



University of Arkansas at Little Rock Law Review

Volume 19 | Issue 2

Article 3

1997

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Timothy O. Dudley

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Recommended Citation

Timothy O. Dudley, *The Continuous Representation Doctrine: Must You Sue Your Lawyer While She Still Represents You*, 19 U. ARK. LITTLE ROCK L. REV. 241 (1997).

Available at: <https://lawrepository.ualr.edu/lawreview/vol19/iss2/3>

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ESSAY—THE CONTINUOUS REPRESENTATION DOCTRINE:
MUST YOU SUE YOUR LAWYER WHILE SHE STILL REPRESENTS
YOU?

*Timothy O. Dudley**

I. INTRODUCTION

Lawyers are being sued with increasing frequency. A lawyer's representation of her client often continues for several years in the same matter, particularly in litigation. Crowded court dockets, extended discovery, continuances of trial dates, and protracted appeals may prolong litigation for four or five years.

The statute of limitations in Arkansas for legal malpractice claims is three years.¹ This may create a problem for the client. What happens if the lawyer acts negligently very early in the representation? Must the client sue the lawyer during the representation or risk losing the legal malpractice claim to the statute of limitations?

II. DEVELOPMENT OF THE DOCTRINE

The continuing representation doctrine developed from the continuing treatment doctrine in medical malpractice cases.² Under the continuous treatment doctrine, the statute of limitations is tolled as long as the patient is under the continuing care of the negligent doctor for the same injury out of which the malpractice action arose.³

Two rationales support the continuous treatment doctrine. First, it is unreasonable to expect a patient to discover that the negligent doctor's acts may be the cause of the injury while the patient continues to be treated by the negligent doctor.⁴ Second, it is absurd to expect a patient to sue the doctor while the doctor continues to treat the patient.⁵

The first rationale is supported by four interrelated concerns. First, a negligent doctor may have reason to conceal his negligence or other important information from a patient during treatment.⁶ Second, the trust

* Timothy O. Dudley received his bachelors degree and his *juris doctor* from the University of Arkansas at Little Rock. He is a trial lawyer currently practicing in Pulaski County, Arkansas.

1. ARK. CODE ANN. § 16-56-105 (Michie 1987); *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (1989).

2. *Wettanen v. Cowper*, 749 P.2d 362, 365 n.1 (Alaska 1988).

3. *Langner v. Simpson*, 533 N.W.2d 511, 519 (Iowa 1995).

4. *Id.*

5. *Id.* at 520.

6. *Id.* at 519.

a patient places in her doctor might inhibit the patient from questioning the doctor's care during the relationship.⁷ Third, a patient's inquiry regarding the doctor's care, or threats to sue the doctor, may interrupt or hinder the patient's care and treatment.⁸ Finally, the need for flexibility in determining the cause of latent injury weighs against requiring the patient to sue the doctor while the doctor continues the treatment.⁹

The second rationale for the continuous treatment doctrine recognizes that a patient's relationship with the doctor is based upon trust in the doctor's medical skills.¹⁰ If the doctor has made a mistake which requires corrective treatment, the patient's interest in the correct diagnosis of the problem, cure, and recovery, would be thwarted by requiring her to sue the doctor during the doctor's treatment.¹¹

Similar rationales support the continuous representation doctrine. The premise of the doctrine is to avoid unnecessarily disrupting the attorney/client relationship by requiring the client to sue the lawyer during representation.¹² The doctrine prevents the absurd spectacle of the client suing the lawyer while the representation continues.¹³ A lawyer, as well as a doctor, may be reluctant to reveal his negligence and may in fact be motivated to conceal it. Furthermore, damage caused by the lawyer's negligence may not occur, or be certain, until the representation is concluded.¹⁴ Finally, the continuous representation doctrine gives the lawyer an opportunity to correct the mistake or to mitigate any damages caused by the mistake.¹⁵

The majority of states that have considered the continuous representation doctrine have adopted it.¹⁶ Unfortunately, Arkansas is not one of them.

III. THE DOCTRINE IN ARKANSAS

The Arkansas Supreme Court recognizes and follows the continuing treatment doctrine. The doctrine was first recognized and followed in *Lane v. Lane*.¹⁷ In *Lane*, the defendant physician began treating the plaintiff for

7. *Id.*

8. *Id.* at 519-20.

9. *Id.*

10. *Id.*

11. *Id.*

12. RONALD E. MALLIN & VICTOR B. LEVITT, LEGAL MALPRACTICE § 391 (4th ed. 1996).

13. *Id.*

14. *Pittman v. McDowell, Rice & Smith, Chartered*, 752 P.2d 711 (Kan. Ct. App. 1988).

15. *Id.* at 716 (citing MALLIN & LEVITT, *supra* note 12, § 391, at 460-61).

16. MALLIN & LEVITT, *supra* note 12, § 21.12.

17. 295 Ark. 671, 752 S.W.2d 25 (1988).

migraine headaches in 1966.¹⁸ That treatment continued through 1984,¹⁹ and the patient sued the doctor for malpractice in May 1985.²⁰ Plaintiff survived motions for summary judgment and directed verdict on the ground that the statute of limitations barred the action, and recovered a judgment against the doctor.²¹ The doctor appealed, claiming that the statute of limitations expired before the action was filed.²²

The Court rejected the doctor's argument, holding the statute of limitations in a medical malpractice action does not begin to run until treatment by the doctor for the particular disease or condition terminates.²³

The court recognized that the Arkansas legislature determined that the statute of limitations in a medical malpractice action begins running at the date of the wrongful act and at no other time.²⁴ Nevertheless, the court recognized a steady judicial trend toward acceptance of the continuing treatment doctrine.²⁵ The court also recognized that the bases for the doctrine are sound.²⁶ Those bases recognized by the court included the cumulative effect of continuing treatment on the patient, the opportunity the doctrine extends to a physician to correct the mistake, and the absurdity of requiring an injured patient to interrupt corrective efforts by suing the doctor.²⁷ Since *Lane*, the Arkansas Supreme Court has adhered to the continuous treatment doctrine.²⁸

Are lawyers and other professionals entitled to preferential treatment over doctors? In Arkansas, they are. Although the rationale for the continuous treatment doctrine is based upon the same considerations supporting the continuous representation doctrine, the Arkansas Supreme Court has refused to recognize the continuous representation doctrine. The court's reasons for doing so are supported by neither logic nor precedent. In fact, the reasons given by the court for its refusal to recognize the continuous representation doctrine are equally applicable to the continuous treatment doctrine. The decisions of the court cannot be reconciled on the basis of either logic or precedent.

18. *Id.* at 672, 752 S.W.2d at 26.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 672-73, 752 S.W.2d at 26.

23. *Id.* at 676-77, 752 S.W.2d at 28.

24. *Id.*

25. *Id.* at 675, 752 S.W.2d at 27-28.

26. *Id.* at 675, 752 S.W.2d at 28.

27. *Id.*

28. *Taylor v. Phillips*, 304 Ark. 285, 801 S.W.2d 303 (1990); *Tullock v. Eck*, 311 Ark. 564, 845 S.W.2d 517 (1993); *Green v. National Health Laboratories, Inc.*, 316 Ark. 5, 870 S.W.2d 707 (1994).

In attorney malpractice cases, Arkansas follows the occurrence rule under which the statute of limitations begins to run when the negligence occurs.²⁹ In *Chapman v. Alexander*, the court stated that it has followed the occurrence rule in professional malpractice actions for well over one hundred years.³⁰ However, the court's observation in *Chapman* cannot be reconciled with its holdings in professional liability cases.

As discussed above, Arkansas has departed from the occurrence rule in medical malpractice cases. The court recognizes the continuous treatment doctrine in medical malpractice cases despite the legislative pronouncement that the statute of limitations begins to run in medical malpractice cases at the time of the negligent act, and at no other time.³¹ The court has actually departed from the occurrence rule in lawyer malpractice cases as well, despite its assertions to the contrary. The court's rationale for doing so differs depending upon the circumstances of the case.

In *Stroud v. Ryan*³² the court followed the "damage rule,"³³ not the occurrence rule. In *Stroud*, the lawyer negligently failed to respond to a writ of garnishment served on the client, resulting in entry of a default judgment against the client.³⁴ The lawyer successfully moved to set aside the default judgment, but that order was reversed by the court of appeals more than three years later.³⁵ After the order granting the default judgment was reinstated on appeal and the client was required to pay the judgment, the client sued the lawyer.³⁶

The lawyer obtained summary judgment from the trial court on the ground that the statute of limitations had expired because the client did not sue within three years of the time the lawyer failed to answer the writ of garnishment.³⁷ The Arkansas Supreme Court held that the statute of limitations was tolled during the appeal from the order setting aside the default judgment.³⁸ The court reasoned that the client could not have sued the lawyer during the pendency of the appeal because the lawyer's negligence had caused the client no damage—an essential element of his

29. *Chapman v. Alexander*, 307 Ark. 87, 88, 817 S.W.2d 425, 425 (1991).

30. *Id.* at 90, 817 S.W.2d at 427 (citing *White v. Reagan*, 32 Ark. 281 (1877) in support of the statement that Arkansas follows the occurrence rule).

31. ARK. CODE ANN. § 16-114-203 (Michie 1987).

32. 297 Ark. 472, 763 S.W.2d 76 (1989).

33. Under the "damage rule," the statute of limitations does not begin to run until the client suffers damage as a consequence of the lawyer's negligence. *Pittman v. McDowell, Rice & Smith*, 752 P.2d 711, 715 (Kan. Ct. App. 1988).

34. *Id.* at 473, 763 S.W.2d at 77.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 474, 763 S.W.2d at 78.

claim.³⁹ Thus, the court held that the complaint against the lawyer was timely filed, although filed more than three years after the lawyer's negligent act.⁴⁰

The court's holding in *Stroud* cannot be reconciled with its statement in *Chapman* that Arkansas has followed the occurrence rule in professional malpractice actions for well over one hundred years. In *Stroud*, the negligent act occurred more than three years before the client filed suit.⁴¹ The court, however, noted that the statute of limitations did not begin to run until the lawyer's negligent act caused damage to the client.⁴² That is the classic statement of the damage rule.

The court followed *Stroud* in *Pope County v. Friday, Eldredge & Clark*.⁴³ In *Pope County*, the court again followed the damage rule. In *Pope County*, the lawyer drafted an ordinance providing for the issuance of bonds to be used for renovation and expansion of the county courthouse. The ordinance was adopted by the quorum court and approved by the voters.⁴⁴ A taxpayers' suit was subsequently filed, but the taxpayers were denied relief by the chancellor.⁴⁵ The Arkansas Supreme Court reversed the chancellor's decision and held that the bond issue was invalid.⁴⁶ More than three years after the lawyer drafted the ordinance, the county sued the lawyer for malpractice. The trial court granted summary judgment to the lawyer, holding that the statute of limitations had expired before the complaint was filed. The supreme court reversed, holding that the statute of limitations was tolled during the appeal because the clients could not have sued during the pendency of the appeal since they had sustained no damage.⁴⁷ Although the court did not concede that it was applying the damage rule, it clearly was. Again, the court's holding in *Pope County* cannot be reconciled with the occurrence rule.

In *Wright v. Compton, Prewett, Thomas & Hickey, P.A.*,⁴⁸ the court implicitly applied the continuing representation doctrine. In that case, the lawyer gave advice regarding reorganization of a corporation and the tax consequences of reorganization.⁴⁹ The advice was given in 1985, and a

39. *Id.*

40. *Id.*

41. *Id.* at 473, 763 S.W.2d at 77.

42. *Id.* at 474, 763 S.W.2d at 78.

43. 313 Ark. 83, 852 S.W.2d 114 (1993).

44. *Id.* at 84, 852 S.W.2d at 114.

45. *Id.*

46. *Id.* (citing *Keeton v. Barber*, 305 Ark. 147, 806 S.W.2d (1991)).

47. *Id.* at 85, 852 S.W.2d at 115.

48. 315 Ark. 213, 866 S.W.2d 387 (1993).

49. *Id.* at 214, 866 S.W.2d at 388.

lawsuit against the lawyer was not filed until 1989.⁵⁰ The clients presented evidence that the reorganization was actually completed in 1986.⁵¹ The supreme court reversed the trial court's summary judgment in favor of the lawyer, essentially holding that the statute of limitations began to run when the lawyer completed the last act in his representation of the clients:

In *Chapman*, we made it clear that the limitation period begins to run in malpractice cases upon the occurrence of the last element essential to the cause of action. In this case that would be the date of the last act in the reorganization. If we were to adopt the defendants' position it could require a plaintiff to bring suit against his attorney before a lengthy transaction were complete and that, in turn, could well deny the attorney the chance to effectuate the proper result.⁵²

The court thus recognized one of the principal bases for the continuing representation doctrine and applied it in the case, reversing the summary judgment in favor of the lawyer. That decision cannot be reconciled with the occurrence rule, because the lawyer's negligent act occurred more than three years before the lawsuit was filed against him.

It is ironic that the court cited *Chapman* to support its holding in *Wright*. In *Chapman*, the court was explicitly requested to abandon the occurrence rule and adopt one of three other rules.⁵³ The *Chapman* court was asked to adopt the discovery rule,⁵⁴ the "date of injury rule,"⁵⁵ or the termination of employment rule,⁵⁶ but declined to adopt any of these approaches.⁵⁷ Nevertheless, the court relied upon its ruling in *Chapman* in implicitly applying the continuing representation rule in *Wright*.

In *Chapman*, the court gave a number of reasons for its refusal to depart from its professed adherence to the occurrence rule. Those reasons, however, are logically inconsistent with the court's holdings in other cases. The court's first reason for adhering to the occurrence rule is the rule has a "countervailing fairness about it."⁵⁸ Initially, all are treated alike.⁵⁹ That argument can be applied to any statute of limitations issue. If the court

50. *Id.*

51. *Id.* at 216, 866 S.W.2d at 389.

52. *Id.* at 217, 866 S.W.2d at 390 (citation omitted).

53. *Chapman v. Alexander*, 307 Ark. 87, 88, 817 S.W.2d 425, 425 (1991).

54. Under the "discovery rule," the statute of limitations does not begin to run until the negligent act is discovered or should have been discovered. *Id.*

55. The "date of injury" rule is the same as the "damage rule." See *supra* note 33.

56. The "termination of employment" rule is the same as the continuing representation doctrine. See *supra* notes 12-15 and accompanying text.

57. *Chapman*, 307 Ark. at 91, 817 S.W.2d at 427.

58. *Id.* at 88, 817 S.W.2d at 426.

59. *Id.*

adopts the continuing representation rule, everyone, whether lawyers or other professionals, is treated in the same manner. Under the court's current approach, all professionals are not treated in the same manner. As previously noted, the court recognized and applied the continuous treatment doctrine to physicians, thus holding physicians to a different standard than other professionals.

The court's second reason for adhering to the occurrence rule is that "an abstractor, accountant, architect, attorney, escrow agent, financial advisor, insurance agent, medical doctor, stockbroker, or other such person will not be forced to defend some alleged act of malpractice which occurred many years ago."⁶⁰ Applied to the continuous representation doctrine, that argument is unpersuasive. Under the continuous representation doctrine, the client would be required to sue within three years after the representation ceased, and thus, the claim would not be stale. The lawyer reasonably would be expected to have his file and witnesses available to aid in defense of the claim. Once again, the reason is inconsistent with the court's adherence to and application of the continuous treatment doctrine. If the continuous treatment doctrine does not result in forcing a doctor to defend against a stale claim, how would the continuous representation doctrine force a lawyer to defend against a stale claim?

Finally, the court reasoned that, because it had adhered to the occurrence rule for over one hundred years, any change in the statute of limitations should be made by the legislature, not the courts.⁶¹ The court noted that "[l]egislative silence after such a long period gives rise to an arguable inference of acquiescence or passive approval of our construction of the statute."⁶² The court cited the 1979 amendment to the Medical Malpractice Act,⁶³ providing that the statute of limitations on a medical malpractice claim begins to run on the date of the wrongful act and at no other time. The amendment was cited in support of the court's reasoning that the legislature agrees with its application of the occurrence rule and refusal to recognize other approaches to the statute of limitations in professional malpractice cases.⁶⁴ The *Chapman* court seems oblivious to the fact that it adopted the continuous treatment doctrine in medical malpractice cases in 1988,⁶⁵ years after the legislature passed the amendment to the

60. *Id.* at 88-89, 817 S.W.2d at 426.

61. *Id.* at 90, 817 S.W.2d at 427.

62. *Id.*

63. *Id.* at 90, 817 S.W.2d at 426.

64. *Id.*

65. See *Lane v. Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988); see also *supra* notes 17-28 and accompanying text.

Medical Malpractice Act. Further, the court made no effort to harmonize its adoption of the continuous treatment doctrine with its refusal to adopt the continuous representation doctrine. The court made no attempt to explain why it was permissible for the court to judicially recognize the continuous treatment doctrine but not permissible to judicially recognize the continuous representation doctrine.

After *Chapman*, the court applied the damage rule in *Pope County*, and the continuing representation doctrine in *Wright*. The court failed to attempt reconciliation of its holdings in those cases with the holding in *Chapman*. Although the court cited *Chapman* in support of its holding in *Wright*, the holdings in those cases are diametrically opposed.

IV. CONCLUSION

The decisions of the Supreme Court of Arkansas on the issue of statute of limitations in legal malpractice claims cannot be reconciled. Although purporting to adhere to the occurrence rule, the court has applied either the damage rule or the continuous representation doctrine in a number of cases. It is not possible to reconcile or rationalize the court's refusal to apply the continuous representation doctrine to legal malpractice issues with its simultaneous application of the continuous treatment doctrine to medical malpractice issues.

The continuous representation rule is based upon policy, fairness to clients, and other considerations more sound than those upon which the occurrence rule is based. The continuous representation doctrine prevents disruption of the attorney/client relationship, gives the lawyer opportunity to remedy his negligence or mitigate the damages which his negligence caused, and relieves the client of the obligation of constantly second guessing the lawyer. Accordingly, the Supreme Court of Arkansas should adopt and apply the continuous representation doctrine with respect to issues of legal malpractice.