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CPLR 214(6): Cause of Action for Professional Malpractice Held to Accrue No Later Than the Time of Termination of Parties' Professional Relationship

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a concomitant of the tort action — the personal injury statute of limitations. Accordingly, plaintiff's action in strict products liability was upheld as timely, having been commenced within three years of the injury.[41] The action for breach of warranty, however, was dismissed on the ground that *Mendel* was still controlling authority for this action until the Court of Appeals ruled otherwise.

It is anticipated that the Court of Appeals will consider *Rivera* in the near future, and, by affirmance, solidify its adoption of strict products liability.[42] In situations similar to *Rivera*, where the sale has occurred years before, or *Codling*, where the jury finds a defect but an absence of negligence, the need is clearly demonstrated for an alternative cause of action in strict products liability. *Rivera* presents an ideal opportunity for the Court of Appeals to lend much-needed clarity to this area of the law.

CPLR 214(6): Cause of action for professional malpractice held to accrue no later than the time of termination of parties' professional relationship.

Generally, a cause of action for malpractice accrues at the time of the wrongful acts or omissions of the professional.[43] Applying this rule, the Appellate Division, Second Department, in *Sosnow v. Paul*,[44] dismissed a complaint for malpractice filed against two architects after the three-year statute of limitations set forth in CPLR 214(6) had expired. The dismissal resulted despite the apparent inability of the nonprofessional plaintiff to discover the negligence until the action was time-barred.

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41 Two judges dissented on the ground that *Codling* had not established a new cause of action for strict liability and thus, they felt, *Mendel* was directly applicable. 44 App. Div. 2d at 326-29, 354 N.Y.S.2d at 664-67.

42 Chief Judge Breitel, as evidenced by his dissent in *Mendel*, 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495, has long been an advocate of the recognition of strict products liability in tort.

43 *See, e.g.*, Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963); Gilbert Properties, Inc. v. Millstein, 40 App. Div. 2d 100, 338 N.Y.S.2d 370 (1st Dep't 1972); Seger v. Cornwell, 44 Misc. 2d 994, 255 N.Y.S.2d 744 (Sup. Ct. Albany County 1964).

Two exceptions to this rule exist. Where the negligence charged involves the leaving of a foreign object in the body of a patient by a physician, the action does not accrue until the patient could reasonably have discovered the injury. *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 508 (1971). In addition, Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962), established the continuous treatment doctrine, whereby the accrual of a malpractice cause of action is delayed until the services of the physician for the same or related injuries terminate. *Accord*, O'Laughlin v. Salamanca Hosp. Dist. Authority, 36 App. Div. 2d 51, 319 N.Y.S.2d 128 (4th Dep't 1971).

44 43 App. Div. 2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974).

The defendants in *Sosnow* were retained to supply architectural services for the construction of several apartment buildings. The buildings, completed in April 1965, were constructed in accordance with plans supplied by the defendants. Subsequently, all the buildings began to exhibit structural stress, including cracking and bulging of extensive areas of exterior masonry. In an action commenced in September 1971, plaintiffs alleged that the defendants' negligent failure to provide in their specifications for expansion and control joints throughout the building had caused the deterioration of the masonry. The Supreme Court, Nassau County, upheld the plaintiffs' contention that the cause of action did not accrue until the malpractice was discovered.[45] Adhering strictly to precedent, the Second Department, in a memorandum opinion, reversed and dismissed the complaint, reasoning that the cause of action accrued, and the statute of limitations began to run, on the date of the completion of the defendants' performance, thereby barring this action.[46]

The plaintiffs relied principally upon *Flanagan v. Mount Eden General Hospital*,[47] wherein the Court of Appeals held that in a medical malpractice action in which the negligence charged was the leaving of a foreign object in a patient's body, the statute of limitations did not begin to run until the patient could reasonably have discovered the malpractice.[48] The *Flanagan* holding, however, has been largely limited to foreign object cases.[49] As a result, the majority in *Sosnow* declined to extend the application of the rule to architectural malpractice suits.[50]

In their memorandum of dissent, Justices Benjamin and Munder argued that a cause of action for negligence only arises when the negligent act creates damage or injury to the plaintiff. Accordingly, the dissenters concluded that the malpractice action accrued, and the

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45 *Id.* at 978, 352 N.Y.S.2d at 503.

46 *Id.*

47 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 508 (1971).

48 *See* note 43 *supra*.

49 *See* Schiffman v. Hosp. for Joint Diseases, 36 App. Div. 2d 31, 319 N.Y.S.2d 674 (2d Dep't 1971).

50 The *Flanagan* discovery rule, although initially strictly limited to foreign object cases, has been liberalized. For example, in Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 507 (1971), the *Flanagan* rule was extended to a malpractice action for the breaking of a prosthetic device placed in the plaintiff's hip four years earlier. The discovery rule has also been applied to an injury caused to the plaintiff's pancreas during an operation for the removal of his spleen and discovered four years later. Dobbins v. Clifford, 39 App. Div. 2d 1, 330 N.Y.S.2d 743 (4th Dep't 1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 153 (1972).

statute of limitations began to run, when the damage to the buildings occurred, rather than upon the completion of the defendants' services.[51]

To hold as did the *Sosnow* majority, that a cause of action accrues, and the statute of limitations begins to run, no later than the termination of the parties' professional relationship, penalizes the layman for his lack of expertise. The dissent offers the more realistic alternative of focusing upon the time at which actual damage or injury occurs. Until that point, the lay client should be entitled to rely upon the competence of the professional.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302(b): Court retains personal jurisdiction over non-resident defendants in matrimonial actions.

Effective June 7, 1974, the Legislature has renumbered the previous subdivision (b) of CPLR 302 to become subdivision (c), and has inserted a new subdivision (b).[52] This new subdivision allows the court to maintain personal jurisdiction, in matrimonial actions or family court proceedings involving support or alimony, over non-resident or non-domiciliary defendants.[53] In order to exercise personal jurisdiction in such situations, the following conditions must be satisfied: (1) the party who is seeking support must be a domiciliary or resident of New York when the request is made; and (2) New York must have been the parties' matrimonial domicile before their separation, or the plaintiff must have been abandoned by the defendant in New York, or the defendant's obligation to pay support or alimony must have accrued under either the law of New York or an agreement executed in New York.[54]

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[51] The dissenters relied in part upon Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936), wherein Judge Lehman observed:

> It is only the *injury* to person or property arising from negligence which constitutes an invasion of a personal right, protected by law, and, therefore, an actionable wrong. . . . Through lack of care a person may set in motion forces which touch the person or property of another only after a long interval of time . . . and then only through new, fortuitous conditions. There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury.

In 1962, the Law Revision Commission recommended legislation that would have postponed the time of accrual for a malpractice action until the discovery by the plaintiff of the facts constituting the malpractice. *See* N.Y. SESS. LAWS [1962] 3392-93 (McKinney); 1 WK&M ¶ 214.21. Prior to this, a committee of the Association of the Bar of the City of New York had suggested the adoption of a discovery accrual rule for medical malpractice actions. *See* 13 RECORD OF N.Y.C.B.A. 465-66 (1958). In neither instance did the Legislature adopt the recommendations.

[52] N.Y. SESS. LAWS [1974], ch. 859, § 1 (McKinney).

[53] *Id.*

[54] *Id.*