at 574.

[36]*Id.* Cited in *Groen* in support of its holding:
Hewes v. Wolfe, 74 N.C. App. 610, 330 S.E.2d 16 (1985) (where attorney tortiously institutes or continues civil proceedings or is guilty of oppressive or

relationship. It should not be. The attorney-client relationship is unique in that the attorney has almost unbridled authority to act on behalf of his client. No other principal-agent relationship exists in which the agent occupies a position as special as that of the attorney to his client.

While earlier cases clearly have held that an attorney's acts as an agent are binding upon his client,[37] these cases involved the effect of an attorney's actions upon the actual case being litigated by the attorney. Because an attorney is specifically engaged to act on behalf of a client in a legal proceeding, it is not surprising that his actions bind a client for purposes of those proceedings. The *Groen* decision can be said to be a logical extension of these decisions. By holding the insurance company liable to Groen for the negligence of its attorney, *Groen* appears to conclude that the attorney acted as the agent of the company, and therefore, the negligence of the attorney was the negligence of the insurance company.[38]

Authority also exists for assessing monetary sanctions against a client for costs incurred by an opposing party as a result of an attorney's conduct.[39] Such liability is predicated upon procedural rules[40] and is intended to facilitate the efficient operation of the courts.

Not only is the concept of vicarious liability set forth in *Groen* of substantial concern to a client, an attorney's potential liability for damages for wrongful or negligent acts is expanded. As the insurance company

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wrongful conduct during course of proceeding in order to enforce claim of client, client is liable for attorney's wrongful acts); *Racoosin v. LeSchack & Grodensky*, 103 Misc. 2d 629, 426 N.Y.S.2d 707 (1980) (utility liable for damages for willful interference with property where judgment against customer for unpaid utility bills was later declared void for lack of jurisdiction over customer); *Flight Kitchen, Inc. v. Chicago Seven-Up Bottling Co.*, 22 Ill. App. 3d 558, 317 N.E.2d 663 (1974) (corporate defendant liable for acts of attorney who wrongfully ordered levy against plaintiff's property to enforce judgment rendered on behalf of defendant).

Accord, Peterson v. Farmers Casualty Co., 226 N.W.2d 226 (Iowa 1975). *But see* Lynn v. Superior Court, 225 Cal. Rptr. 427, 180 Cal. App. 3d 346 (1986) (client is not liable for the negligent or intentional infliction of emotional distress caused by its attorney because an attorney is an independent contractor); Plant v. Trust Co. of Columbus, 168 Ga. App. 909, 310 N.E.2d 745 (1983); Evans v. Steinberg, 40 Wash. App. 585, 699 P.2d 797 (1985) (insurer not liable for malpractice claims against an attorney because an attorney is an independent contractor).

[37]*See, e.g.*, International Vacuum, Inc. v. Owens, 439 N.E.2d 188 (Ind. Ct. App. 1982) (citing Kuhn v. Indiana Ice & Fuel Co., 104 Ind. App. 387, 390, 11 N.E.2d 508, 509 (1937)); *see also supra* note 30.

[38]486 N.E.2d at 573-74.

[39]In Brutus v. Wright, 163 Ind. App. 366, 324 N.E.2d 165 (1975), costs were assessed against a client for expenses associated with a continuance caused by an attorney's delay.

[40]IND. R. TR. P. 53.5 provides in part "the court may award such costs as will reimburse the other parties for their actual expenses incurred from the delay." *See also* IND. R. TR. P. 11; FED. R. CIV. P. 11, 37(b).

did in *Groen*, a client will most likely contest such claims of vicarious liability for the acts of the attorney. Generally, any attorney's fees reasonably incurred in such defense to reduce or avoid damages caused by an attorney's negligent or wrongful actions are recoverable as consequential damages in a subsequent malpractice action against an attorney.[41] Thus, in addition to being liable in damages for tortious conduct, an attorney may also be liable to a client for expenses incurred by the client to mitigate or defend against the damages claimed by a third party and caused by the acts constituting malpractice.

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[41]*See, e.g.*, United Fidelity Life Ins. Co. v. Law Firm of Best, Sharp, Thomas & Glass, 624 F.2d 145 (10th Cir. 1980); Spering v. Sullivan, 361 F. Supp. 282 (D. Del. 1973); McGregor v. Wright, 117 Cal. App. 186, 3 P.2d 624 (1931); Ninth Ave. & Forty-Second St. Corp. v. Zimmerman, 217 A.D. 498, 217 N.Y.S. 123 (1926); Hiss v. Friedberg, 201 Va. 572, 112 S.E.2d 871 (1960); R. Mallen & V. Levit, Legal Malpractice § 309 (2d ed. 1981).