DORMANT MISTAKES: The Statute of Limitations in Professional Negligence-Discovery, Fraudulent Concealment, and the Continuous Representation Rule

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Professional liability cases present special challenges related to the statute of limitations because mistakes made by attorneys may remain undetected and cause no harm until long after they are made.[2] For example, errors in deeds, estate planning documents, tax advice, prenuptial agreements, land-use permit applications, or contracts may lie dormant for years after the documents were drafted and executed. In addition, a valuable and productive relationship may persist between the attorney and client over many years. Of course, the client relies upon the attorney's expertise, and is generally in no position to meaningfully determine whether the attorney's advice is accurate.[3] It would be inefficient and irrational to require a client to keep a second attorney on standby to examine the work of the first attorney for potential errors. At the same time, however, the discovery rule potentially subjects attorneys to open-ended liability because they are outside the scope of the statute of repose.[4] This accumulating liability may create inefficiencies and increase insurance costs as carriers are required to insure some level of open-ended risk for work performed many years previously, and which they may be unable to defend adequately because files have disappeared and memories have faded.

To balance these competing concerns, legislatures and courts have developed concepts related to the accrual of causes of action. Prior to 1974, New Hampshire observed the occurrence rule, under which a cause of action accrued on the date the negligent act occurred regardless of whether the client was aware of it. The discovery rule, concepts of fraudulent concealment, and the continuous representation developed to ameliorate the harsh impact of the occurrence rule. The legislature has since incorporated the discovery rule into the statute of limitations.[5]

Parties facing a statute of limitations defense frequently seek to avoid dismissal by invoking each of these concepts without considering the significant distinctions between them. The New Hampshire Supreme Court has suggested there are differences between the discovery rule and fraudulent concealment rule, for example,[6] but to date the fraudulent concealment and continuous representation rules have not been fully explained in the context of the discovery rule. This article suggests an analytical framework to do so. Accrual of a cause of action under the discovery rule depends upon the client's awareness – actual or presumptive – of the material facts comprising the cause of action. Fraudulent concealment and continuous representation should be analyzed through the lens of client awareness as well. The discovery rule is best fitted to cases where neither the attorney nor the client is aware a mistake has been made at the time it was made. The fraudulent concealment rule best applies, generally speaking, in cases where the attorney is aware a mistake has been made and the client has been harmed, and the client is unaware of the mistake or the harm. The continuous representation rule is best fitted to cases where both the attorney and client are aware a mistake has been made, and an agreement or mutual understanding has been reached the attorney will attempt to fix the mistake.

I. THE STATUTE OF LIMITATIONS

The fundamental purposes of the statute of limitations are to ensure timely notice to the adverse party, eliminate stale and fraudulent claims, grant repose to claims that otherwise might linger indefinitely, and serve as an instrument of docket management.[7]

II. WHEN A CAUSE OF ACTION FOR LEGAL MALPRACTICE ARISES

The starting point in evaluating a statute of limitations defense is whether a cause of action has arisen. A cause of action for legal malpractice arises once all the elements of the claim are present.[8] The elements of a legal malpractice claim are proof of an attorney-client relationship, a breach of a duty arising from that relationship, and a connection of legally recognized causation between the breach and resulting harm to the client.[9]

III. WHEN A CAUSE OF ACTION FOR LEGAL MALPRACTICE ACCRUES: DISCOVERY AND FRAUDULENT CONCEALMENT

The discovery rule and fraudulent concealment are accrual concepts. They depend upon when the client actually or presumptively becomes aware of the material facts comprising the cause of action.

A. The Discovery Rule

Prior to 1974, there was no distinction under New Hampshire law between when a malpractice cause of action arose and when it accrued: the statute of limitations accrued when the acts of negligence occurred, regardless of whether the client was aware of the negligence and its harmful effect.[10] This meant a cause of action could expire before the client was aware a mistake had occurred. The New Hampshire Supreme Court promulgated the common law discovery rule in professional negligence cases to counteract the harsh effects of the occurrence rule: first in medical malpractice cases,[11] and shortly afterwards in legal malpractice cases.[12] The Court held the discovery rule "finds its justification in the necessary reliance of the layman on the professional in his field and the mystery to the layman of the professional's work."[13] The Court reasoned that it followed from these factors "the client may not recognize negligent professional acts when they occur and should not be expected to."[14]

Under the discovery rule, a malpractice cause of action does not accrue until the client discovers or should reasonably discover that the attorney has acted negligently and that the client has suffered harm as a result. The statute of limitations was later amended to incorporate the discovery rule, which created an analytical distinction between when a cause of action arose and when it accrued.[15]

A cause of action for professional malpractice now accrues if the client is aware or should reasonably be aware of the reasonable possibility of a connection between the lawyer's advice and harm suffered by the client.[16] "Harm" and "damages" are distinct concepts in this context. Harm is the loss of a right, remedy, or interest, or the imposition of a liability, while damages constitute the monetary measure of that harm.[17] The harm can consist of fees incurred to correct the problem[18], or, more subtly, of a lost opportunity to achieve a better outcome. The cause of action accrues regardless of whether the plaintiff knows the full extent of harm at the time he reasonably should become aware of it[19], so long as it is tangible and quantifiable.[20]

If the client discovers, and reasonably should discern, a connection between some harm he suffered and the attorneys' conduct, the cause of action accrues and the statute of limitations commences to run. This principle vindicates the client's reliance upon the attorney's professional expertise, but has no application after the client is actually or presumptively aware he suffered harm on account of the attorney's actions. The point in time at which the client achieves sufficient awareness depends upon the facts and circumstances of each particular case, and is an issue for the court to decide either on dispositive pleadings[21] or after an evidentiary hearing.[22] Once application of the statute of limitations has been established, the burden of proving an exception applies to toll the statute rests upon the plaintiff.[23]

Many of the legal malpractice cases addressing the statute of limitations focus on when the harm occurred, or when the client should reasonably have become aware of the harm, and its connection to the attorneys' conduct. These cases are fact-intensive. For example, in *Feddersen v. Garvey*[24], the First Circuit Court of Appeals held the cause of action accrued more than three years before Feddersen filed suit because by that time he had retained two additional law firms, one of whom informed him in writing he had a potential malpractice claim against his first attorney, to defend himself against the consequences of his first attorney's alleged malpractice.[25] In *Coyle v. Battles,*[26] the New Hampshire Supreme Court held a cause of action accrued in May 1995 at the latest, by which time the plaintiffs had retained separate counsel and threatened to sue the defendants to recover alleged excessive fees.[27] In *Draper v. Brennan*[28], the New Hampshire Supreme Court held Draper's cause of action accrued when the court denied his motion to enforce a settlement agreement he believed entitled him to free health insurance.[29]

Feddersen and *Coyle* may fairly be characterized as "easy" accrual cases because the respective plaintiffs retained successor counsel to advise them of the consequences of the first attorneys' work. *Draper* is a slightly different case because the damages involved an alleged lost opportunity to obtain a better outcome in a settlement agreement.

Draper was in a dispute with a bank and its president, which settled in 1986. Draper asked that the settlement agreement include provisions for the bank to provide free medical insurance coverage to his and his family until he reached age 65, but his attorney allegedly failed to request or obtain these provisions. In May 1988, the bank notified Draper he was required to contribute to the cost of his health insurance. Draper filed a motion to enforce the settlement agreement, which the trial court denied in February 1991. In October 1991, the FDIC took over the bank and repudiated the settlement agreement. Draper sought, again, to enforce the settlement agreement, but the trial court dismissed the claim on May 21, 1992. Draper filed a malpractice claim on April 18, 1994. Draper's theories of negligence were (1) failure to require security for the bank's obligation to pay his health insurance costs, and (2) failure to ensure the bank was required to pay his entire premium regardless of changes in bank policy.[30] The trial court dismissed the claim based upon the statute of limitations. The Supreme Court affirmed.

Draper claimed he repeatedly asked his attorney for some type of annuity or bonding to secure the payment of health insurance expenses, but the attorney failed to request or obtain this security. The Supreme Court held Draper's cause of action arose and accrued on the date he signed the settlement agreement without provision for security because he was, or should have been, aware there was no security for the bank's obligations under the settlement agreement, and that shortcoming constituted a "tangible, quantifiable loss."[31] Accordingly, his cause of action accrued in 1986 when he signed the settlement agreement absent provisions for security.[32]

Draper's claim, in essence, was that he lost an opportunity to obtain greater benefits under the settlement agreement. On that theory, he suffered harm, and his cause of action arose and accrued, at the

time he agreed to accept a less favorable settlement than he believed he would have otherwise obtained. The harm consisted of the difference between the value of the settlement as signed, and the value of the settlement he believed he would have obtained.[33]

A wrinkle on the discovery concept was addressed in a recent New Hampshire Superior Court case. The plaintiff sued his former lawyer for breach of fiduciary duty arising from an alleged non-waivable conflict of interest. The lawyer sought dismissal based upon the statute of limitations. The plaintiff argued he could not reasonably have discovered the claim without the advice of an independent lawyer because such claims are highly technical.[34] The Court (Delker, J.) found the statute of limitations commenced running at the time plaintiff was on notice he had suffered harm from some action or inaction of his attorney, and he need not be aware of the exact legal basis of his potential claim.[35] The Court further found the plaintiff could not "rely on the discovery rule on the premise that no one explicitly connected the dots for him when all of the bases for the claim were known to him."[36] Plaintiff's argument, if accepted, would have implied the statute of limitations would never accrue until and unless the Plaintiff consulted an attorney who advised him the first attorney had acted negligently. This is contrary to the language of RSA 508:4 and *Draper v. Brennan*, in which the Court held the cause of action accrued notwithstanding the absence of a successor attorney advising Draper of his first attorney's alleged negligence.

No cause of action accrues under the discovery rule unless the client is aware, or should reasonably be aware, of a negligent or wrongful act by his attorney, and resulting harm. That is, the discovery rule determines when the statute of limitation starts to run, but does not toll the time period after discovery has occurred.

B. Fraudulent Concealment

The fraudulent concealment doctrine is a variation of the discovery rule.[37] At first glance, it may appear unclear what role fraudulent concealment plays in light of the discovery rule, because in both instances the central issue is simply whether the client is aware or should reasonably be aware of the attorney's error and resulting harm. This may explain why the New Hampshire Supreme Court has rejected the fraudulent concealment rule in each case in which it has been raised since the discovery rule was enacted. Facts showing concealment are relevant in considering whether the client reasonably should be aware of material facts comprising the cause of action.[38]

"[T]he fraudulent concealment rule states that when facts essential to the cause of action are fraudulently concealed, the statute of limitations is tolled until the plaintiff has discovered such facts or could have done so in the exercise of reasonable diligence."[39] The discovery rule and fraudulent concealment rule rest upon "the common purpose of preventing the unfairness that would result is an injured person were foreclosed from bringing an action before becoming aware of its existence."[40] The conceptual difference between the discovery and fraudulent concealment rules arises from the attorney's knowledge of negligent conduct, and concealment of material facts that might result in the client's awareness of the negligence.

The New Hampshire Supreme Court applied the fraudulent concealment rule on a few occasions prior to adoption of the discovery rule,[41] but appears not to have done so since.[42] In each instance where the Court addressed the issue on the merits, it determined the plaintiff was aware of the relevant facts and no material information had been withheld by the professional.

In *Beane*, the plaintiff argued both fraudulent concealment based upon the defendant's alleged concealment of accounting errors, and a theory of "fiduciary tolling" under which the cause of action would accrue only when the fiduciary agent (in this case, an accountant) disclosed his misconduct.[43] The Court rejected the fraudulent concealment argument on the basis plaintiff knew or should reasonably have discovered he had suffered harm when the IRS issued a tax deficiency against him.[44] In other words, Beane was aware of the material facts comprising his cause of action. The Court rejected the fiduciary tolling argument on the basis "there is no support in [New Hampshire] case law for the proposition that a limitations period is tolled in fiduciary cases until the fiduciary discloses his or her misconduct."[45] In F*urbush v. McKittrick*[46], the Court rejected the fraudulent concealment rule on the basis "[t]he defendant did not conceal any essential facts" from the client.[47]

On this analysis, the fraudulent concealment rule applies under circumstances where the attorney is aware negligence has occurred and withholds material facts relating to his negligence from his client, and the client is otherwise unaware of those facts. This vindicates the underlying purpose of the fraudulent concealment rule, which is to afford the client an opportunity to discover they suffered harm on account of negligent conduct, and to avoid rewarding an attorney who conceals facts essential to the client's interests.

THE CONTINUOUS REPRESENTATION RULE

The continuous representation rule, by contrast to the discovery and fraudulent concealment rules, tolls the statute of limitations after a cause of action has accrued. The basic principle of the continuous representation rule is that the statute of limitations is tolled during any period the attorney continues to represent the client in regard to the same matter in which the negligence occurred. This gives the attorney an opportunity to discover and fix the problem without penalizing the client, permits the parties an opportunity to salvage what may have been a productive relationship, and may help to avoid unnecessary litigation.

No uniform approach to the continuous representation rule has developed among the jurisdictions that have considered or adopted it. Some states continue to adhere to the occurrence rule and apply continuing representation to ameliorate its effects.[48] Other states treat continuous representation as an accrual rule that delays commencement of the statute of limitations until the end of the attorney's representation of the client.[49] At least one state has held the continuous representation rule has no application in light of the discovery rule, and has declined to adopt it altogether.[50] Mallen and Smith's treatise on legal malpractice[51] states the continuous representation rule applies in jurisdictions that have adopted the discovery rule because the

policy reasons underlying the rule are equally compelling, "even if some damages have occurred and even if the client is fully aware of the attorney's error."[52] This suggests continuous representation is a tolling rule that applies, if at all, after the cause of action has accrued and the statute of limitations commences running.

The New Hampshire Supreme Court has not formally adopted the continuous representation rule, and, accordingly, has not yet had an opportunity to fully explore its potential application in the context of the discovery rule.

The New Hampshire Supreme Court has twice rejected a potential application of the continuous representation rule on the basis the client could not, under the applicable circumstances, reasonably rely upon the professional's ongoing representation. The issue first surfaced in *Coyle v. Battles*.[53] The attorney in that case represented the Coyles in foreclosure and bankruptcy proceedings. By May 12, 1995, the Coyles had complained about the attorney's bills and retained new counsel, who threatened to sue the attorney and directed him to perform no further work on the case. The last time billed by the attorney was for work on June 14, 1995. The Coyles filed suit on June 12, 1998, and the attorney sought dismissal based upon the statute of limitations, which the trial court granted. The Supreme Court declined to adopt the continuous representation rule because, under the circumstances, the Coyles did not reasonably rely[54] on their first attorney after May 12, 1995. Similarly, in *Beane v. Dana S. Beane & Co., Inc*., the Supreme Court rejected the rule because the plaintiff did not reasonably rely upon the defendants' professional accountancy services after the IRS assessed a tax deficiency against him and he retained two law firms in an attempt to reverse it.[55]

Both *Coyle* and *Beane* were readily disposed under the rubric of reasonable reliance, and there was no need for the Court to analyze the cases more fully. These cases can, however, be explained on a basis that addresses the purposes of the continuous representation rule more fully. On closer examination, the continuous representation doctrine did not apply in *Coyle* and *Battles* because there was no evidence the professional believed an error had been made or that the attorney and client agreed that the attorney would attempt to fix it. In both cases, the fact the client retained different professionals arguably negated any reason for the client to believe the attorney was working to fix the problem. Additionally, *Coyle* and *Beane* can be explained on the basis the representation was not "continuous" in light of the fact other professionals were retained who took positions hostile to the first professional or worked to rectify the consequences of the errors.[56] Representation is "continuous" when it relates to the same subject matter as that in which the error occurred.[57]

This suggests the continuous representation rule applies under circumstances where (a) there is an agreement between the attorney and client there was a problem to be fixed, and the attorney would attempt to fix it; and (b) the ongoing representation related to the same subject matter as that in which the error was made. These elements vindicate the policy underlying the rule, and fully distinguish the accrual concepts of discovery and fraudulent concealment.

The cases and authorities that address the continuous representation rule do not explicitly address whether an agreement or mutual understanding as a necessary element. For example, in *Morrison v. Watkins*[58], the Court of Appeals of Kansas held the continuous representation doctrine applied notwithstanding the client's awareness she had suffered harm on account of the attorney's conduct because she "attempted to work with them to mitigate damages and correct their mistakes."[59] Similarly, Mallen and Smith write the policy reasons for the rule are compelling to afford the attorney an opportunity to fix the mistake even if some damages have occurred and "even if the client is fully aware of the attorney's error."[60] Overlooked by Mallen and Smith, however, is that the cause of action does not accrue unless the client is aware of the attorney's error, and some damage has occurred. Unless those conditions are satisfied there is no occasion to apply the continuous representation rule or any other tolling principle. Applying the continuous representation rule under those circumstances vindicates the underlying policies if the client reasonably expects, based upon an agreement or express understanding with the attorney that the attorney will attempt to rectify the problem.

This more complete understanding of the continuous representation rule, although it was not a statute of limitations case, is exemplified by *Shaheen, Cappiello, Stein & Gordon, P.A. v. The Home Ins. Co*.[61] A pre-nuptial agreement drafted by the firm omitted language protecting the wife's exclusive ownership of the marital home. The error

was discovered for the first time during later divorce proceedings, and was fully disclosed to the client, who "approved the firm's continuing representation in her divorce action."[62] The firm advanced equitable arguments why the wife should be granted exclusive rights in the marital home, which the court ultimately rejected. As a result, the wife was required to pay additional compensation to the husband she would not have been required to pay.

Under the discovery rule, the client discovered the error no later than the time the attorney disclosed it to her, and she was aware she suffered harm in the form of the diminished value of her ownership interest in the marital home. The continuous representation rule would toll the statute of limitations during the period the attorney was attempting, with the client's consent upon full disclosure, to rectify the harm through further litigation in the same proceeding.

CONCLUSION

Applying the statute of limitations in professional negligence cases can be a complex undertaking because the harm may be separated in time from the underlying error, and may remained undiscovered for many years. Analysis of the statute of limitations requires understanding the principles underlying the accrual and tolling rules. The discovery and fraudulent concealment rules are rules of accrual based upon the client's actual or imputed awareness of the circumstances surrounding the attorney's error and the harm the client may have suffered. The continuous representation rule, by contrast, presumes the client's awareness of the material facts, but tolls the statute on account of an agreement between the client and attorney that an error has been made and the attorney will attempt to fix it. This understanding of the continuous representation rule permits the attorney an opportunity to fix the problem and the client an opportunity to have the problem fixed quickly and cheaply and to salvage what may have been a productive professional relationship.

ENDNOTES

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2 Broadly speaking, the same considerations apply to malpractice claims regardless of profession, but this article will focus on legal malpractice.

3 *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 715 (2010) (accounting malpractice case) (quoting *Coyle v. Battles*, 147 N.H. 98, 101 (2001)); *McKee v. Riordan*, 116 N.H. 729, 730-31 (1976).

4 RSA 508:4-b (statute of repose applies only to actions arising from deficiency in the creation of an improvement to real property); *see also Winnisquam Reg'l Sch. Dist. v. Levine*, 152 N.H. 537 (2005).

5 RSA 508:4, I: Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

6 *See Conrad v. Hazen*, 140 N.H. 249, 253 (1995) ("[w]hile fraudulent concealment is the foundation of the discovery rule … the two rules are not coextensive").

7 *Therrien v. Sullivan*, 153 N.H. 211, 215 (2006); *Perez v. Pike Indus., Inc.*, 153 N.H. 158, 160 (2005); *West Gate Village Ass'n v. Dubois*, 145 N.H. 293, 298-99 (2000).

8 *Draper v. Brennan*, 142 N.H. 780, 783 (1998).

9 *E.g., Estate of Sicotte v. Lubin & Meyer, P.C.*, 157 N.H. 670, 674 (2008); *Draper*, 142 N.H. at 784.

10 *Cloutier v. Kasheta*, 105 N.H. 262, 264 (1964) (medical malpractice); *Roberts v. Richard & Sons, Inc.*, 113 N.H. 154, 155 (1973) ("[t]he general rule in tort actions has been that ignorance of the cause of action on the part of the plaintiff does not toll the statute of limitations").

11 *Shillady v. Elliot Comm. Hosp.*, 114 N.H. 321, 324 (1974).

12 *McKee v. Riordan*, 116 N.H. 729, 730-31 (1976).

13 *Id.*

14 *Id.*

15 See footnote 5. *See also Conrad v. Hazen*, 140 N.H. 249, 252 (1995).

16 *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 713 (2010) (possibility of connection) (citing *Pichowicz v. Watson Ins. Agency*, 146 N.H. 166, 168 (2001)); *see Lamprey v. Britton Const., Inc.*, 163 N.H. 252, 257 (2012) (reasonable possibility of connection).

17 Ronald E. Mallen & Jeffrey M. Smith (hereinafter "Mallen & Smith"), 3 *Legal Malpractice* § 21:1, pp. 2-3 (2014 ed.).

18 *E.g., Feddersen v. Garvey*, 427 F.3d 108 (1st Cir. 2005); *Pichowicz v. Watson Ins. Agency*, 146 N.H. 166, 168 (2001).

19 *Beane*, 160 N.H. at 713; *Draper*, 142 N.H. at 786 ("that some actual harm occurred is sufficient to bring his cause of action into existence").

20 *Draper*, 142 N.H. at 784-85 ("[w]hen the plaintiff relinquished his claim against the bank and its president without getting the security he had wanted in return, he suffered a tangible, quantifiable loss").

21 *E.g., Feddersen v. Garvey*, 427 F.3d 108 (1st Cir. 2005) (summary judgment); *Beane*, 160 N.H. at 711-12 (motion to dismiss); *Coyle v. Battles*, 147 N.H. 98 (2001) (summary judgment).

22 *E.g., Rattee v. Crele Const. Corp. et al.*, No. 09-E-0500 (Merrimack Cty.), Order (June 28, 2011) (McNamara, J.) (evidentiary hearing required on application of the discovery rule and continuing representation rule); *cf. Beane*, 160 N.H. at 711-12 (no evidentiary hearing required where dismissal for statute of limitations was based upon allegations in plaintiff's pleading).

23 *Feddersen v. Garvey*, 427 F. 3d 108, 112 (1st Cir. 2005); *Beane*, 160 N.H. at 712 (quoting *Glines v. Bruk*, 140 N.H. 180, 181 (1995)).

24 427 F.3d 108 (1st Cir. 2005).

25 *Id.* at 113.

26 147 N.H. 98 (2001).

27 *Id.* at 101.

28 142 N.H. 780 (1998).

29 *Id.* at 785.

30 *Id.* at 784.

31 *Id.* at 784-85.

32 *Id.*

33 There is, of course, no guarantee the bank would have agreed to settle the dispute if Draper had proposed different terms. Legal malpractice cases based upon lost opportunities to obtain better outcomes in litigation or transactions raise complex issues of causation and damages outside the scope of this article.

34 *Mukarkar v. DTC*, No. 218-2012-CV-01062 (Rockingham Cty.) (Order on Motion for Summary Judgment) (12/30/13) (Delker, J.). The author represented the defendant in that case.

35 *Id.* p. 4.

36 *Id.* p. 5 (citing *Boggs v. 3M Co.*, 2012 WL 3644967, at *6 (W.D. Ky. August 24, 2012), *aff'd* 527 Fed. Appx. 415 (6th Cir. 2013)).

37 The New Hampshire Supreme Court sometimes addresses both the discovery rule and fraudulent concealment as tolling principles, *e.g., Beane*, 160 N.H. at 257, 259, and sometimes describes fraudulent concealment as an extension or adjunct to the discovery rule. *E.g., Rowe v. John Deere*, 130 N.H. 18, 21 (1987) (extension of discovery rule). This article respectfully suggests the discovery and fraudulent concealment rules are accrual and not tolling principles.

38 Evidence of concealment may form the basis for a claim under the Consumer Protection Act, RSA 358-A:2, which also employs a three year exemption period and the discovery rule. RSA 358-A:3, IV-a.

39 *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 714 (2010) (quoting *Bricker v. Putnam,* 128 N.H. 162, 165, 512 A.2d 1094 (1986)); *see also Lamprey v. Britton Const., Inc.*, 163 N.H. 252, 259-60 (2012) ("[f]raudulent concealment occurs when one party to a transaction … by concealment or other action intentionally prevents the other from acquiring material information…. It requires something affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to a cause of action … some actual artifice to prevent knowledge of the fact or some representation intended to exclude suspicion and prevent inquiry") (quotations omitted).

40 *Bricker v. Putnam*, 128 N.H. 162, 165 (1986).

41 *E.g., Lakeman v. La France*, 102 N.H. 300, 303 (1959); *see also Hamlin v. Oliver*, 77 N.H. 523, 524 (1915) ("[t]he fraudulent concealment plea by the defendant of plaintiff's cause of action is an answer to the plea of statute of limitations").

42 *E.g., Lamprey v. Britton Const., Inc.*, 163 N.H. 252 (2012); *Beane*, 160 N.H. at 714; *Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617 (2005).

43 *Beane*, 160 N.H. at 714-15.

44 *Id.* at 714.

45 *Id.* at 714.

46 149 N.H. 426 (2003). The author's firm represented the defendant in that case.

47 *Id.* at 432.

48 *E.g., Targonski v. Clebowicz*, 63 A.3d 1001 (Conn. App. 2013) (attorney knew he had omitted right of way from deed but failed to rectify the problem and assured client there was no cause for concern).

49 *Biomet, Inc. v. Barnes & Thornburg*, 791 N.E.2d 760, 765 (Ind. App. 2003) (statute of limitations accrued on date appellate court affirmed verdict against plaintiff, not date verdict was rendered in the trial court, on account of continued representation by defendant law firm through appeal); *see Morrison v. Watkins*, 889 P.2d 140, 146 (Kan. Ct. App. 1995) ("[u]nder the continuous representation rule, the client's cause of action does not accrue until the attorney-client relationship is terminated").

50 *Tenn-Fla Partners v. Shelton*, 233 S.W.3d 825 (Tenn. Ct. App. 2007); *Cherry v. Williams*, 36 S.W.3d 78 (Tenn. Ct. App. 2000).

51 The New Hampshire Supreme Court has cited this treatise as persuasive authority in thirteen published cases.

52 Mallen & Smith, § 23:13, p. 509.

53 147 N.H. 902 (2001).

54 The Court utilized the phrase "innocent reliance", which is derived from the Massachusetts case of *Cantu v. St. Paul Companies*, 401 Mass. 53, 514 N.E.2d 666, 669 (1987). The term "innocent reliance" has been referenced in cases from other jurisdictions analyzing the continuous representation rule. *E.g., Morrison v. Watkins*, 20 Kan. App. 2d 411, 889 P.2d 140 (1995); *Sharts v. Natelson*, 118 N.M. 330, 346, 881 P.2d 690 (N.M. App. 1993) (rule discussed but not adopted). The term "reasonable reliance" seems more accurate because it is a well-established principle in New Hampshire law, *e.g., J.G.M.C.J. Corp. v. C.L.A.S.S., Inc.*, 155 N.H. 452, 462-63 (2007), and the term "innocent" implies the parties must address the client's naivete or ingenuousness, rather than whether his state of mind was objectively reasonable under the circumstances.

55 *Beane,* 160 N.H. at 715.

56 *See* Van Sickle *v. Kohout*, 215 W. Va. 433, 437-38, 599 S.E.2d 856, 861 (W. Va. 2004) (when a victim of legal malpractice terminates his or her relationship with the negligent attorney, subsequent efforts by new counsel to reverse or mitigate the harm through administrative or judicial appeals do not toll the statute of limitations).

57 This underscores the importance of representation agreements that delineate the scope of the engagement, and the use of closing letters when the representation is complete. For example, in *Lytell v. Lorusso*, 74 A.D.3d 905, 906-07, 903 N.Y.S.2d 98, 100 (2010), the New York Supreme Court held the continuous representation rule tolled the statute of limitations in relation to a real estate closing because the plaintiff was "left with the reasonable impression" the attorney continued to represent him after the closing date because the attorney allegedly promised to record a life estate agreement and mortgage.

58 889 P.2d 140 (Kan. Ct. App. 1995).

59 889 P.2d at 148.

60 Mallen & Smith, § 23:13, p. 509.

61 143 N.H. 35 (1998).

62 *Id.* at 37.

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