What's Trending? Stay Ahead of the Curve with the Latest Trends, Tips, and Significant Cases in Professional Liability

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I. Introduction

From unfortunate Zoom meeting mishaps to working from home every day in our pajamas, we can all agree that 2020 has been a year unlike any other. Just as the year started to crank up, everything stopped, and life drastically changed for all of us; for better or for worse. While we all have our complaints about our "new normal," at the end of the day, if you are breathing and able to read this paper, you are *doing* just fine – just not *doing* all the things you used to do the same way or as much as you would like.

We all watched as the legal world slowed down as we slogged through 2020. In contrast, 2021 is showing all signs that things will be moving at lightning speed as our world tries to make up the pace. Riding with the tide, our state and federal courts issued fewer opinions related to professional liability than in years past.

Although there are fewer reported opinions issued in 2020 than prior years, it is expected that the number of professional malpractice claims will rise and continue to rise in 2021. In May of this year, LAW360 reported that the number and size of legal malpractice claims surged in 2019, and another waive is imminent as a direct result of the coronavirus pandemic, according to a new report by insurance broker Ames & Gough. Coe, Aebra, *Legal Malpractice Claims Have Soared (And May Soar Higher)*, LAW360 (May 18, 2020), https://www.law360.com/articles/1274652. In the report, Ames & Gough published its annual survey of 10 leading lawyers' professional liability insurers that provide insurance coverage to 80 of the 100 largest law firms in the U.S. by revenue. *Id.* The survey revealed that 8 of the 10 insurers saw as many or more legal malpractice claims in 2019 than they did in 2018, with three reporting more than a 10% increase. *Id.* And circumstances like the ones presented by the current pandemic will only create more risk which will, in all likelihood, cause these numbers to soar in 2021.

While the reported cases were fewer in 2020, there are several that were quite significant. A few state high courts issued opinions related to matters of first impression. See *Gray v Oliver*, 943 N.W.2d 617 (2020) (assignment of legal malpractice claim); *Robinson-Podoll v. Harmelink., Fox & Ravnsborg Law Office*, 939 N.W.2d 32 (2020) (duty to inform client of error or malpractice). Others clarified long-standing unsettled law that is still ever-changing. See *Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077 (burden of proof for "settle-and-sue" cases).

With respect to trends, several courts revisited questions related to causation, comparative fault and the discovery rule. See *id*; *Knutson v. Foster* (Aug. 8, 2018, G054247) __Cal.App.5th ____ (causation); *Broward County, Florida v. CH2M Hill, Inc.*, 2020 WL 4197936 (Fla. App. July 22, 2020 (comparative fault); *Davis v. Tuma*, 469 P.3d 595 (Idaho 2020) (discovery rule).

Additionally, there was one practice tip that stood out among all the cases – the need for formal disengagement letters.

The remainder of this Paper contains a brief synopsis of some of the most significant professional liability cases that were decided in 2020. Where appropriate, each synopsis is followed by a general Practice Tip or Practice Note.

II. Accountants

A. *Broz v. Plante & Moran*, PLLC, 2020 WL 110785 (Mich. App. Jan. 9, 2020).

A Michigan Court of Appeals held that a statute setting forth the standard of care in malpractice claims was limited to claims against health care professionals who practice medicine and did not apply to claims against accountants. Robert Broz operated several businesses organized as S Corporations, which provided for pass through taxation. An accounting firm prepared Broz's tax returns for several years. The IRS audited Broz's tax returns and issued a notice of deficiency.

In United States Tax Court, Broz sued the IRS as a result of the audit and made certain strategic decisions not to pursue certain arguments. Ultimately, the Tax Court issued a decision in favor of the IRS. Although Broz appealed to the Sixth Circuit, the Tax Court's ruling was affirmed in 2011.

Consequently, Broz sued his accounting firm for malpractice in 2012. After a series of various dismissals and appeals, the accounting firm later moved for summary disposition on the malpractice claim arguing that the plaintiff had failed to establish the standard of care. In response, the plaintiff relied on the testimony of expert Peter Oettinger whose report described the structure of plaintiff's business, the tax obligations resulting from that structure, and the way in which the businesses could have been structured differently to lessen plaintiff's tax obligations. In his deposition, Oettinger stated that he applied the standard of care established by the AICPA (American Institute of Certified Public Accountants). Additionally, Oettinger submitted an affidavit stating that defendant provided "bad accounting advice" that resulted in the IRS disallowing millions of dollars of deductions.

Nevertheless, the trial court granted summary disposition in favor of defendant, ruling that plaintiff's expert failed to establish the standard of care. The intermediate appellate court affirmed, ruling that plaintiff's expert failed to set forth the standard of care and the grounds for its breach. Plaintiff appealed, and the Supreme Court remanded the case to the appellate court for reconsideration in light of *Cox v. Flint Bd. of Hosp. Mgrs*., 651 N.W.2d 356 (Mich. 2002) which held that MCL 600.2912a does not apply to malpractice claims against nurses. After doing so, the intermediate appellate court again affirmed.

Based on the *Cox* court's reasoning, the appellate court in the instant case held that MCL 600.2912a does not apply to accountants. Plaintiffs argued that accounting malpractice claims were governed by MCL 600.2962, which requires only proof of a negligent act, rather than proof of the standard of care, plaintiffs contended. However, the court noted that neither MCL 600.2912 nor MCL 600.2962 identified a standard of care applicable to malpractice actions against accountants. The *Cox* decision established that in the absence of a statutory standard, the common law standard of care applies. Thus, plaintiffs were required to demonstrate the standard of care and that the defendant breached that standard of care to demonstrate accounting malpractice

When analyzing Oettinger's testimony, the appellate court determined that, while the report suggested that other approaches might have been successful, the report did not state that defendant's conduct constituted malpractice. In his deposition, although Oettinger applied the standard of care based on the AICPA, he did not state what the standard was or whether defendant breached the standard. Likewise, Oettinger's statement in his affidavit that defendant provided "bad advice" did not state the standard of care or how it was breached.

> *Practice Tip:* Even in 2020, various statutory construction arguments are being made to establish whether common law principles apply to common professional liability disputes. Thus, it is important to analyze the laws and statutes closely to identify issues that remain undecided by each state's highest court.

B. *Christopher A. Jackson Revocable Inter Vivos Trust of 19 July 1995 v. Abeles & Hoffman, P.C.,* 595 S.W.3d 156 (Mo. App. 2020).

A Missouri Court of Appeals found that an accounting firm that reviewed a limited partnership's financial statements for the purpose of valuing the interest of withdrawing partners could not be held liable to the withdrawing partners. Plaintiffs, a trust and a limited partnership, owned shares in AMS Investment Group, LP and AMS Automotive, LLC (collectively AMS). AMS hired an accounting firm to review AMS' financial statements. Plaintiffs contended that the accounting firm knew the purpose of the review was to value Plaintiffs' ownership interest in AMS in order to calculate the purchase price of a withdrawing partner interest under the AMS limited partnership agreement.

Plaintiffs and AMS litigated over Plaintiffs' ownership interest and a confidential settlement was later reached. Subsequently, Plaintiffs sued the accounting firm for negligence in preparing the review of AMS' financial statements. In their petition, Plaintiffs claimed the accounting firm owed them a duty to properly determine such ownership interest valuation. The accounting firm soon moved for summary judgment. The trial court granted it and Plaintiff appealed.

In affirming the lower court's grant of summary judgment, the appellate court held that in situations such as this where the plaintiff does not have an accountant-client relationship with the defendant, but rather are third parties to the contract, whether the defendant is liable is controlled by the decision in *Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, 493 S.W.2d 378 (Mo. App. 1973). In that case, the court held that an accounting firm that performs an audit may be liable to a third party that the accounting firm knows will rely on the audit or knows the recipient of the audit intends to supply information from the audit to prospective users. In this case, however, it was undisputed that Plaintiffs did not rely on the purchase price that was calculated based on the accounting firm's report. Instead, Plaintiffs rejected AMS's $1.3 million offer. Consequently, the accounting firm could not be held liable to Plaintiffs.

> *Practice Note:* There is disagreement amongst the states and even within some jurisdictions of states about the appropriate standard of liability to apply to negligence suits brought by third parties against accountants. Generally, only a person in privity with an accountant can recover against that accountant for negligence. Lately, however, courts have applied different standards, including the general privity approach, standards set forth in the RESTATEMENT (SECOND) TORTS § 552, and the "reasonably foreseeable plaintiff." Of particular note is *Bily v. Arthur Young & Co.* (1992) 3 Cal 4th 370, 11 Cal Rptr 2d 51, 834 P2d 745, for example, where the court examined the current approaches to accountant third-party liability and determined that for general negligence, a traditional privity approach would be adopted, but for negligent misrepresentation, the RESTATEMENT approach would prevail.

III. Architects and Engineers

A. *Broward County, Florida v. CH2M Hill, Inc.*, 2020 WL 4197936 (Fla. App. July 22, 2020).

In Florida, an appellate court made a rare holding that under a statute governing negligence actions, fault could be apportioned between an engineer that was alleged to have negligently designed an airport runway, and a general contractor that was alleged to have breached its contract in constructing the runway. In this case, Broward County contracted with the engineering firm CH2M Hill, Inc. to design improvements for an airport, including Taxiway C. The contract required the designs to satisfy FAA requirements, under which taxiways must be designed and constructed to have a useful life of 20 years. The County contracted with URS Corporation to serve as Program Manager. Triple R Paving, Inc. was the general contractor.

Almost immediately after Taxiway C was constructed and opened to traffic, the surface failed. As a result, the County withheld $600,000 from its final payment to Triple R for any necessary repairs to Taxiway C. Triple R sued the County for breach of contract and related claims. Triple R also asserted a professional negligence claim against CH2M. The County asserted a counterclaim against Triple R for breach of contract and a crossclaim against CH2M for breach of contract and indemnification. The County also sued URS but eventually settled that claim. The County alleged that Triple R's construction of Taxiway C was defective, and that CH2M's design of Taxiway C was defective. After a bench trial, the trial court apportioned 60% fault to URS, 25% to Triple R, and 15% to CH2M, and awarded $6,723,303 in damages. The County appealed, and CH2M and Triple R cross-appealed.

On appeal, the County argued that the trial court erred in apportioning fault. Specifically, the County argued that comparative fault is not applicable to breach of contract cases and that the court should have followed the rule that where separate breaches of contract cause a single, indivisible injury, comparative fault is inapplicable, so that the breaching parties are held jointly and severally liable for the plaintiff's damages. However, the Court of Appeals rejected this argument. In affirming the lower court's apportionment of fault, the appellate court held that the definition of "negligence action" under Section 768.81, Florida Statutes (2018) obviously encompassed the County's action against CH2M because an engineer is a "professional" within the meaning of subsection 768.81(1)(c). The court acknowledged that Triple R, a general contractor, was not a professional under section 768.81(1)(c). Nonetheless, the court held that it was appropriate to allocate fault to Triple R under section 768.81(3), which requires a court to "enter judgment against each party liable on the basis of such party's percentage of fault" because the County's claims against CH2M and Triple R were intertwined.

> *Practice Note:* Application of comparative fault in cases involving breach of contract is rare. In most instances, legal support typically comes in the form of statutory authority. Thus, look to statutes whenever possible when researching ways to apply comparative fault.

B. *Creative Restaurant, Inc. v. Dyckman Plumbing and Heating*, Inc., 2020 WL 3443529 (N.Y. App. June 24, 2020).

In New York, an appellate court held that the continuous representation doctrine may toll the statute of limitations in a suit against an architect who attempted to remedy problems that arose two years after the work was completed. In March 2014, the plaintiff, Creative Restaurant, Inc., leased the first floor of a building to operate a "Little Caesar's" franchise. The plaintiff hired a contractor to perform work on the premises. Pursuant to a contract dated April 23, 2014, the contractor hired an architect to perform services that included providing "schematic HVAC & Plumbing design."

The contractor and the architect allegedly advised the plaintiff the wrong address was being used for the premises, that the correct address was 8622 4th Avenue, and that all building permits should be filed under that address. Thus, in December 2014, the architect obtained an equipment use permit and a letter of completion for the address 8622 4th Avenue. Two years later, in December 2016, National Grid Services Inc. shut off gas services for the premises, claiming that the plaintiff was "stealing gas." Plaintiff contacted the architect, who attempted to remedy the problem by performing additional services between December 2016 and December 2017.

On March 7, 2018, plaintiff sued the architect for malpractice. Defendant moved to dismiss, arguing that the claim was barred by a three-year statute of limitations. A trial court granted the motion and the plaintiff appealed. In reversing the dismissal, the Court of Appeals held that the statute of limitations may be tolled under the continuous representation doctrine and that there were factual issues as to whether the continuous representation doctrine applied in this case. The court specifically held that the continuous representation doctrine may apply when an architect attempts to remedy problems that manifested themselves after the work was completed. The court rejected the architect's argument that the passage of two years between the architect's completion of project and the architect's attempt to remedy the problems with the gas line connection precluded the continuous representation doctrine from applying.

> *Practice Tip:* In this case, the court held that the passage of time alone between the architect's completion of the project and the attempt to remedy the problems did not render the continuous representation doctrine from applying "as a matter of law." It is possible that the outcome may have been different if the architect had taken some form of affirmative action such as a formal disengagement to render the continuous representation doctrine inapplicable. Generally, all professionals should make a habit of formally disengaging after all services are rendered.

IV. Attorneys

A. *Bill Birds, Inc. et al. v. Stein Law Firm, P.C.,* 2020 N.Y. Slip Op. 02125 (2020).

A New York Court of Appeals limited the application of the long-standing Judiciary Law § 487 which makes attorneys liable for deceit of a party or the court. *In Bill Birds, Inc*., clients brought an action against their lawyer for malpractice and violation of Judicial Law § 487 alleging the law firm induced them into bringing a meritless case the lawyer knew would not be successful in order to charge unnecessary attorney's fees. Plaintiffs alleged that the underlying action—a trademark dispute which was dismissed based on a forum selection clause in the subject licensing agreement—clearly lacked merit, in part because a

provision in the licensing agreement prohibited plaintiffs from challenging the defendant's ownership of the relevant intellectual property.

After answering the complaint, defendants moved for summary judgment, arguing, among other things, that the Judiciary Law § 487 claim must be dismissed because plaintiffs failed to allege any misrepresentations made in the context of ongoing litigation. Plaintiffs opposed the motion, submitting affidavits alleging essentially the same conduct described in the complaint. In addition, plaintiffs submitted an expert affidavit from an attorney who averred that defendants' legal advice was incorrect and that defendants induced plaintiffs into litigation under "false pretenses."

The court granted defendants' motion for summary judgment in part, dismissing the legal malpractice, breach of contract and fraud claims, but denied the motion with respect to the § 487 claim. However, the defendant later appealed the ruling on § 487. On appeal, the court considered whether inducing the plaintiffs to bring a meritless claim for unnecessary attorneys' fees constituted a violation of § 487. Ultimately, the Court of Appeals held that even if a plaintiff's attorney induces a client into bringing a frivolous lawsuit, the attorney's actions do not constitute a violation of § 487. In reaching its decision, the Court held that given the requirement that the conduct involve "deceit or collusion" and be intentional, liability under the statute does not extend to negligent acts or conduct that constitutes only legal malpractice, evincing a lack of professional competency.

Practice Tip: There will likely be substantial litigation going forward regarding the question of whether allegations are just non-meritorious legal statements or statements that either explicitly or impliedly misrepresent some material fact. Attorneys must still be mindful that they can still be liable for malpractice, fraud and/or violating professional rules of conduct if they mislead their clients or "trick" them into bringing frivolous lawsuits that cause their clients damages.

B. *Gray v Oliver*, 943 N.W.2d 617 (2020).

In a case of first impression, the Supreme Court of Iowa held that a legal malpractice claim could not be assigned to a non-client that was previously adverse to the client the attorney was representing. This case involved a tragic set of facts in which a 13-year-old girl was raped during a sleepover by her friend's stepfather. The step-father was convicted of the rape and sentenced to prison. The Grays, the parents of the victim, later filed a civil suit against the step-father who retained an attorney who did little to defend the suit. The civil case was tried, and a jury awarded the victim and her parents $127 million in compensatory and punitive damages. The step-father retained new counsel and appealed.

While the appeal was pending, the Grays caused to be issued a writ of execution on the $127 million judgment against the step-father. The sheriff levied

on his right to bring claims against his former attorney. The Grays purchased this right for $5,000 at the sheriff's sale and sued the former attorney for legal malpractice for providing the step-father with an inadequate defense. The former attorney moved for summary judgment, arguing that public policy prohibited the assignment of a legal malpractice claim to a litigation adversary. The trial court granted the motion, and the Grays appealed.

In affirming the dismissal, the Iowa Supreme Court In this case, in deciding this as an issue of first impression, specifically prohibited the involuntary assignments of legal malpractice claims to litigation adversaries. The Court acknowledged that courts in other jurisdictions have prohibited assignments of legal malpractice claims for public policy reasons to which it agreed, and stated that these reasons are even more compelling when the assignment is involuntary. The Court noted that involuntary assignments erode the public's confidence in the legal system by allowing the parties to reverse their positions. After a litigant obtains an assignment of the opposing party's legal malpractice claim, the litigant pursues the claim by taking the opposite position that the litigant had argued in the underlying case.

Here, the Grays argued in the appeal of the underlying case that the $127 million verdict was supported by the evidence. The Grays then switched positions in the legal malpractice case, arguing that the underlying case could have been settled for much less than the amount of the verdict if Oliver had provided competent representation. The court determined that this gamesmanship violated public policy.

> *Practice Note:* In jurisdictions where there is a prohibition against the assignments of legal malpractice claims, courts have found that they are inconsistent with an attorney's duty of loyalty. An attorney will be less likely to engage in zealous advocacy if the attorney knows the opposing party may be able to obtain the client's legal malpractice claim and retaliate against the attorney. Nevertheless, even in those jurisdictions, claimants will make creative attempts to get around the general prohibition. See *Goin v. Crump*, 2020 WL 90919 (Tex. App. Jan. 8, 2020) (court held that court-ordered turnover of a judgment debtor's legal malpractice claim to a receiver was void as against public policy).

C. *Knutson v. Foster* (Aug. 8, 2018, G054247) __Cal.App.5th ____.

A California court of appeals recently held that claims of fraudulent concealment and intentional breach of fiduciary duty by a client against his or her attorney are subject to the substantial factor causation standard, not the "but for" or "trial within a trial" causation standard applied in legal malpractice claims for negligence. In this case, Plaintiff, a rising swimming star, sued her former

attorney for professional negligence, fraudulent concealment and intentional breach of fiduciary duty. Plaintiff alleged she was induced by her swimming coach to swim professionally, forgoing a five-year scholarship package to swim for Auburn University, by making oral promises regarding financial support USA Swimming would provide.

The head coach was eventually fired, and USA Swimming refused to honor the oral agreements made to Plaintiff. Thus, she retained an attorney, to get USA Swimming to honor the agreement. The attorney, however, did not disclose his close ties to USA Swimming or his previous representation of the head coach who had made the oral agreement. Nevertheless, the attorney negotiated a settlement and convinced plaintiff to agree to an almost impossible performance marker of qualifying in the top 25 swimmers in the world, or top three in the United States, for three years and a release of all claims against the former head coach. The pressure and stress of the deal she ultimately agreed to reactivate a prior eating disorder and eventually plaintiff retired from the sport.

After discovering her attorney's conflicts of interest, Plaintiff sued her attorney for fraudulent concealment and intentional breach of fiduciary duty. After a three-week trial, the jury found in plaintiff's favor, but the trial court granted a new trial, concluding plaintiff had failed to meet her burden of proving that if the misrepresentations had not been made and plaintiff had employed another attorney, she would have received a better result. Plaintiff appealed.

On appeal, the court concluded the trial court erred by applying an incorrect legal standard for causation in granting a new trial. As the court explained, because legal malpractice involves negligent conduct on the part of an attorney, causation for legal malpractice is analyzed differently than causation for intentional torts of fraudulent concealment and intentional breach of fiduciary duty, which are distinct intentional torts. For those claims, the substantial factor causation standard applies.

D. K*&L Gates LLP v. Quantum Materials Corp.*, No. 03-19-00138-CV, 2020 WL 1313733 (Tex. App. – Austin, 2020, pet. denied).

A Texas Supreme Court refused review a lower court's decision to deny an Anti-SLAPP motion filed by a law firm in a suit against a former client who alleged breach of fiduciary duties. Quantum Materials Corp. ("Quantum") hired K&L Gates in 2016 for "non-adverse" corporate advice, which included helping the company go public and drafting lending agreements with two investor entities. The engagement letter included an advance conflict waiver allowing K&L Gates to represent adverse parties in matters not substantially related to the corporate work. In 2017, a dispute arose between Quantum and the lenders over payment issues, during which the lenders demanded equity in the corporation rather than cash.

Quantum subsequently filed suit against a transfer agent involved in the dispute. K&L Gates lawyers filed an intervention petition on behalf of the lenders alleging breach of contract against Quantum. Quantum quickly moved to disqualify K&L Gates alleging a conflict of interest arguing that K&L Gates had obtained confidential financial information during their prior representation. Although they denied any conflict, K&L Gates nevertheless withdrew its representation of the lenders.

Upon receiving a demand for fees owed from the prior representation, Quantum sued K&L Gates for malpractice, breach of fiduciary duty, and violations of the Deceptive Trade Practices Act ("DTPA") for making express misrepresentations that the firm would "act in Quantum's best interest." K&L Gates responded with a motion to dismiss under Section 27.005 of the TCPA (Texas's Anti-SLAPP statute). See TEX. CIV. PRAC. & REM. CODE § 27.005(b). As grounds for dismissal, K&L Gates argued that Quantum's suit arose from K&L Gates's exercise of the right to petition: specifically, it characterized the suit as "based solely on K&L Gates's alleged statements and filings made on behalf of the Lenders (its clients) in the course of" the litigation between Quantum Materials and the Lenders. K&L Gates further argued that the firm and its attorneys benefit from the doctrine of attorney immunity and that its conduct was exempt from the DTPA's prohibition on unconscionable conduct because it qualified as "advice, opinion or judgment."

Quantum opposed the motion, arguing, amongst other things, that the TCPA protection of the right to petition does not contemplate "attorneys who work to the detriment of one client (in favor of more lucrative clients) under the blanket generalization that any such work must have necessarily arisen in the context of (inherently protected) litigation." The court ultimately denied the Motion to Dismiss and K&L appealed.

Affirming the lower court's ruling, the Court of Appeals held that because Quantum satisfied its burden to state a prima facie case for its claim of breached fiduciary duties. Specifically, Quantum argued that K&L Gates breached the fiduciary relationship when it "attended confidential board meetings and reviewed highly confidential corporate secrets that K&L Gates soon thereafter arrogated to Quantum's detriment." Accordingly, the district court did not err in declining to dismiss that claim. The court also held that because K&L Gates's alleged express misrepresentations cannot be characterized as "advice, opinion, or judgment," the allegations are not exempt from the DTPA's prohibition on unconscionable conduct. See Tex. Bus. & Com. Code § 17.46(a). Lastly, with respect to K&L Gates's affirmative defense based on immunity, the court held that the defense does not shield an attorney from liability arising from misconduct toward his or her own client.

> *Practice Note*: In its petition to the Texas Supreme Court which was denied in October of 2020, K&L Gates raised the question of whether there is now a former-client

exception to attorney immunity. Quantum argued that this was not an issue the Texas Supreme Court needed to take up because K&L Gates never terminated its representation of the company based on the terms of their engagement letter. Thus, it was not a former client. This begs the question of whether the Texas Supreme Court would have granted the petition had there been a formal disengagement letter.

E. *Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077.

The California Court of Appeal for the Fifth Appellate District clarified an important area of the law in California that has endured a history of confusion regarding the standard of proof in "settle and sue" legal malpractice cases. A "settle and sue" legal malpractice case is one where the plaintiff in the malpractice case settled the underlying lawsuit, then sued their lawyer from the underlying case, claiming that but for the lawyer's malpractice, the plaintiff would have either settled the underlying case for more money, or recovered more money at trial. In the underlying divorce case, Masellis and her attorney engaged in settlement negotiations with her husband prior to trial. Apparently, the settlement negotiations were tumultuous. Ultimately, Masellis testified that she agreed to a settlement she otherwise would not have agreed to because her counsel did not seem prepared for trial. Marsalis's counsel prepared the settlement agreement that did not include a date certain for her husband to pay the settlement. Consequently, he took two years to pay his settlement and because the settlement was not entered as a judgment, Masellis was not entitled to interest.

Masellis ultimately sued her attorney alleging legal malpractice. After a trial, a jury awarded her $300,000 in damages for the attorney's negligence and breach of fiduciary duty. The attorney then moved unsuccessfully for judgment notwithstanding the verdict and for a new trial arguing that Masellis had failed to meet the standard of "legal certainty" required to prove proximate cause and damages citing *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 166, 149 Cal.Rptr.3d 422. She ultimately appealed.

After surveying several judicial decisions that employed the phrase "legal certainty" when describing a legal malpractice plaintiff's burden of proof, the court observed that some of these cases, such as *Slovensky v. Friedman* (2002) 142, Cal.App.4th 1518, *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, Orrick Herrington & Sutcliffe v. Sup. Ct. (2003) 107 Cal.App.4th 1052, and *Thompson v. Halvonik* (1995) 36 Cal.App.4th 6577 failed to explicitly state that the appropriate burden of proof is the "legal certainty" standard and explain how that standard fits within the framework of the three common standards of proof listed in Evidence Code §§ 115 and 502. Consequently, the *Masellis* court concluded that the "legal certainty" standard was ambiguous, and that cases using the term "'legal certainty' are not authority applying a heightened burden of proof

to the elements of causation and damages in a legal malpractice action" and reaffirmed that the applicable burden of proof, whether for a settle and sue plaintiff or a regular legal malpractice plaintiff, is a preponderance of the evidence. In the unpublished parts of the opinion, the court concluded that the trial court properly denied the attorney's motions for judgment notwithstanding the verdict and for a new trial because substantial evidence supported the jury's findings that the attorney's negligence was a substantial factor in causing Masellis's damages (but for the negligence, Masellis would have received a more favorable recovery if she had gone to trial).

> *Practice Tip*: California's appellate courts are still split on this issue as California attorneys ponder the importance and interpretation of the recent decision.

F. *Robinson-Podoll v. Harmelink., Fox & Ravnsborg Law Office*, 939 N.W.2d 32 (2020).

In a matter of first impression, the Supreme Court of South Dakota held that a lawyer had a professional duty of care to notify a client of an act, error or omission that is reasonably expected to be the basis of a malpractice claim. In this case, Jill Robinson-Podoll brought a legal malpractice action against her attorney and her attorney's law firm arising out of their representation of Robinson-Podoll in a claim for personal injuries from an automobile accident. The attorney prepared a summons and complaint naming the defendants. On April 23, 2010, the attorney forwarded the summons and complaint to the Yankton County Sheriff for service six days before the statute of limitations was to run. The Sheriff served the first defendant on April 24, 2010 but was unable to locate the second defendant. The Sheriff subsequently delivered the summons and complaint to the Codington County Sheriff for service the second defendant after the limitations period had expired.

On May 12, 2010, an attorney representing the Plaintiff's insurance carrier on a subrogation claim related to the accident sent Plaintiff's attorney an email pointing out the fact that there appears to be a limitations problem with the second defendant. The subrogation attorney sent another email on August 9, 2010 stating he spoke with counsel for the second defendant who was confident the suits were served beyond the statute of limitations.

Eventually, the second defendant moved for summary judgment on Robinson-Podoll's personal injury action alleging the claim against him was time barred by the applicable statute of limitations. The circuit court agreed and, after various appeals and remands, dismissed the case on limitations. On appeal, the court addressed the question of whether an attorney has a duty to disclose known malpractice. In holding that one does, the court explained that "[w]hen an act, error, or omission could reasonably be expected to be the basis of a legal malpractice claim against a lawyer, the lawyer's professional responsibility to keep a client 'reasonably' informed is directly implicated. Imposing a legal duty

to disclose such an act, error, or omission serves the purpose of ensuring that a client can make an informed decision about how best to proceed under such circumstances."

> *Practice Tip*: Full disclosure and informed consent are two very important parts of a successful attorney-client relationship. In times when errors are committed, full disclosure of such error will go a long way in increasing the chances of resolving any potential malpractice claim and avoiding suit.

V. Real Estate and Insurance Agents

A. *American Reliable Insurance Company v. Lancaster*, 2020 WL 5867951 (Ga. App. Oct. 2, 2020).

A Georgia Court of Appeals reversed and granted summary judgment, dismissing a lawsuit filed by policyholders against their insurance carrier and held that an insurance agent did not have actual or apparent authority to act on behalf of the insurance carrier. The policyholders, the Lancasters, filed suit against American Reliable Insurance Company ("ARI") after ARI denied their claim for coverage following a fire that completely damaged their home on May 30, 2015. ARI denied the claim for failure to pay premiums. However, the Lancasters alleged they had made premium payments directly to their insurance agent. The insurance agent never forwarded the payment to the insurance carrier.

After the Lancasters filed against ARI and the agent, ARI filed a motion for summary judgment which was denied based on a finding that genuine issues remained as to the agent was ARI's agent. ARI appealed. Reversing the lower court's judgment, the appellate panel said in Georgia, an independent insurance agent is not considered an agent for an insurer unless the insurer granted the agent authority to bind coverage or represented to a policyholder that the agent represented it. Because the Lancasters submitted no evidence that the agent was an employee of ARI or an authorized agent, the court ruled ARI could not be held liable. The court further held that the renewal notice that ARI had mailed to the Lancasters "stated on the front page that it was a direct bill, rather than an agency bill, policy." Although the Lancasters argued that they never read the renewal notice or the statement that they must pay ARI directly, the insurer demonstrated that it had sent proper notice by entering U.S. Postal Services receipt notices into evidence.

> *Practice Tip:* The insurance agent was found to have committed fraud by accepting the premium payments and failing to forward them to the insurance carrier. Don't commit fraud!

B. *Davis v. Tuma*, 469 P.3d 595 (Idaho 2020).

An Idaho Supreme Court recently considered whether a party was on notice of the contents of recorded land records to start the statute of limitations on a fraud claim. A California couple retained a real estate agent to assist them with searching for property in rural Idaho. Several years after the 2009 purchase, the couple discovered that they had no legal right to use the road they had been using to access the property. The only alternative was to go over a very steep hill that was difficult to navigate during much of the year. The couple never visited the property during the time it was purchased and completely relied on the real estate agent for the site visit. The agent, however, reviewed all the recorded covenants and boundary line surveys with the couple as well as the title commitment.

Although the couple used the road from time to time, in July of 2016, they received a cease-and-desist letter on behalf of the owners of the easement. Upon realizing they had no right to use the roadway or any other reasonable access to the property, the couple sued the real estate agent and the brokerage for fraud, alleging that the agent "intentionally and deceitfully misrepresented his capacities" to review the title commitment and recorded documents, and that he had lied when he told them they had nothing to worry about. Alternatively, they argued he had committed constructive fraud by making representations in ignorance of their truth or falsity. The agent and brokerage moved for summary judgment based on the three-year statute of limitations. Although the couple asserted the discovery rule, the agent and brokerage argued that the facts were discoverable in the land records, and a purchaser is deemed to have notice of all facts that would be discovered by a diligent search of the land records. The trial court granted summary judgment and the couple appealed.

Reversing the lower court's judgment, the Idaho Supreme Court stated that it had not held that the principle of "record-as-notice" will establish discovery for purposes of the commencement of the statute of limitations in a fraud action. In fact, this court noted it had previously held that Idaho's record-as-notice statute was "not meant to be a shield against fraud and misrepresentation." The court went on to note that the recording statutes say nothing about notice for other purposes, such as the discovery rule. Accordingly, the trial court erred in hold that record notice barred the action.

The court further explained that it's holding does not mean the recorded documents are necessarily irrelevant. The statute should start to run when the plaintiffs knew or should have known of the fraud and the recorded documents may play a role in the factual determination of whether they "should have known." However, knowledge of fraud and determination of whether and when one should have known about it is a fact question for the jury.