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Legal Malpractice - Liability for Failure to Warn: First National Bank of Clovis v. Diane, Inc.

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LEGAL MALPRACTICE—Liability for Failure to Warn: *First National Bank of Clovis v. Diane, Inc.*

I. INTRODUCTION

In *First National Bank of Clovis v. Diane, Inc.*,[1] the New Mexico Court of Appeals affirmed a lower court decision holding an attorney liable in tort for his failure to warn a client of potential liability in the event the attorney's advice proved to be erroneous.[2] *First National Bank of Clovis* represents a growing trend in legal malpractice law that may expand the preexisting tort liability of New Mexican lawyers for their conduct in their relationships with clients. This Note examines the rationale of the court of appeals' opinion and explores the implications of the decision for practicing attorneys and the developing law of legal malpractice in New Mexico.

II. STATEMENT OF THE CASE

In 1979, Diane, Inc., with the assistance of Nick Kapnison, borrowed $165,000 from the First National Bank of Clovis.[3] Before billing Diane for securing the loan, Kapnison asked his attorney, Bernard Robinson, whether charging a $25,000 brokerage fee would be legal under New Mexico law.[4] Robinson advised Kapnison that such a fee would be legal.[5] Based on that advice, Kapnison billed and collected $25,000.[6]

Subsequently, First National sued Diane on the promissory notes which evidenced the loan.[7] Diane then filed a third-party complaint against Kapnison claiming that Kapnison violated New Mexico law by charging a brokerage fee in excess of the statutorily authorized amount.[8] The trial

1. 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985).

2. *Id.* at 553, 698 P.2d at 10.

3. *Id.* at 551, 698 P.2d at 8. Kapnison's assistance included negotiating and securing the loan for Diane, Inc. *Id.* at 550, 698 P.2d at 7.

4. *Id.* at 551, 698 P.2d at 8.

5. *Id.*

6. *Id.* at 550, 698 P.2d at 7.

7. *Id.* Diane was in default on its payments to First National. The case was settled before it reached trial.

8. *Id.* Diane claimed that Kapnison violated N.M. STAT. ANN. § 56-8-7 (1978). *Id.* When Robinson gave his advice in 1979, that statute provided:

> For negotiating or securing any loan, no person, association of persons or corporation shall charge, collect or receive in excess of the following amounts: upon any loan not exceeding five hundred dollars ($500), four percent; upon any loan exceeding

court granted summary judgment in the third party action in favor of Diane and ordered Kapnison to pay Diane the statutory damages of double the illegal fee.[9] At this point, Kapnison filed an appeal to the supreme court[10] from the summary judgment in favor of Diane and also took the added precaution of filing a cross-claim against Robinson for legal malpractice, seeking recovery of the amounts he had been ordered to pay to Diane.[11]

In the appeal, Kapnison claimed that his attorney Robinson had correctly concluded that the brokerage fee limitation statute and the statutory penalty for violation did not apply because the contracting party was a corporation.[12] The supreme court affirmed the summary judgment against Kapnison, rejecting this interpretation of the statutes that had formed the

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> five hundred dollars ($500) and not exceeding two thousand dollars ($2,000), four percent upon the first five hundred dollars ($500) and three percent upon the remainder; upon any loan exceeding two thousand dollars ($2,000), four percent upon the first one thousand dollars ($1,000), and two percent upon the remainder.

N.M. STAT. ANN. § 56-8-7 (1978).

Using the formula set forth in § 56-8-7, Kapnison's allowable fee for securing the $165,000 loan would have been $3,320 (four percent upon the first one thousand dollars and two percent upon the remaining $164,000).

The legislature has since amended § 56-8-7 to provide that broker's fees shall be negotiable, but shall not exceed six percent of the principal, where the loan is for business, commercial, or agricultural purposes and exceeds $50,000, or where a registrant under the Mortgage Loan Company and Loan Broker Act secures the loan. N.M. STAT. ANN. § 56-8-7 (Cum. Supp. 1984). Kapnison's allowable fee under the revised statute would be $9,900 (six percent of $165,000).

9. *First National Bank of Clovis,* 102 N.M. at 550, 698 P.2d at 7. Kapnison was, therefore, liable to Diane for damages in the amount of $50,000 (double the $25,000 fee charged). The trial court calculated the damage award by using N.M. STAT. ANN. § 56-8-8 (1978) which provides:

> That any person, association of persons or corporation violating the preceding section [56-8-7 NMSA 1978] shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars [($100)] nor more than five hundred dollars [($500)], or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment; and shall also be liable in damages to the party injured in double the whole amount so charged for negotiating or securing any such loan.

N.M. STAT. ANN. § 56-8-8 (1978). This statute has not been amended. N.M. STAT. ANN. § 56-8-8 (Cum. Supp. 1984).

10. Diane v. Kapnison, 100 N.M. 143, 667 P.2d 450 (1983). Because the case involved a contract, the appeal went directly from the district court to the supreme court. *See* N.M. STAT. ANN. §§ 34-5-8 (Cum. Supp. 1985) and 34-5-14 (1978) for court of appeals and supreme court appellate jurisdiction.

11. *First National Bank of Clovis,* 102 N.M. at 550, 698 P.2d at 7. In the cross-claim action against Robinson, Kapnison alleged the negligent inadequacy of Robinson's advice, while at the same time, he alleged the propriety of that advice in his appeal from the summary judgment in favor of Diane.

12. *Diane,* 100 N.M. at 145, 667 P.2d at 452.

When Robinson advised Kapnison in 1979 as to the fee Kapnison could charge, the statute read, in pertinent part:

> B. No provision of law prescribing maximum rates of interest that may be charged in any transaction shall apply to a transaction in which a corporation is a debtor, regardless of the purpose for which the corporation was formed and regardless of the fact that an individual is codebtor, endorser, guarantor, surety or accommodation party. No corporation or its codebtor, endorser, guarantor, surety or

basis of Robinson's advice to Kapnison.[13] The supreme court held that corporations could rely on a violation of the statute governing rates of commissions for procuring loans to support the statutory award of double the illegal fee.[14]

After the supreme court affirmed the summary judgment in favor of Diane, the trial court in the legal malpractice action found Robinson negligent in failing to advise Kapnison of the potential liability in the event his advice was incorrect.[15] The trial court awarded Kapnison $51,125 in damages,[16] including attorney fees.[17] Robinson's appeal from the lower

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> accommodation party shall have a cause of action or affirmatively plead, counterclaim, setoff or set up the defense of usury in any action to recover damages or enforce a remedy on any obligation executed by the corporation and no civil or criminal penalty which would otherwise be applicable shall apply on any obligation executed by the corporation.

N.M. STAT. ANN. § 56-8-9 (1978). This statute has since been amended to provide exceptions to the provision that no civil or criminal penalty shall apply on any obligation executed by the corporation as set out in N.M. STAT. ANN. §§ 30-43-1 to -5 (1978). N.M. STAT. ANN. § 58-8-9 (Cum. Supp. 1984).

Robinson had relied on § 56-8-9(B), which denied a corporation protection of the usury laws, when he advised Kapnison that he could legally charge the $25,000 fee to a corporation. *First National Bank of Clovis*, 102 N.M. at 551, 698 P.2d at 8. Under Robinson's theory, because §§ 56-8-7 through -9 followed in the same numerical sequence within the same Article, § 56-8-9 impliedly repealed §§ 56-8-7 and -8 as to corporations. *Diane*, 100 N.M. at 145, 667 P.2d at 452. Robinson argued, therefore, that because Diane was a corporation, § 56-8-9 deprived it of the protection of the brokerage fee limitations as well as recovery of double damages. *Id.* Robinson further reasoned that a fee for securing the loan was interest because the statutes prescribing the legal fees for securing loans were within the same Article as the statute regulating interest. *Id.* Corporations were therefore barred from availing themselves of the protection of the statutes regulating fees for securing loans because they could not plead usury either affirmatively or defensively. *Id.*

13. *Diane*, 100 N.M. at 144–45, 667 P.2d at 451–52. The supreme court stated that courts do not favor repeals by implication. *Id.* at 145, 667 P.2d at 452. The court found that the statutes were clear and dealt with separate and distinct subjects and held that they should be given effect as written. *Id.* The court concluded that § 56-8-7 sets forth the charges allowed for negotiating or securing a loan; § 56-8-9 deals with the interest, discount, or other advantage permitted for the loan of money. *Id.* To establish "usury," there must be either "a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due." *Id.* (quoting Hogg v. Ruffner, 66 U.S. (1 Black) 115, 118 (1861)). Kapnison made no loan to Diane, nor was Kapnison acting as First National's agent. *Id.* The interest First National charged to Diane and the $25,000 brokerage fee Kapnison charged to Diane are two separate and identifiable charges. *Id.* Based on this analysis, the supreme court rejected Kapnison's interpretation of the statutes. *Id.*

14. *Id.* at 145–46, 667 P.2d at 452–53.

15. *First National Bank of Clovis*, 102 N.M. at 550, 698 P.2d at 7.

16. *Id.* The award included $25,000 for the penalty Kapnison paid to Diane, $25,000 for attorney fees, and $1,125 tax on the fees. *Id.* Although Kapnison owed Diane $50,000, because Kapnison had already received the $25,000 commission, Kapnison's actual out-of-pocket expenses were $25,000 plus attorney fees. *Id.* at 550 n.1, 698 P.2d at 7 n.1.

17. *Id.* at 550, 698 P.2d at 7. The trial court's award of $25,000 for attorney fees included legal services for all pre-trial matters, Kapnison's appeal to the supreme court of the summary judgment in favor of Diane, and trial preparation and trial of the malpractice claim. *Id.* at 554–55, 698 P.2d at 11–12.

The New Mexico Court of Appeals affirmed the trial court's decision that Kapnison was entitled to recover attorney fees for legal services rendered in all matters relating to the separate action of *Diane*. *Id.* at 555–56, 698 P.2d at 12–13. In affirming this decision, the court of appeals held that where an attorney's client is required to engage counsel to defend a separate action proximately

court's malpractice judgment followed.[18] In *First National Bank of Clovis v. Diane, Inc.*, the New Mexico Court of Appeals affirmed the malpractice judgment, holding that in light of the particular circumstances of the case, Robinson should have warned his client of potential liability under a New Mexico statute in the event Robinson's advice was deemed to be incorrect.[19]

III. RATIONALE OF THE COURT

In an action against an attorney for malpractice, a client must prove that an attorney-client relationship existed, that the attorney's actions constituted negligence, that the negligence was the proximate cause of the client's injury, and that the client sustained damages.[20] Where the malpractice claim is based on inadequacy of advice, as in *First National Bank of Clovis*, a client must also prove reliance on the attorney's advice to his or her detriment.[21] Only the element of whether Robinson's actions constituted negligence was at issue in *First National Bank of Clovis*.[22]

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resulting from the attorney's negligence, a court may award reasonable attorney fees incurred as special damages. *Id.* at 555, 698 P.2d at 12.

Generally, absent a statute or agreement specifically authorizing payment of attorney fees, parties are held responsible for paying their own fees. *Id.* The court of appeals applied this rule to the malpractice action and decided that Kapnison was responsible for paying attorney fees incurred in his action against Robinson. *Id.* The case was remanded, therefore, to exclude attorney fees incurred in the malpractice action. *Id.*

The court of appeals provided three reasons for holding that Robinson was liable for Kapnison's attorney fees in all legal matters prior to the malpractice action. First, New Mexico appellate courts have permitted the recovery of attorney fees in two cases with circumstances similar to the present action. *Id.* In the first case, the supreme court held attorney fees recoverable as part of accommodation indemnitor's expense of defending himself on a performance bond. *Id.* (citing Dinkle v. Denton, 68 N.M. 108, 359 P.2d 345 (1961)). In the second case, the court of appeals recognized the right of an insured to recover from his insurer attorney fees he had incurred while defending a wrongful death action. *Id.* (citing Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App. 1972)). Second, other jurisdictions have held that attorney fees are recoverable under these circumstances. *Id. See* Sorenson v. Fio Rito, 90 Ill. App.3d 368, 413 N.E.2d 47 (1980); Ramp v. St. Paul Fire & Marine Insurance Co., 263 La. 774, 269 So.2d 239 (1972); Coats v. Bussard, 94 Mich. App. 558, 288 N.W.2d 651, *rev'd on other grounds*, 409 Mich. 858, 294 N.W.2d 692 (1980); Hiss v. Friedbert, 201 Va. 572, 112 S.E.2d 871 (1960); Gustavson v. O'Brien, 87 Wis.2d 193, 274 N.W.2d 627 (1979). Third, and most important, the court reasoned that if resolving a problem caused by an attorney's negligence necessitated the hiring of an accountant, a plaintiff would recover the accountant's fees as an ordinary element of damages. Where the only difference is that it was necessary for the plaintiff to hire an attorney rather than an accountant to resolve the conflict, it is illogical for a court to deny recovery of attorney fees. *First National Bank of Clovis*, 102 N.M. at 555, 698 P.2d at 12.

18. *First National Bank of Clovis*, 102 N.M. at 548, 698 P.2d at 5.

19. *Id.* at 550, 698 P.2d at 7.

20. *See* George v. Caton, 93 N.M. 370, 373, 600 P.2d 822, 825 (Ct. App. 1979).

21. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 217, at 311 (1977).

22. *First National Bank of Clovis*, 102 N.M. at 550, 698 P.2d at 7. The court confined its analysis to whether Robinson's actions constituted negligence because it was the only element of malpractice Robinson presented as an issue in the case. Brief for Appellant at 1, First National Bank of Clovis v. Diane, Inc., 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985).

In determining whether Robinson had a duty to advise his client of potential liability, the New Mexico Court of Appeals examined the particular circumstances of the case and compared Robinson's conduct to that of lawyers of ordinary skill and capacity.[23] The crucial inquiry was whether Robinson's advice to Kapnison was so legally deficient that his conduct did not reach the level of skill, prudence, and diligence exercised by the ordinary lawyer.[24] By applying this objective standard test of requisite competence under the circumstances, the court disregarded Robinson's argument that his good faith belief in the correctness of his advice should shield him from liability.[25]

Once the court ascertained the test, it looked to whether Robinson's actions met the requisite degree of competence. The court of appeals found that the statutes were clear as written[26] and noted that well-established principles of statutory construction would have caused a careful practitioner to pause before concluding that corporations could not rely

23. *First National Bank of Clovis*, 102 N.M. at 552, 698 P.2d at 9. By applying this test, the court held Robinson to the professional standard of care—that attorneys are to use a reasonable degree of care and skill and to possess the knowledge necessary to perform their duties properly. Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 635 (1973). Reasonable care, skill, and knowledge is determined by the degree of care, diligence, and skill a practicing attorney of ordinary skill, prudence, and knowledge of the law would exercise in a situation of like character under like circumstances. *Id.*

The professional standard applies the objective test of what a reasonable attorney would do to the subjective set of particular facts of the attorney's situation. Ishmael v. Millington, 50 Cal. Rptr. 592, 595, 241 Cal. App. 2d 520, 523 (1966). *See also* Sarti v. Udal, 91 Ariz. 24, 25, 369 P.2d 92, 93 (1962) (where the court stated that what may be negligence on the part of an attorney in any particular case must be decided by the facts and circumstances of the situation under consideration). *See generally* Rodriguez v. Horton, 95 N.M. 361, 364–65, 622 P.2d 261, 264–65 (Ct. App. 1980) (where a testifying attorney analyzed the particular acts and circumstances of the defendant attorney to determine whether they were beneath the standard of care applicable to a reasonably prudent Workmen's Compensation lawyer). The *First National Bank of Clovis* court addressed the inadequacy of an attorney's advice, which has become a recurring basis of liability under the professional standard. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 217 (1977). Although an attorney need not caution of every possible alternative, if the attorney should have reason to believe that adverse consequences of his advice might exist, he must so advise his client. Smith v. St. Paul Fire & Marine Insurance Co., 366 F.Supp. 1283, 1290 (M.D. La. 1973), *aff'd*, 500 F.2d 1131 (5th Cir. 1974). Other recurring bases of liability include errors of judgment, the failure to follow instructions, the failure to meet time limitations, delegation or referral, financial management of a client's property, misappropriation or loss of funds, and legal malpractice as a defense to compensation. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE at 299 (1977).

24. *First National Bank of Clovis*, 102 N.M. at 552, 698 P.2d at 9. The court evaluated Robinson's legal advice regarding the statute against the state of the law at the time he interpreted it in 1979 and not after the court in *Diane, Inc. v. Kapnison* settled the law. *Id.* The quality of an attorney's services is to be evaluated on the basis of the law as it appeared at the time the services in question were rendered, and not at the time of the legal malpractice action. Smith v. Lewis, 118 Cal. Rptr. 621, 625, 530 P.2d 589, 593 (1975).

25. *First National Bank of Clovis*, 102 N.M. at 553, 698 P.2d at 10.

26. *Id.* The court stated that in 1979 N.M. STAT. ANN. § 56-8-7 (1978) clearly concerned brokerage fees while N.M. STAT. ANN. § 56-8-9 (1978) clearly dealt with usury. *Id.* at 552, 698 P.2d at 9. For text of statutes, see *supra* note 8 and note 12.

on a violation of the statute.[27] The trial court record disclosed Robinson's awareness of those well-established principles.[28] The record also indicated Robinson's familiarity with the brokerage statutes in 1979;[29] he was aware that the brokerage fee limitation statute applied to brokers and that the statutes made a distinction between interest and a brokerage fee.[30] Robinson testified at trial that he had considered the two cases interpreting the statutes before rendering his advice.[31] Because in one of the cases considered the court upheld an award of double damages for a violation of the brokerage fee limitation statute,[32] the court of appeals reasoned that Robinson should have known that substantial penalties could be imposed if Kapnison charged an excessive fee.[33]

Given these facts and circumstances, the court of appeals reasoned that when Robinson rendered his advice, he had reasonable grounds to consider his interpretation questionable and, therefore, should have advised Kapnison of potential liability.[34] Applying the objective standard to Robinson's conduct, the court concluded that an attorney possessing and exercising ordinary skill and capacity would have found it prudent to advise the client of the potential exposure to liability under the New Mexico statute.[35]

The court then added "a further compelling reason" for holding Rob-

27. *First National Bank of Clovis*, 102 N.M. at 552, 698 P.2d at 9. The court of appeals stated that in Diane v. Kapnison, the supreme court analyzed and found lacking in merit the theory that corporations could not rely on a violation of N.M. STAT. ANN. § 56-8-7 (1978); therefore, the court of appeals refrained from repeating that analysis. *Id.* For a discussion of the supreme court's analysis in *Diane*, see *supra* note 13.

28. *First National Bank of Clovis*, 102 N.M. at 552, 698 P.2d at 9. The record disclosed that Robinson was aware that New Mexico statutes are to be given effect as written, and where free from ambiguity, no room for construction exists. *Id.*

29. *Id.*

30. *Id.* The court also considered that the record disclosed that Robinson had previously advised an individual that his listed "finder's fee" was more than the statutory amount allowed under § 56-8-7. *Id.*

31. *Id.* The first case made clear that § 56-8-7 applies only to a broker-principal relationship. Home Savings & Loan Ass'n v. Bates, 76 N.M. 660, 662, 417 P.2d 798, 800 (1966). In the second case, the New Mexico Supreme Court upheld an award of double damages found as a result of a violation of the statute which limits loan brokerage fees. Forrest Currell Lumber Co. v. Thomas, 81 N.M. 161, 165, 464 P.2d 891, 895 (1970).

32. *Forrest Currell*, 81 N.M. at 165, 464 P.2d at 895.

33. *First National Bank of Clovis*, 102 N.M. at 552, 698 P.2d at 9.

34. *Id.* at 552–53, 698 P.2d at 9–10. The court of appeals quoted what the court in Smith v. St. Paul Fire & Marine Insurance Co. had expressed:

> [I]f the attorney has reason to believe, or should have reason to believe that there could be some adverse consequences from taking the course advised, he is obligated to so advise his client. But if there is no reasonable ground for him to believe that his advice is questionable, he certainly has no obligation to advise clients of every remote possibility that might exist.

Id. at 553, 698 P.2d at 10 (quoting *Smith*, 366 F.Supp. at 1290).

35. *Id.*

inson liable for malpractice.[36] Balancing Kapnison's potential liability for following Robinson's advice against his financial benefit from doing so, the court determined that the potential liability clearly outweighed any benefit to Kapnison.[37] The court concluded that Robinson should have recognized this potential burden to his client and, therefore, should have chosen a more conservative approach.[38]

The court of appeals emphasized that Robinson was not liable for malpractice because he incorrectly interpreted the statutes at a time when the law was unsettled.[39] Rather, Robinson was liable because, in light of the particular circumstances of the case, Robinson should have taken a more conservative approach and warned Kapnison of the liability he might encounter by charging a $25,000 brokerage fee.[40]

IV. DISCUSSION AND ANALYSIS

In reaching its conclusion, the *First National Bank of Clovis* court left three areas of ambiguity that could have been addressed. First, in determining that the good faith standard was inapplicable in this case, the court missed an opportunity to address the standard's general inapplicability to legal malpractice actions. Second, the court left open three possible interpretations of the significance of balancing potential liability with benefit in duty to warn actions. Finally, by confining its analysis and discussion to the particular facts of the case, the court chose not to discuss the significance of *First National Bank of Clovis* in the developing law of legal malpractice.

A. The Court's Disregard of the Good Faith Standard

The court of appeals disregarded Robinson's argument that his good faith and honest belief that his advice was correct should shield him from liability.[41] However, the only guidance the court provided for why a good faith belief was insufficient was that under the particular circumstances

36. *Id.*

37. *Id.* Using Robinson's advice, Kapnison's potential liability under § 56-8-8 was $50,000 in damages payable to Diane and a possible fine, imprisonment, or both if convicted of a misdemeanor. *See supra* note 9 for full text of statute. Kapnison's potential financial benefit using Robinson's advice was $21,680 ($25,000 he charged minus the $3,320 he could have charged under § 56-8-7).

38. *First National Bank of Clovis,* 102 N.M. at 553, 698 P.2d at 10. The court recognized that because an attorney's judgment may result in litigation is not, by itself, a breach of duty to the client. Litigation often results from a disagreement of professional judgment. *Id.*

39. *Id.* Robinson had argued that because the law was unsettled when he gave his advice in 1979, he could not be held liable for an error in judgment. *Id.* at 551, 698 P.2d at 8.

40. *Id.* at 553, 698 P.2d at 10.

41. The court concluded that "[t]he soundness of defendant's advice should be evaluated on more than a good faith belief; rather, whether he exhibited the requisite degree of competence." *Id.* at 553, 698 P.2d at 10.

of the case, the objective standard was applicable.[42] Because the court did not clearly express its reason for rejecting the good faith argument, the court implicitly suggested that the good faith defense to liability may retain viability in certain unarticulated situations. By so doing, the court missed an opportunity to state clearly that a good faith defense is generally inapplicable in legal malpractice negligence actions.

Cases involving an attorney's error of judgment or mistake of law can be explained on the basis that an attorney is not negligent if a reasonably competent attorney could have made the error under the circumstances; otherwise, the attorney is liable.[43] No New Mexico court has relieved an attorney from liability simply because the attorney honestly believed that his or her actions were correct. The *First National Bank of Clovis* court quoted the good faith standard it had articulated in a previous case[44] but explained that this standard was prefaced with the recognition that even with respect to matters involving judgment, an attorney must exercise reasonable and ordinary care and diligence.[45]

The good faith standard contained in cases from other jurisdictions appears either as dicta or as an articulation of the breach of fiduciary duties rather than the duty of care associated with malpractice claims.[46] In fact, the good faith standard is nothing more than a vestige from an earlier era that serves no function in determining negligence.[47] The only

42. *Id.*

43. Beckham, *Trial Lawyer's Liability for Judgmental Decisions,* PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 157, 160 (1979).

44. *First National Bank of Clovis,* 102 N.M. at 552, 698 P.2d at 9. The court quoted what it had stated in George v. Caton, 93 N.M. 370, 376, 600 P.2d 822, 828 (Ct. App. 1979), "[a] lawyer is not liable, however, for an error in judgment if he acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his clients." *Id.*

In *George,* the plaintiff brought suit to recover damages for losses sustained when defendant attorneys failed to file a wrongful death action before the expiration of the statute of limitations. *George,* 93 N.M. at 370, 600 P.2d at 822. The district court granted summary judgment to the attorneys, holding that no attorney-client relationship existed. *Id.* at 372, 600 P.2d at 824. Although the attorney-client relationship was the only issue on appeal, the New Mexico Court of Appeals held not only that issues of material fact existed as to whether an attorney-client relationship existed, but also as to whether the attorneys' actions were negligent, and as to whether any attorneys' negligence was the proximate cause of plaintiff's losses. *Id.* at 376–78, 600 P.2d at 828–30. The important dictum on the standards regarding duty offered to guide the lower court on remand was based on the breach of failure to file within the statute of limitation. *Id.* at 377, 600 P.2d at 829.

45. *First National Bank of Clovis,* 102 N.M. at 551–52, 698 P.2d at 8–9.

46. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 118, at 189–90 (1977).

47. *Id.* at 190. Although some of the oldest decisions have suggested that good faith can be a shield to protect attorneys, an attorney's negligence is based on an objective standard. *Id.* at 189–190. Attorneys will not be liable for a mistaken judgment or a bad result alone. *Id.* at 189. However, they will be liable if the mistake or result is attributable to negligence. *Id.* 204, at 302.

There is much discussion that a good faith standard exception should exist for errors made during trial. In fact, one court has held that such an exception exists. Stricklan v. Koella, 546 S.W.2d 810 (Tenn. Ct. App. 1976), *cert. denied,* ___ S.W.2d ___ (Tenn. 1977). In *Stricklan,* the trial judge granted the attorney summary judgment in a legal malpractice case, holding that no cause of action

appropriate standard for evaluating legal malpractice negligence claims is objective.[48] The *First National Bank of Clovis* court missed an opportunity to eliminate existing misconceptions regarding the good faith standard's applicability to legal malpractice actions.

B. The Court's Treatment of the Balancing Issue

The *First National Bank of Clovis* court determined Robinson's malpractice liability and then added the "further compelling reason" that Robinson should have taken a more conservative approach because the potential liability clearly outweighed any benefit.[49] Because the court articulated this further reason after it reached the determination of malpractice, the court left confusion as to how this reason fits within the holding of the case and as to how this important issue should be treated in future negligent failure to warn cases.

Because the court labels the balancing issue a "further" reason, the issue can be assumed to be simply another factor that courts should examine in making malpractice liability determinations. Its significance may be no more or less than any of the other factors courts should look to in making malpractice determinations. Under this interpretation, it is feasible to argue that if the facts of a particular case violate what the reasonably prudent attorney would do, an attorney may be held liable even where the burden of potential liability does not clearly outweigh any benefit to the client.

However, the court specifically added the balancing issue after it had clearly held Robinson liable for malpractice. This positioning allows the interpretation that the "further compelling reason" is an alternative holding. Under this interpretation, a court could find an attorney negligent either if the potential liability clearly outweighed the benefit to the client

existed against attorneys arising out of the manner in which they honestly choose to present their case to the trier of facts. *Id.* at 812. The court based its decision on Rondel v. Worsley [1966] 1 All E.R. 467, [1966 C.A.] 3 All E.R. 647 and [1967 H.L.], 3 All E.R. 993, which held that as a matter of law no action would lie against an attorney by his client for negligence in and about his conduct of the client's case in court. 546 S.W.2d at 813.

The *Stricklan* decision typifies the developing law on mistakes made during a trial. THOMAS P. BROWN III, HOW TO AVOID BEING SUED BY YOUR CLIENTS 13 (1981). Although attorneys are not automatically immune from liability for mistakes made during a trial, courts favor attorneys where the mistake involves judgmental decisions on trial tactics during the trial. *Id.* This is especially true where it is difficult to ascertain what would have occurred had the attorney not used the particular tactic being questioned. *Id.* at 13–14. *Compare* Haskell, *The Trial Lawyer's Immunity from Liability for Errors of Judgment*, PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 141 (1979) (advocating that trial lawyers should be immune from malpractice suits based on their professional judgment during the litigation process), *with* Beckham, *Trial Lawyer's Liability for Judgmental Decisions*, PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 157 (1979) (refuting Haskell).

48. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 118, at 190 (1977).

49. *First National Bank of Clovis*, 102 N.M. at 553, 698 P.2d at 10.

or if the other particular circumstances of the case substantiated legal malpractice. Thus, if the potential liability clearly outweighs the benefit, a reasonable attorney must warn. This interpretation would force attorneys to warn of potential adverse consequences even where they have no reasonable grounds to believe that their advice is questionable.[50]

The court's treatment of the balancing issue allows for even a further interpretation of how this issue could be addressed in negligent failure to warn cases. Under this final interpretation, the balancing issue would be a threshold consideration where the court would examine the particular facts and circumstances of the case only if on balance the potential liability clearly outweighed any benefit. If this is not the case, no liability attaches. If it is the case, the court would proceed to look at the facts and circumstances of the case to determine if liability will attach.

The court's treatment of the balancing issue leaves open various interpretations of how the balance could be applied in future negligent failure to warn cases. Because *First National Bank of Clovis* opens the way for creative argument, its full impact must await further development in future cases.

C. *The Significance of First National Bank of Clovis in the Developing Law of Legal Malpractice*

The New Mexico Court of Appeals confined its analysis and discussion to the precise facts of the *First National Bank of Clovis* case. By so doing, it missed an opportunity to discuss the significance of this case in the developing law of legal malpractice.

Beginning in 1979, New Mexico experienced an increase in legal malpractice actions,[51] with three attorneys recently held liable for malpractice.[52] The New Mexico statistics support the contention that malpractice actions against attorneys are becoming significantly more numerous

50. This interpretation directly contradicts the notion the court of appeals quoted from *Smith* that an attorney is not obligated to advise clients of every possibility if there is no reasonable ground for him to believe that his advice is questionable. *First National Bank of Clovis*, 102 N.M. at 553, 698 P.2d at 10. *See supra* note 34 for the complete quote.

51. Although New Mexico has experienced only eight reported malpractice cases in its history, seven of the cases were reported from 1979 to 1985. *See* Sanders v. Smith, 83 N.M. 706, 496 P.2d 1102 (Ct. App. 1972); Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979); George v. Caton, 93 N.M. 370, 600 P.2d 822 (Ct. App. 1979); Rodriguez v. Horton, 95 N.M. 356, 622 P.2d 261 (Ct. App. 1980); Holland v. Lawless, 95 N.M. 490, 623 P.2d 1004 (Ct. App. 1981); Wisdom v. Neal, 568 F. Supp. 4 (D.N.M. 1982); Shaw v. Warner, 101 N.M. 22, 677 P.2d 635 (Ct. App. 1984); First National Bank of Clovis v. Diane, Inc., 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985).

52. *See* First National Bank of Clovis v. Diane, Inc., 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985); Wisdom v. Neal, 568 F. Supp. 4 (D.N.M. 1982) (where attorney was liable for damages for clients' losses because of the attorney's improper distribution of an estate); Rodriguez v. Horton, 95 N.M. 361, 622 P.2d 261 (Ct. App. 1980) (where attorney was liable to client for $10,500 compensatory damages and $25,000 punitive damages for fraud and malpractice in connection with settlement of client's workmen's compensation case for only $8,000).

and that attorney malpractice may be the fastest growing area of the law.[53] Courts are imposing malpractice liability based on an attorney's failure to warn with greater frequency.[54] *First National Bank of Clovis* is an important example of this trend in malpractice law.

The court of appeals held Robinson liable for malpractice by applying the objective test of what a reasonable attorney would have done. The question arises, however, whether specific limitations should be placed on attorneys' duty to warn. Robinson argued that the duty to warn of potential liability is analogous to the requirement of informed consent in the medical field and such consent is not appropriate in the legal profession.[55] Requiring attorneys to obtain informed consent from their clients before pursuing a particular course of action, just as members of the medical community have been required to obtain patients' informed consent to the use of medical procedures and treatments, would remove limitations on the attorneys' duty to warn.[56]

The imposition of informed consent duties on attorneys would have significant implications. One obvious result would be a substantial increase in attorney exposure to liability for legal malpractice.[57] In addition, Robinson's argument asserts that "the imposition of such a duty would hold a lawyer to a preposterous and incredible standard."[58] Attorneys would be required to accompany any advice rendered with a discussion

53. *See* Lawter, *Recent Developments in Lawyers' Malpractice*, 56 OKLA. B.J. 321 (1985). Reported malpractice decisions during the 1970s almost equalled all previously reported malpractice cases. *Id. See also* Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289 (1984). Reasons for this substantial increase include the increased emphasis on standards of professional care and competence and consumer rights. *See* Lawter, *supra*, at 321.

54. Statistics regarding legal malpractice reveal that in 1982, while slightly less than ten percent of malpractice claims were based on a failure to inform, errors of that type gave rise to the highest percentage of claims of all categories. Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289, 1292 (1984).

55. *First National Bank of Clovis*, 102 N.M. at 552, 698 P.2d at 9. The court of appeals declined to address Robinson's argument, stating that it was necessary to concentrate on only the particular facts of the present case, and not address such a broad statement. *Id.*

56. *See* Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289 (1984). Failure to obtain informed consent is a suggested new tort in the legal profession. *Id. See also* Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980).

Peck states that the theory of informed consent receives support in the Model Rules of Professional Conduct. Peck, *supra*, at 1290. The preamble to the Model Rules provides: "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." *Id.* at 1291.

Rule 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.*

The comment to rule 1.4 provides that the "client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." *Id.*

57. *Id.* at 1289. Peck states that an attorney's liability will be determined not only by legal profession standards, but also by what the public expects in the way of legal services. *Id.*

58. *First National Bank of Clovis*, 102 N.M. at 551, 698 P.2d at 8.

of all possible consequences, alternatives, and consequences of the alternatives. This extra amount of time spent with clients and research to determine multiple consequences could lead to even higher legal fees.[59] It might also impair client confidence in attorney judgments if attorneys are required to justify what they say to clients in order to avoid malpractice actions. On the other hand, such a duty would lead to more informed clients and might lessen the complaints generated regarding the legal profession.[60] The quality of service might improve,[61] and malpractice claims could actually decline due to the efforts to inform.[62]

As discussed earlier, the New Mexico Court of Appeals chose to confine its holding to the facts of the *First National Bank of Clovis* case. However, the decision requires us to speculate whether its holding does help to pave the way for a new tort of informed consent in the legal profession in New Mexico.

V. CONCLUSION

Although some areas of ambiguity remain, *First National Bank of Clovis* makes it clear that situations exist where attorneys must warn their clients of potential liability in the event that their advice is later deemed to be incorrect.[63] The test for deciding when warning is appropriate is whether, given the particular circumstances of the case, a lawyer using such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise would have warned.[64] Attorneys' good faith belief that their advice is accurate will not shield them from liability.[65]

Because the test is requisite competence under the circumstances, the only real guideline the court could provide for the future is that when attorneys are in situations similar to Robinson's, they must warn their clients of potential liability. However, because *First National Bank of Clovis* is consistent with the current trend in legal malpractice law of

59. Peck, *supra* note 56, at 1306. Peck also suggests that attorneys would be liable for non-negligent judgment errors about undisclosed risks or potential gains which, if disclosed, would have caused a client to either litigate or avoid litigation by rejecting or accepting a settlement offer. *Id.* at 1299.

60. *Id.* at 1306–07.

61. *Id.* at 1307. A New York study indicates that actively participating clients received better settlements of their personal injury claims, and lawyers received higher contingent fees. *Id.* at 1306–07.

62. *Id.* at 1306. Peck suggests that a patient's understanding of the dangers of a medical procedure may reduce the frequency of medical malpractice suits and that the same favorable result may occur in the legal profession. *Id.*

63. *See First National Bank of Clovis*, 102 N.M. at 548, 698 P.2d at 5.

64. *Id.* at 552, 698 P.2d at 9.

65. *Id.* at 553, 698 P.2d at 10.

more frequently holding attorneys liable for failure to inform, careful practitioners may be well-advised to take added precautions to keep their clients fully informed.

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