



## Alerts

### Continuous Representation Rule Does Not Extend the Statute of Limitations in Legal Malpractice Claims

January 22, 2024

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#### Brief Summary

The North Carolina Court of Appeals aligned itself with the minority view by holding that the continuous representation rule does not extend the statute of limitations for claims of professional negligence (legal malpractice). Instead, the statute of limitations begins to run when the last act of negligence occurs.

#### Complete Summary

In the underlying litigation, the plaintiffs, Rebecca and Matthew Davis (collectively, the "plaintiffs"), filed suit against Janet Rizzo ("defendant") on February 8, 2017, wherein they disputed changes made to the trust of Jeannette B. Davis (the "decedent") and the creation of a new trust benefitting the defendant. The plaintiffs were represented by R. Hayes Hofler, III ("Hofler") of Hayes Hofler, P.A. The plaintiff, Rebecca Davis, alleged that she brought suit on behalf of the decedent.

However, at the time that the complaint was filed, the decedent was still living and had not been declared incompetent. The defendant and the decedent separately moved to dismiss the underlying complaint for failure to state a claim upon which relief could be granted. In response, the plaintiffs moved to continue or stay the proceedings in order to gather additional information about the decedent's incapacity, which the court denied.

On March 28, 2017, the decedent petitioned the trial court to be removed as a represented plaintiff and to intervene as a defendant, which was allowed. On the same day, the trial court also granted the defendant's and the decedent's motions to dismiss.

On April 4, 2017, the plaintiffs filed a Rule 60 motion seeking a petition for adjudication of incompetency and appointment of a guardian. The trial court denied this motion on May 12, 2017. The plaintiffs then appealed on June 7, 2017, which the defendant and the decedent moved to dismiss as untimely. On November 7, 2017, the plaintiffs filed a second Rule 60 motion seeking relief from the trial court's dismissal.

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In the interim, the decedent moved to Georgia, where the defendant petitioned to have her declared incompetent. In December 2017, the plaintiffs petitioned in North Carolina to have the decedent declared incompetent and to appoint plaintiff Matthew Davis as her guardian.

In light of the Georgia proceeding, on July 12, 2018, the court dismissed the petition with prejudice and relinquished jurisdiction. Thereafter, a Georgia court found the decedent incompetent and appointed the defendant as her guardian/conservator. On August 21, 2018, the Court of Appeals granted the defendant's and decedent's motions to dismiss the appeal.

The plaintiffs then petitioned the North Carolina Supreme Court for review, which was denied. On May 24, 2019, the plaintiffs moved to stay or continue the hearing to gather additional evidence. The court denied this motion and the second Rule 60 motion on June 6, 2019. Subsequently, the defendant and decedent filed a motion seeking more than \$160,000 in attorneys' fees from the plaintiffs.

On February 8, 2021, the plaintiffs filed a complaint against Hofler for professional negligence and breach of contract. In response, Hofler filed a motion to dismiss, arguing, *inter alia*, that "he did not owe plaintiffs a continuing duty, as that standard only applies in medical malpractice cases." *Davis v. Hofler, P.A.*, 2024 N.C. App. LEXIS 11, at \*5 (Ct. App. January 2, 2024). The trial court granted the motion and dismissed the plaintiffs' complaint as barred by the statute of limitations. Plaintiffs appealed.

In North Carolina, legal malpractice claims are subject to a three-year statute of limitations and a four-year statute of repose, as set forth in N.C. Gen. Stat. § 1-15(c). An action begins to accrue "at the time of...the last act of the defendant giving rise to the cause of action." *Davis v. Hofler, P.A.*, 2024 N.C. App. LEXIS 11, at \*7 (Ct. App. January 2, 2024) quoting *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74 (2013):

"Further, if a 'claimant's loss is not readily apparent to the claimant at the time of its origin, and . . . is discovered or should reasonably be discovered by the claimant two or more years after... the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made.'" *Davis, supra.* at \*11 quoting *Bolton v. Crone*, 162 N.C. App. 171, 173 (2003). "Continuing representation of a client by an attorney following the last act of negligence does not extend the statute of limitations." *Davis, supra.* at \*7 quoting *Carle supra.*

To determine when the last act or omission occurred[,] [the court] looks to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied." *Davis, supra.* at \*9 quoting *Carle v. Wyrick, Robbins, Yates & Ponton, LLP*, 225 N.C. App. 656, 661 (2013).

Here, Hofler argued that his "last act" for limitation purposes was either the filing of the complaint on February 8, 2017 or the trial court's dismissal of the complaint on March 28, 2017. In contrast, the plaintiffs argued that Hofler's last act was filing the motion to stay or continue on May 24, 2019.

The appeals court held that Hofler's last act was not the filing of or the dismissal of the complaint because his efforts "show[ed] a continued pursuit of the legal theories asserted in the complaint from which plaintiffs' malpractice claim arises." *Davis, supra.* at \*10. Based upon the limited information available in the complaint against Hofler, the court reasoned that the plaintiffs' claim may not have begun accruing until as late as June 6, 2019, when the trial court dismissed the second Rule 60 motion. Ultimately, the appeals court reversed and remanded the matter for further proceedings.

Despite this, the appeals court affirmed that the statute of limitations for a legal malpractice claim begins to run upon a lawyer's allegedly negligent act and that a lawyer's continuing representation of a client does not extend the statute of limitations.

## Significance of Decision

This decision is significant as it upholds a minority view on the continuing representation rule. North Carolina is one of few jurisdictions, such as Illinois, that has rejected the continuous representation rule in legal malpractice claims.