

Can a Legal Malpractice Claim be ‘Spun’ as Fraudulent Misrepresentation?

Legal malpractice actions generally assert claims by a client arising out of a lawyer’s conduct within the course and scope of his or her representation of the client. But sometimes the claim is characterized or labeled by the client as something other than malpractice because characterizing the claim as malpractice may present conceptual difficulties. In a recent decision by the Supreme Court of New Mexico the conceptual difficulty was that the client may not have sustained actual damages, which, if so, would preclude the assertion of a claim for malpractice. Therefore, as an alternative to asserting malpractice and other claims, the client characterized the lawyer’s conduct as fraudulent misrepresentation.

In *Encinias v. Whitener*, ___ P.3d ___ (N.M. 2013) 2013 N.M. LEXIS 313, parents and their son retained a lawyer to represent the son, a high school student who allegedly had been attacked by fellow students. The parents and son wanted to sue the school district. They contended that the school “and the school district were negligent in failing to protect [their son] from being attacked, and further negligent in failing to respond to the attack or notice that it had occurred.” The alleged attack did not occur on school property but “on a street that the school had cordoned off so that students could patronize food vendors there.”

In Nevada, for the school district, just as for other political subdivisions, sovereign immunity is not an absolute bar to claims under state law. Sovereign immunity is subject to limited waivers of that immunity pursuant to the Tort Claims Act in Nevada (as in the Political Subdivision Tort Claims Act in Pennsylvania), expressed as exceptions to the general rule that sovereign immunity always applies. Therefore, the potential legal obstacle to a claim against the school district was whether one of the statutory exceptions applied under these circumstances.

The lawyer failed to file suit within the applicable two-year statute of limitations, which would clearly constitute legal malpractice if the clients’ claim against the school district had been actionable if timely brought. After all, one of the elements of a malpractice claim is that the client must show that he or she has sustained actual damages, that is, that the client has sustained an actual loss. There-

fore, if an exception to the Tort Claims Act did not apply, then clients had not sustained any loss because they had no viable claim against the school district to begin with and thus had no malpractice claim against the lawyer.

Client son brought suit against the lawyer and the lawyer’s law firm. But instead of merely alleging a malpractice claim, the son also asserted claims for fraudulent and negligent misrepresentation, among others. He alleged that the lawyer had “specifically (and erroneously) assured the family in October 2006 that the statute of limitations had *not* run, and it is reasonable for clients to assume that they can rely on their attorneys’ legal advice.” He alleged that the lawyer did not come to the realization until more than 10 months later that the statute of limitations had run but waited more than a year thereafter before telling the clients. He complained that the lawyer never informed him “that no work had been done on the case,” and he characterized the failure to disclose these facts as misrepresentation by omission.

Defendants filed a motion for summary judgment. They contended that the clients had sustained no damages because the claim against the school district, had it been timely commenced, would have been barred by sovereign immunity because the exception urged by the clients under the Tort Claims Act did not apply under these circumstances. Because, in defendants’ view, the clients had sustained no damages, they also contended that the son could not state a claim for misrepresentation, whether it be fraudulent or negligent. In contrast, the son contended that he was damaged because one of the exceptions under the Tort Claims Act did apply, so the school district could have been sued successfully. He also argued that he was further damaged because the misrepresentations “made it more difficult for [him] to collect evidence supporting his underlying claim for the malpractice suit.”

The trial court granted summary judgment on the malpractice and misrepresentation claims. The New Mexico Court of Appeals affirmed the grant of summary judgment in all respects. The Supreme Court of New Mexico reversed the Court of Appeals on all points.

The opinion, supported by a unanimous court, engaged in a technical discussion of the exception to immunity posited by the clients and concluded that this exception could apply under the alleged facts relevant to the “case within a case,” that is, the case that would have been brought against the school district. As a result of this conclusion, the court found that, for summary judgment purposes, defendants could not say that clients were not damaged when the statute was missed.

The Supreme Court also reversed with respect to the misrepresentation claims on two bases. First, because of its finding that the exception to immunity could have applied — again, clients could have shown damages — which

Avoiding Liability



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would support a claim for negligent misrepresentation. The court recognized the possibility of damages based upon the contention that the son was damaged because the misrepresentation caused him delay that made it more difficult to collect evidence in support of the malpractice case. Second, the court held that a claim for fraudulent misrepresentation had been stated by the son against his lawyer for conduct falling within the course and scope of his representation, even in the absence of any damages. The court premised this conclusion upon the proposition that fraudulent misrepresentation, which requires that the misrepresentation be intentional or reckless, does not require actual damages — nominal and punitive damages can still be awarded.

In *Encinias* a fraudulent misrepresentation claim was asserted as a means to overcome the problem that the malpractice action may have been unsustainable because of a lack of actual damages. The problem posed by this approach is that legal malpractice claims are not based upon negligence; instead they are based upon the premise that the lawyer has breached the duty of care. That breach can be the result of negligence, but it can also be the result of reckless or intentional conduct. But regardless of the degree of culpability, damages are a required element. Therefore, by spinning the claim as fraudulent misrepresentation *Encinias* effectively circumvented this requirement. Spinning it as negligent misrepresentation, in the absence of actual damages, would not have done so.

We can expect plaintiffs to continue to find avenues to recovery where their lawyer has not met their expectations for the underlying matter.