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Do You Need Will Insurance - Let the Testator Beware - Hargett v. Holland

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NOTE

Do You Need "Will Insurance?" Let the Testator Beware - *Hargett v. Holland*.

INTRODUCTION

On July 20, 1993, the North Carolina Court of Appeals rendered its decision in *Hargett v. Holland*,¹ holding that the statute of limitations and the statute of repose for negligent drafting of a will do not begin to run until the date of the testator's death.² On appeal, the North Carolina Supreme Court on September 9, 1994, dealt a resounding blow to that opinion in holding that, absent an ongoing attorney-client relationship between the testator and the attorney-defendant with regard to the will, the four-year professional malpractice statute of repose bars the claim of the intended beneficiaries.³

Concededly, both the holding of the court of appeals and the holding of the supreme court in this case have elements of injustice - the former holding as to the attorney-practitioner and the latter as to the intended beneficiaries. While the court of appeals appeared to establish a precedent with wide-sweeping and potentially devastating ramifications to the practice of estate and probate law, the supreme court appears, in practicality, to have dealt a death blow to the malpractice claims of injured intended beneficiaries under a will absent the fortuity of the death of the testator within four years of the execution of the will. An analysis of the present status of our case law and the applicable professional malpractice statute,⁴ however, reveals that such a result was inescapable. The disparate positions of the two courts are indicative of the struggle to adapt factual settings involved in legal malpractice situations to a statute primarily enacted to address issues and factual situations presented in medical malpractice actions.⁵

While at first reading the opinion of the supreme court appears a very straightforward result, upon further scrutiny it becomes an opinion fraught with unanswered questions and wide-sweeping implications in the area of legal malpractice. Though not specifically stated

1. 111 N.C. App. 200, 431 S.E.2d 784 (1993), *rev'd*, 337 N.C. 651, 447 S.E.2d 784 (1994).

2. *Id.* at 205, 431 S.E.2d at 787.

3. *Hargett v. Holland*, 337 N.C. 651, 652-53, 447 S.E.2d 784, 786 (1994).

4. N. C. GEN. STAT. § 1-15(c) (1983). *See infra* note 29 for the text of the statute.

5. *See infra* text accompanying notes 39-50.

by either the court of appeals or the supreme court, this case appears to be one of first impression for the appellate courts of our state. Not only is it the first case to reach the appellate courts involving negligent drafting of a will, it is, more significantly, the first case to reach the appellate courts involving legal malpractice where the plaintiff in the action was not the client of the attorney-defendant. This is significant in two respects: (1) it highlights the uncomfortable fit that results from an effort to apply the factual situation created by this action to the express language and purpose of North Carolina General Statute § 1-15(c), which exclusively governs the statutes of limitation and repose applicable to legal malpractice actions (as well as those professional malpractice claims not specifically dealt with in other statutes); and (2) it fails to definitively address the question of the status of a third party to the attorney-client relationship in a legal malpractice action.

This note explores the *Hargett* decisions, the history and evolution of N.C. Gen. Stat. § 1-15(c), the confusion in the case law, and the tension between the clear language of the statute and its judicial interpretation in legal malpractice situations. The note will conclude that the time has arrived for a legislative reexamination of the statute.

STATEMENT OF THE CASE

In 1978, Vann W. Hargett ("Hargett"), the father of the plaintiffs, contracted with the defendant, Robert Holland ("Holland"), an attorney practicing in North Carolina, to prepare a will for him which would provide to his then wife, Elizabeth Hargett, a life estate in the 79.65-acre family farm, with a remainder over to the plaintiffs, the children from his first marriage. While the defendant denied that he prepared the will or supervised its execution, for purposes of deciding whether the claim was barred by the professional malpractice statute of limitations, the parties stipulated that the court might treat the will as having been prepared by the defendant on or before September 1, 1978. Sometime after executing the will, Hargett advised the plaintiffs of his testamentary disposition of the family farm. There was no indication that Hargett either revoked the will or executed any codicil prior to his death on November 7, 1988. On November 21, 1988, the plaintiffs learned that Elizabeth Hargett claimed that under the will she was entitled not only to the life estate in the family farm, but also the remainder interest should she survive Hargett by more than six months. The plaintiffs alleged that on several occasions thereafter, Holland assured them that the will had been prepared in accordance

with Hargett's intentions.⁶ A declaratory judgment action was initiated which was resolved in an unpublished opinion by the court of appeals.⁷ That decision resulted in Elizabeth Hargett taking a life estate in the farm; however, the remainder interest was to be shared among the plaintiffs and two children of Elizabeth Hargett by a former marriage.

The plaintiffs initiated an action against Holland on November 6, 1991, less than three years after the death of Hargett but more than thirteen years after the drafting and execution of the will. They alleged that Holland negligently drafted Hargett's will and that they were damaged to the extent that they did not receive all of the remainder interest in the family farm. Holland moved to dismiss the action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and the trial court granted his motion on the ground that the statute of limitations had expired prior to commencement of the action.⁸

The plaintiffs appealed to the North Carolina Court of Appeals, and in its July 20, 1993, decision, the court of appeals reversed the order of the trial court and remanded the case for trial.⁹ The court of appeals explained that the sole issue to be determined on appeal was whether the trial court erred in holding that the statute of limitations and the statute of repose as set forth at N.C. Gen. Stat. § 1-15(c) began to run as to the plaintiffs-beneficiaries on September 1, 1978, the date of the execution of the will.¹⁰ The court acknowledged the applicable statutory language,¹¹ but it then went on to hold that based upon the holdings of the supreme court in *Pierson v. Buyher*¹² and the court of appeals in *Snipes v. Jackson*,¹³ a cause of action in favor of a benefi-

6. Hargett v. Holland, 337 N.C. 651, 653-54, 447 S.E.2d 784, 786-87 (1994).

7. Hargett v. Hargett, 101 N.C. App. 574, 400 S.E.2d 780 (1992).

8. Hargett, 337 N.C. at 654, 447 S.E.2d at 787.

9. 111 N.C. App. at 205, 431 S.E.2d at 787.

10. *Id.* at 201, 431 S.E.2d at 785.

11. *Id.* at 202, 431 S.E.2d at 785. See *infra* note 29 for the text of N.C. Gen. Stat. § 1-15(c).

12. 330 N.C. 182, 409 S.E.2d 903 (1991). In that case, the court held that the three-year statute of limitations did not begin to run against an insurance agent for negligence until the death of the decedent and actual harm to the beneficiaries of the insurance policy occurred, even if the death and resulting harm occurred more than three years following the date of issuance of the policy. *Id.* at 186-87, 409 S.E.2d at 906. However, the court held that the court of appeals erred in analogizing the case to professional malpractice and expressly disavowed the discussion by the court of appeals of professional malpractice and N.C. Gen. Stat. § 1-15(c) as they related to the facts in *Pierson*. *Id.* at 184-85, 409 S.E.2d at 905.

13. 69 N.C. App. 64, 316 S.E.2d 657 (1984). The court held that the statute of limitations in § 1-15(c) did not begin to run against an attorney who rendered negligent tax advice to his client until the client was assessed by the Internal Revenue Service. *Id.* at 71, 316 S.E.2d at 661. This case, however, is an excellent example of the tension created by applying § 1-15(c) to a legal malpractice situation. The court in *Snipes* expressly stated in its opinion that the statute of limitations set out in § 1-15(c) begins to run at the time of the last negligent act or breach of some duty by the attorney and not the time actual damage is discovered or fully ascertained; however,

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ary of a will does not accrue until the testator's death, and that the statute of limitations did not begin to run until that time.¹⁴ In finding that the statute of repose likewise did not begin to run until the death of the testator, the court noted that it had previously held in *Sunbow Indus., Inc. v. London*¹⁵ that an attorney had a continuing duty to the client to prepare and file appropriate documents to perfect his client's security interest in collateral. The court of appeals found a similar "continuing duty" applicable to the present case.¹⁶ The court held Holland had breached his duty to the testator, since he could have corrected the error in the will at any time before the testator's death pursuant to his "continuing duty" to prepare a will on behalf of the testator that disposed of the testator's assets in accordance with his wishes, but failed to do so. Furthermore, any injury to the plaintiffs occurred at the testator's death.¹⁷ The court reasoned, therefore, that the statute of repose began to run at the testator's death and that the action by the beneficiaries was appropriately initiated within the four-year statute of repose as set forth in N.C. Gen. Stat. § 1-15(c).¹⁸

On discretionary review, the supreme court expressed the issue solely as whether the § 1-15(c) four-year statute of repose bars a claim of professional malpractice against an attorney when the claim is filed more than thirteen years after the attorney prepared the will and supervised its execution.¹⁹ Therefore, the court focused its opinion on the applicable malpractice statute of repose, studiously avoiding the discussion by the court of appeals as to when the statute of limitations had accrued or would expire. The court held that a contract to prepare and supervise the execution of a will delineated the attorney's duty to his client, and that such an arrangement did not impose on the attorney a continuing duty to review or correct the will or to prepare another will.²⁰ Absent some ongoing attorney-client relationship between the testator and the attorney with regard to a will from which

it then went on to engraft upon the express provisions of the statute a "tolling provision" of sorts, stating that the statute also requires that the plaintiff's loss or injury, whether apparent or hidden, be complete and have fully arisen before the statute is triggered. *Id.* This statement is in complete derogation of the express language of the statute. In what is an apparent acknowledgment by the court of the inherent inconsistencies in its opinion, it stated, "Finally we emphasize that the malpractice action against Veazey and Jackson is not directly analogous to professional negligence suits against doctors or attorneys in general. Here there is no loss or injury unless a third party, the I.R.S., decides to assess a tax deficiency." *Id.*

14. *Hargett*, 111 N.C. App. at 203, 431 S.E.2d at 786.

15. 58 N.C. App. 751, 294 S.E.2d 409, *disc. review denied*, 307 N.C. 272, 299 S.E.2d 219 (1982).

16. *Hargett*, 111 N.C. App. at 204, 431 S.E.2d at 787.

17. *Id.* at 205, 431 S.E.2d at 787.

18. *Id.*

19. 337 N.C. at 652, 447 S.E.2d at 786.

20. The court distinguished the facts of *Sunbow*, holding that the reliance of the plaintiffs and the court of appeals on that opinion was misplaced. *Id.* at 657, 447 S.E.2d at 789.

such a continuing duty might arise, no such duty exists. After Holland completed the drafting of the will and supervised its execution, he had fully performed his professional obligations and his professional duty to Hargett was at an end.²¹ Therefore, the "last act" of Holland giving rise to the claim for malpractice out of negligent drafting of Hargett's will was the supervision of the will's execution.²²

Statutes of limitations run from the time a cause of action accrues;²³ by contrast, a statute of repose creates a time limitation that generally runs from the time of the defendant's last act giving rise to the claim or from the substantial completion of services rendered by the defendant.²⁴ A statute of repose creates an additional element of the claim which must be satisfied,²⁵ and is a condition precedent to the recognition of the cause of action. If the action is not brought within that statutory period, the plaintiff "literally has no cause of action. The harm that has been done is *damnum absque injuria* — a wrong for which the law affords no redress."²⁶ The supreme court in *Hargett* held that regardless of when the plaintiffs' claim might have accrued or when they might have discovered their injury (once again side-stepping the question of when the claim, in fact, accrued), their claim could not be maintained unless it was brought within four years of the last act of the defendant giving rise to the claim.²⁷ The supreme court concluded that since Holland's last act was the supervision of the execution of the will on September 1, 1978, the plaintiff's claim brought on November 6, 1991 was barred by the four-year statute of repose contained in § 1-15(c).²⁸

21. *Id.* at 656, 447 S.E.2d at 788.

22. *Id.* at 658, 447 S.E.2d at 789.

23. It should be kept in mind that pursuant to the express language of § 1-15(c), a professional malpractice action accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." See *infra* text accompanying note 37. This is contrary to the traditional rule that the time of accrual of a cause of action "is generally recognized as the point in time when the elements necessary for a legal wrong coalesce." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985).

24. *Hargett v. Holland*, 337 N.C. at 654, 447 S.E.2d at 787 (quoting *Trustees of Rowan Tech. College v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985)). *Rowan Tech. College* involved the six-year statute of repose for damages based upon or arising out of the defective or unsafe condition of an improvement to real property now contained at N.C. Gen. Stat. § 1-50(5).

25. *Id.* (citing *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982)). *Bolick* involved the six-year statute of repose for damages arising out of alleged defects or failures in relation to products now contained at N.C. Gen. Stat. § 1-50(6).

26. *Id.* at 655, 447 S.E.2d at 787 (quoting *Boudreau v. Baughman*, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988)). *Boudreau* was also a products liability claim involving the application of the statute of repose now contained at N.C. Gen. Stat. § 1-50(6).

27. *Id.*, 447 S.E.2d at 788.

28. *Id.* at 654, 447 S.E.2d at 787.

Analysis

The holding of the court of appeals that the statutes of limitation and repose for negligent drafting of a will do not begin to run until the date of the testator's death is contrary to the plain language of N.C. Gen. Stat. § 1-15(c). That statute exclusively governs the statutes of limitations and repose applicable to legal malpractice actions and specifically states that a cause of action for malpractice arising out of the performance of or failure to perform professional services is deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action. The periods for both the statutes of limitation and repose are measured from that date.²⁹ The court of appeals, however, treated the statutes of limitations and repose in separate discussions, as though § 1-15(c) leaves open for judicial interpretation the issue of whether those periods might begin to run at different times.³⁰

The supreme court avoided that difficult issue by focusing solely on the statute of repose, holding that it runs from the last act of the defendant giving rise to the cause of action.³¹ The court found that the last act of Holland giving rise to the cause of action was his supervision of the execution of Hargett's will and that the provisions of § 1-15(c) relative to the statute of repose were triggered as of that time. Since the plaintiffs did not discover their loss until some ten years

29. N.C. GEN. STAT. § 1-15(c) (1983) provides:

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

30. See *Stallings v. Gunter*, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990) (stating that "after the North Carolina legislature amended § 1-15(c), the starting date for running of the statute of repose became *the same date* as that for accrual of the cause of action, 'the last act of the defendant giving rise to the claim.' Therefore, pursuant to § 1-15(c), *the current statute of repose cannot expire before accrual of the action.*") (emphasis added).

31. See *supra* notes 21-28 and accompanying text.

later, at the earliest, their cause of action was barred.³² The failure of the supreme court to address the statute of limitations issue leaves open the question of whether the court of appeals correctly interpreted that statute. By not squarely addressing that issue, the supreme court has lost the opportunity presented by the facts of this case to clarify the meaning of § 1-15(c) as it pertains to legal malpractice actions.

If the court was, in fact, uncomfortable with the operation of the statute of limitations in this instance, the final result could still be justified under the rationale that it is the duty of the court to enforce the statute of limitations as enacted by the General Assembly. Despite the unfortunate result in this case, depriving a plaintiff of a remedy for injurious consequences of alleged malpractice,³³ the court could have used the opportunity to raise its concern that perhaps it is time for a reexamination and reworking of the statute by our legislature. As the supreme court stated in *Bolick v. American Barmag Corp.*:

"It is for the Legislature, not for this Court, to impose, as a condition precedent to liability for personal injury, that the injury must occur within a specified time after the wrongdoing which is alleged to have been the proximate cause. . . ." That the legislature has the authority to establish a condition precedent to what originally was a common law cause of action is beyond question. "[T]he General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter."³⁴

The supreme court lost the opportunity to clarify in unequivocal terms the time when a statute of limitation begins to run in malpractice actions where the plaintiff is not the client of the attorney-defendant and where any injury to him, however slight, does not occur until a point in time after the expiration of the express statutory period provided in § 1-15(c).

It is instructive to examine the history and circumstances surrounding the enactment of § 1-15(c) and the reasons for its enactment to glean the purpose and spirit of the statute and what it sought to accomplish. Prior to 1971, the rule in North Carolina was that a cause of action for professional malpractice accrued at the time of the negli-

32. It is noteworthy that the opinion addresses the "continuing duty" issue at the end of its opinion, after it had already determined that only the statute of repose was at issue. *Hargett*, 337 N.C. at 658, 447 S.E.2d at 789.

33. See *Stanley v. Brown*, 43 N.C. App. 503, 507, 259 S.E.2d 408, 410 (1979), *disc. rev. denied*, 299 N.C. 332, 265 S.E.2d 397 (1980). See also *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957) (stating that, "It is not for us to justify the limitation period prescribed for actions such as this. . . . Suffice to say, this is a matter within the province of the General Assembly.").

34. 306 N.C. 364, 370, 293 S.E.2d 415, 419-20 (1982) (citations omitted).

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gent act, not when the damage resulted.³⁵ This can be conceptualized as an "occurrence" rule for accrual of the action (with the occurrence being the negligent act). In 1971, the General Assembly enacted N.C. Gen. Stat. § 1-15(b),³⁶ which provided that "if (1) an essential element of a claim is nonapparent bodily injury or damage to property and (2) no statute otherwise provides, the period of limitation may run from the discovery of the injury but in no event for more than ten years from the last act or omission of the defendant. By that statute, the Legislature adopted a discovery rule for the accrual of actions for professional malpractice."³⁷

On May 12, 1976, the General Assembly amended § 1-15(b) to exclude from its provisions causes of action for malpractice arising out of the performance or failure to perform professional services and added subsection (c).³⁸ The 1976 amendment significantly altered the law of limitations applicable to professional malpractice actions by changing the time of accrual of the actions from the date of discovery of injury to the date of the defendant's last act which gave rise to the action.³⁹ The amendment clearly took professional malpractice cases out of the "discovery" provisions of subsection (b) and placed them within the scope of subsection (c), where the clock starts at the time of the occurrence of the last act of the defendant giving rise to the cause of action.⁴⁰ As enacted, subsection (c) provided for a three-year period from the occurrence of the last act⁴¹ and a one-year-from-discovery

35. *Johnson v. Podger*, 43 N.C. App. 20, 23, 257 S.E.2d 684, 687 (1979).

36. 1971 N.C. Sess. Laws ch. 1157, sec. 1. Chapter 1157 was codified as N.C. GEN. STAT. § 1-15(b) which provided:

Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief. This amendment became effective on July 22, 1971, and was repealed by 1979 N.C. Sess. Laws ch. 654, sec. 3.

37. *Johnson*, 43 N.C. App. at 23, 257 S.E.2d at 687. See also *Black v. Littlejohn*, 312 N.C. 626, 630, 325 S.E.2d 469, 473.

38. 1975 N.C. Sess. Laws, 2nd Sess., ch. 977, §§ 1, 2, effective Jan. 1, 1977. The applicable portion of § 1-15(b) thereafter read: "Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance of or failure to perform professional services, having as an essential element . . ." N.C. GEN. STAT. § 1-15(b) (emphasis added). The text of subsection (c), as enacted, is set out *supra* at note 29.

39. *Flippin v. Jarrell*, 301 N.C. 108, 112, 270 S.E.2d 482, 485 (1980).

40. *Stanley v. Brown*, 43 N.C. App. 503, 506, 259 S.E.2d 408, 410 (1979), *disc. rev. denied* 299 N.C. 332, 265 S.E.2d 397 (1980).

41. See *Black v. Littlejohn*, 312 N.C. 626, 634 n.3, 325 S.E.2d 469, 475 n.3 (1985) (explaining that the case of *Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172 (1830), a case which originated in North Carolina and arose in the context of a legal malpractice action, is generally cited as authority for this rule and stands for the proposition that "regardless of when legal injury or damages arise,

period for injuries “not readily apparent” subject to a four-year period of repose commencing with the defendant’s last act giving rise to the cause of action.⁴² For medical malpractice for damages resulting from a foreign object left in the body, the statute provides for an additional one-year-from-discovery period subject to a ten-year period of repose measured from the same last act.⁴³

The statute’s legislative history reveals that it was enacted specifically in response to a perceived “medical malpractice crisis” experienced in North Carolina and many of her sister states.⁴⁴ The crisis resulted from the increasing reluctance of insurance companies to write medical malpractice insurance policies and a dramatic rise in premiums charged by companies continuing to issue policies. “The difficulty in obtaining insurance at reasonable rates forced many health care providers to curtail or completely cease to render their services. The legislative response to that crisis sought to reduce the cost of medical malpractice insurance and to insure its continued availability to the providers of health care.”⁴⁵ The Report of the North Carolina Professional Liability Insurance Study Commission analyzed the malpractice dilemma as it affected this state, and recommended lowering the outside time limit for all actions based on professional malpractice to four years and allowing within that four-year period only one year from date of discovery in which to bring an action. The legislature responded by enacting subsection (c). The clear legislative purpose was “to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims.”⁴⁶ It signified a return to the earlier “occurrence rule,” with two specific ameliorating qualifications. The adoption of an outer limit of four years from the last act of the defendant giving rise to the cause of action for non-apparent injuries and the ten-year repose for discovery of foreign objects had the effect of granting a defendant immunity to actions for malpractice after those applicable periods of time have elapsed,⁴⁷ but evidenced an attempt to avoid the obvious injustice and harshness of the “occurrence” of the last act accrual period in the three-year period of limita-

the occurrence of the negligent act by the defendant triggers accrual of the statute of limitations.”).

42. See *supra* note 29 for the text of N.C. Gen. Stat. § 1-15(c).

43. *Black*, 312 N.C. at 634, 325 S.E.2d at 475.

44. *Trustees of Rowan Tech. College v. Hammond Assoc.*, 313 N.C. 230, 236, 328 S.E.2d 274, 277-78 (1985).

45. *Roberts v. Durham Co. Hosp. Corp.*, 56 N.C. App. 533, 540-41, 289 S.E.2d 875, 879-80 (1982).

46. *Id.* at 540, 289 S.E.2d at 880.

47. *Black*, 312 N.C. at 633, 325 S.E.2d at 475.

tion.⁴⁸ Case law indicates that the adherence to the "discovery" doctrine in those two situations reflects an intent on the part of the General Assembly to preserve a plaintiff's cause of action, particularly when the defendant's wrongdoing is not known to the plaintiff at the time of the defendant's last act,⁴⁹ and was a wisely effectuated compromise to balance the needs of the malpractice victims and those of health care providers and insurers.⁵⁰ However, those provisions affect *only* the availability of statutes of repose — they do not qualify the statutorily mandated accrual of the action, which is at "occurrence."⁵¹ Although § 1-15(c) was enacted primarily to affect the medical field⁵² and does not specifically define "professional," the appellate courts have explicitly held that the section governs professional malpractice actions against attorneys.⁵³

In 1979, the General Assembly repealed § 1-15(b) and replaced it with N. C. Gen. Stat. § 1-52(16),⁵⁴ which provides for a "discovery" provision for accrual of actions for personal injury or damage to property other than those arising out of claims of professional malpractice, with a ten-year outer limit for accrual.⁵⁵ It is clear from the language of § 1-52(16) that the legislature did not intend that professional malpractice actions be subject to any accrual provisions other than those explicitly set forth in § 1-15(c). The language of that section unequivocally states that the three-year statute of limitations for legal malpractice actions runs from the last act of the defendant giving rise to the cause of action (whenever it might be asserted), qualified only by the fact that if damages are discovered or reasonably should be discovered by the claimant more than two years after the last act, then the plaintiff is entitled to a one-year extension of the statute of limitations within which to file his claim, provided it is not commenced

48. *Id.* at 634-35, 325 S.E.2d at 476.

49. *Id.* at 635-36, 325 S.E.2d at 476.

50. *Id.* at 637, 325 S.E.2d at 477.

51. *See supra* notes 23, 30.

52. *See supra* text accompanying notes 44-49.

53. *See, e.g.,* Sharp v. Teague, 113 N.C. App. 589, 592, 439 S.E.2d 792, 794, *disc. rev. allowed*, 336 N.C. 317, 445 S.E.2d 397 (1994), *rev. denied* 1995 WL 90532 (N.C., 1995); Southeastern Hosp. Supply Corp. v. Clifton & Singer, 110 N.C. App. 652, 653-54, 430 S.E.2d 470, 471 (1993), *aff'd per curiam*, 335 N.C. 764, 440 S.E.2d 275 (1994); Clodfelter v. Bates, 44 N.C. App. 107, 112, 260 S.E.2d 672, 676 (1979).

54. 1979 N.C. Sess. Laws ch. 654 sec. 3(a).

55. 1979 N.C. Sess. Laws ch. 654, sec. 3(b). *See Black*, 312 N.C. at 632 n.2, 325 S.E.2d at 474 n.2. The statute as enacted reads:

Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, *except in causes of action referred to in G. S. 1-15(c)*, shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. GEN. STAT. § 1-52(16) (emphasis added).

more than four years from the last act.⁵⁶ The supreme court in *Hargett* simply concluded that the plaintiffs' claim was barred by the statute of repose in § 1-15(c), which was triggered by the plaintiffs' discovery of their loss more than two years after the last act of defendant Holland giving rise to the claim. Based upon its reasoning on that issue and on examination of the legislative history of § 1-15(c), it should have found it equally clear that the plaintiffs' claim was also barred by the statute of limitations.

It is reasonable in light of the history and purpose of § 1-15(c) to apply the accrual date for legal malpractice actions and the applicable statutory periods to situations where the defendant-attorney provided services directly to his plaintiff-client and the claim arose out of that representation. It is at least arguable that when the plaintiff is the client of the attorney-defendant, he is injured at the time of the occurrence of the last act of the defendant giving rise to his cause of action to the extent that he paid for the negligent service, even if the entirety of his damages might not be cognizable at that time.⁵⁷ But that reasoning fails where the action involves allegations of malpractice in claims made by plaintiffs who were not represented by the defendant but were still damaged by that representation.

In *Pierson v. Buyher*,⁵⁸ the supreme court stated that it was assuming, *without deciding*, that a beneficiary of a life insurance policy can bring an action for negligent advice of an insurance agent to the purchaser of the policy.⁵⁹ That situation is closely analogous to that of the beneficiaries under the will in *Hargett*. Our appellate courts have not addressed the status of an injured third party to a professional relationship (other than the estate or next of kin in a wrongful death action) in a malpractice action arising out of that professional relationship. In holding that it is the contractual relationship between the attorney and his client that determines the extent of the attorney's duty to the client (and therefore the duration of the attorney's profes-

56. N.C. GEN. STAT. § 1-15(c).

57. See *Thorpe v. DeMent*, 69 N.C. App. 355, 360, 317 S.E.2d 692, 695, *aff'd per curiam*, 312 N.C. 488, 322 S.E.2d 777 (1984) (rejecting the argument of the plaintiffs that until a court had adjudicated a matter to their detriment, they had not suffered a "loss" arising out of the defendant-attorney's alleged malpractice. The court held that the plaintiffs' argument confuses the *fact* of loss with the *extent* of loss.). The court went on to state the following rule:

Nominal damages may be recovered in actions based on negligence. . . . The accrual of the cause of action must therefore be reckoned from the time the first injury, however slight, was sustained. . . . It is unimportant that the actual or the substantial damage does not occur until later if the whole injury results from the original tortious act. . . . [P]roof of actual damage may extend to facts that occur and grow out of injury, even up to the day of the verdict. If so, it is clear the *damage* is not the cause of action.

Id. at 360-61, 317 S.E.2d at 696 (citing *Jewell v. Price*, 264 N.C. 459, 461-62, 142 S.E.2d 1, 3 (1965)).

58. 330 N.C. 182, 409 S.E.2d 903 (1991).

59. *Id.*

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sional obligation), the supreme court in *Hargett* implicitly defined the nature of a claim by a beneficiary under a will: the beneficiary's action is derivative of the client's cause of action either as a third party beneficiary to the contract between the attorney and his client or as the victim of a tort which is derivative of the tort against the client (as occurs, for example, in a loss of consortium claim). It is well settled that an attorney who engages in the practice of law

is answerable in damages for any loss to *his client* which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.⁶⁰

This principle comports with a derivative theory of liability. Viewed in that manner, it is reasonable that a beneficiary's claim would accrue and the statute of limitations would expire at the same time that the client's action would accrue and the limitations period expire.

Conceptually, the claim of the plaintiffs in *Hargett* is more closely analogous to the types of claims brought, by third parties to the relationship of architects and their clients, which are governed by the three-year statute of limitations under N.C. Gen. Stat. § 1-52(16)⁶¹ or the accrual and repose provisions of § 1-50(5),⁶² and the claims of third parties to the initial purchase of a product for use or consumption against manufacturers for injuries arising from defects or failures in relation to the product, which are also governed by § 1-52(16) and the repose provisions of § 1-50(6).⁶³ These situations do not, however, present the same twist as those professional malpractice actions governed by § 1-15(c), since these causes of action are not statutorily deemed to accrue until "discovery."

60. *Hargett*, 111 N.C. App. at 204, 431 S.E.2d at 787 (quoting *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954)) (emphasis added).

61. See *supra* note 55.

62. N.C. GEN. STAT. § 1-50(5) (Supp. 1994) provides, in pertinent part:

a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

f. . . . For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant. However, as provided in this subdivision, no action may be brought more than six years from the later of the specific last act or omission or substantial completion.

63. N.C. GEN. STAT. § 1-50(6) (Supp. 1994) provides:

No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

The operation of the statutes of limitation and repose applicable to those causes of action often eliminate a plaintiff's potential cause of action before it accrues. This is the identical effect of the operation of § 1-15(c) as enunciated by the supreme court in *Hargett*. As cases interpreting § 1-52(16), § 1-50(5) and § 1-50(6) reflect, the "open courts" provision of our state's constitution is implicated in such situations.⁶⁴ The "open courts" clause is implicated when a state action has the effect of eliminating a cause of action recognized at common law.

In *Lamb v. Wedgewood South Corp.*,⁶⁵ the estate of a hotel guest who fell through a glass window near an elevator on the sixth floor brought a wrongful death action against the architects who designed the hotel. Because the claim was brought more than six years after the architects performed and furnished their services, and even though the claim did not accrue until the time of the accident, § 1-50(5) by its terms clearly barred the plaintiff's claim against the architects.⁶⁶ The court explained in *Lamb* that § 1-50(5), like its counterpart in other states, was designed to limit the potential liability of architects and others in the construction industry for improvements made to real property, and resulted from the movement in the late 1950's and early 1960's toward abolition of the privity requirement and the advent of "discovery" provisions in tort statutes of limitations.⁶⁷ In holding the statute was not violative of the state constitution, the court recognized that the legislature might pass a statute of repose that had a time period so short it would effectively abolish all potential claims. However, the court recognized that the six-year limitation at issue did not have that effect since empirical data shows that 93% of all claims against architects are brought within six years of the substantial completion of the construction.⁶⁸ The court in *Lamb* refrained from deciding whether the legislature may constitutionally abolish altogether a common law cause of action, either explicitly or in practical effect.⁶⁹

*Tetterton v. Long Mfg. Co.*⁷⁰ involved a wrongful death action against the manufacturer of a tobacco harvester. The initial purchase by its original owner occurred on March 7, 1975. That owner subsequently sold the harvester to plaintiff's husband on July 7, 1981. He

64. N.C. CONST. art. I, § 18 provides:

Courts shall be open. All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay.

65. 308 N.C. 419, 302 S.E.2d 868 (1983).

66. *Id.* at 429, 302 S.E.2d at 873.

67. *Id.* at 427-28, 302 S.E.2d at 873.

68. *Id.* at 444 n.7, 302 S.E.2d at 882 n.7.

69. 308 N.C. at 444, 302 S.E.2d at 882.

70. 314 N.C. 44, 332 S.E.2d 67 (1985).

was killed on July 8, 1981 while operating the harvester, and his widow brought the action on October 6, 1981.⁷¹ In holding § 1-50(6) constitutional and the claim of the widow therefore time-barred before it even accrued, the court explained that the statute had been enacted as part of a products liability act, which was the legislature's response to the upheaval in product liability law in the 1970's. The obvious intent of the legislature was to limit a manufacturer's liability after a certain period of years had elapsed from the date of initial purchase for use or consumption⁷² and was "generally intended to shield . . . manufacturers . . . from 'open-ended' liability created by allowing claims for an indefinite period of time after the product was first sold and distributed."⁷³ The court recognized, as did the court in *Lamb*, that the six-year limitation at issue would not effectively abolish all potential claims, finding that empirical data shows that 97% of product-related accidents occur within six years of the time the product is purchased and nationwide data shows that most claims are filed before that six-year period expires.⁷⁴

The results of negligent medical treatment are generally apparent shortly after the services are performed; a four year statute of repose is unlikely to effectively abolish a cause of action. Section 1-15(c) has been deemed constitutional in the context of a medical malpractice claim on the ground that it is rationally related to the purposes of attempting to preserve medical treatment and controlling malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims.⁷⁵

The availability of legal services and the cost of legal malpractice insurance are similarly valid interests. The negligent drafting of a will, however, is generally not apparent to the testator shortly after a will is drafted; the testator would not execute a will if he realized it did not dispose of his estate according to his wishes. Furthermore, the testator's intended beneficiaries do not have a cause of action until the testator dies. Therefore, unless the testator dies within the period of the applicable statute of repose, the beneficiaries are completely deprived of a remedy. It would be of significant interest to assemble empirical data showing the time within which most actions for negligent drafting of wills are brought to determine whether § 1-15(c) effectively abolishes all potential claims against attorneys for damages sustained by beneficiaries from wills negligently drafted or executed.

71. *Id.* at 49, 332 S.E.2d at 70.

72. *Id.* at 55-56, 332 S.E.2d at 73-74.

73. *Id.* at 54, 332 S.E.2d at 73.

74. *Id.*

75. *Roberts v. Durham Co. Hosp. Corp.*, 56 N.C. App. 533, 541, 289 S.E.2d 875, 880 (1982).

CONCLUSION

The ultimate effect of the supreme court holding in *Hargett* is that the statute of repose for a claim by an intended beneficiary against an attorney for damages sustained due to negligent drafting and/or execution of a will expires four years after the will is executed. The beneficiary's claim will expire even though it may not have "accrued" for purposes of the statute of limitations, unless the testator has contracted with the attorney to periodically review or correct the prepared will or to draft another will. It is time for the legislature to address § 1-15(c) in light of the effect of the *Hargett* holding. The legislature should collect and analyze empirical data on the filing of similar malpractice actions and effect a more reasonable balance between the interest of the attorney (and his malpractice insurance carrier) in being free from exposure to malpractice actions years and potentially decades after the attorney's last contact with his client, and preserving an intended beneficiary's cause of action for malpractice for some reasonable period of time within which it might normally be expected to accrue under traditional rules. Perhaps in some future action the operation of the statute in this context may be deemed an unconstitutional violation of the "open courts" provision of the North Carolina constitution. Unless or until those events occur, *Hargett* is the status of the law.

The only way a testator or his intended beneficiaries may preserve any potential claims for malpractice arising out the negligent drafting or execution of a will is for the testator to contract with the attorney to review, revise and/or redraft the will at least every three years after the will's initial execution. That interval would leave an additional year, should the testator die at the end of any incremental review, to determine whether the will effectuates the intent of the testator and whether a beneficiary will be injured by its failure to do so. While that would, of course, result in some additional expense to a testator, it can be considered "will insurance" - the way in which a testator can assure himself that if his testamentary intent is thwarted by the negligence of his attorney, his intended beneficiaries will have some recourse to ultimately place themselves in the equivalent economic position he intended. **LET THE TESTATOR BEWARE!**

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