



## Alerts

### According to Tenth Circuit, "Continuous Representation" Doctrine Does Not Toll Legal Malpractice Statute of Limitations Under New Mexico Law

January 17, 2020

*Lawyers for the Profession®*

*Cahn v. Word*, 2020 U.S. App. LEXIS 193 (10th Cir. Jan. 6, 2020)

#### Brief Summary

The U.S. Court of Appeals for the Tenth Circuit held that the four year statute of limitations applicable to legal malpractice actions in New Mexico barred a plaintiff's lawsuit against her former lawyers because she filed her claim more than four years after she knew—or reasonably should have known—of their alleged negligence and her resulting injury. The court further reasoned that the "continuous representation" doctrine did not apply, and, even if it did, it would not have changed the outcome.

#### Complete Summary

The plaintiff, Sara Cahn ("plaintiff"), engaged the defendants, Terry M. Word and Terry M. Word, P.C. ("defendants"), to represent her in an underlying medical malpractice case alleging negligent failure to diagnose cancerous masses on her ovary. Plaintiff filed her medical malpractice complaint on April 9, 2009. On July 1, 2010, through discovery in the underlying action, the defendants learned that the doctor who misdiagnosed the plaintiff was named Dr. John Berryman and amended their complaint to name Dr. Berryman as an individual defendant. Dr. Berryman moved for summary judgment asserting that plaintiff's claims were barred by New Mexico's statute of repose for medical malpractice claims. The trial court denied the motion and the case proceeded to a stipulated judgment against Dr. Berryman. Ultimately, the New Mexico appellate court held that the statute of repose did in fact bar the plaintiff's claim against Dr. Berryman and vacated the underlying judgment against him. Significantly, a different attorney represented the plaintiff during the course of the appeal.

On April 27, 2018, the plaintiff filed a legal malpractice action against the defendants alleging they failed to identify Dr. Berryman within the statute of repose for medical malpractice claims and timely name him as a defendant. The defendants moved for summary judgment on the basis that plaintiff's legal malpractice claim was barred by the applicable four year statute of limitations;

#### Attorneys

Robert M. Buchholz

Terrence P. McAvoy

#### Service Areas

*Lawyers for the Profession®*



the district court granted the defendants' motion.

On appeal, the Tenth Circuit affirmed the grant of summary judgment. In particular, the court held that plaintiff's legal malpractice claim accrued no later than June 2013 based on her testimony that as of that date, she knew (1) the statute of repose had run against Dr. Berryman, (2) he had moved to dismiss her underlying claim on that basis, and (3) she was aware of specific steps the defendants failed to take to earlier identify Dr. Berryman as a defendant in the underlying case. Significantly, the court also rejected the plaintiff's argument that under the "continuous representation" doctrine the legal malpractice statute of limitations was tolled until the defendants ceased representing her. In doing so, the court noted that New Mexico courts had not yet adopted the "continuous representation" doctrine, but even if it had, it would not change the outcome because a different attorney had represented the plaintiff in Dr. Berryman's appeal in June 2013, which triggered the running of the statute.

## Significance of Decision

This decision illustrates that the application of a procedural time bar in an underlying action and a plaintiff's retention of other counsel can serve as the basis for a statute of limitations defense in a subsequent legal malpractice action, and New Mexico is yet another state that does not recognize the "continuous representation" doctrine for the purposes of tolling the statute of limitations in legal malpractice actions. *See, e.g., Witt v. Jones & Jones Law Offices, P.C.*, 269 Ill.App.3d 540 (1995) (Illinois courts have consistently refused to recognize the "continuous representation" rule to toll the limitations period in legal malpractice actions).