Significant Medical and Legal Negligence Cases and Developments during the Past Year—A Review and Some Observations

By Francis V. Cristiano

Introduction

For reasons likely not unrelated to the continuing effect of unadjusted statutory caps and other limitations on recovery, this past year was not an active one in terms of medical malpractice litigation or, at least, reported appeals of medical malpractice cases. There was, however, one significant medical malpractice case decided by the Supreme Court. As well, there were two significant cases dealing with legal malpractice - one by the Supreme Court and the other by the court of appeals.

Medical Malpractice

Supreme Court Decision

P.W. v. Children's Hosp. Colo.

Comparative Fault Contentions in Suicide Cases:

Suicide or attempted suicide cases have not been particularly attractive cases for plaintiffs' counsel. Among other reasons, a very problematic reality in these cases is that the defense will inevitably confront the plaintiff with a contention of comparative fault of the victim, despite the fact that the physician or health care provider might very well have agreed to take reasonable precautions to prevent that very thing.

In recent years, the case most often cited with respect to the comparative fault of the decedent is *Sheron v. Lutheran Medical Center*.[1] In *Sheron*, the decedent was discharged from a mental health facility after a mental health provider had concluded that he was not "imminently dangerous" to himself or to others. The following day, however, Sheron, committed suicide. Sheron's survivors contended that the mental health provider was negligent in coming to the conclusions it did that led to Sheron's discharge and ensuing suicide. The matter went to trial. Although the jury rendered a verdict in favor of the plaintiff, the judgement was reduced by 30% based upon the jury's findings that Sheron's negligence constituted 30% of the total negligence. Of significance, however, was that the jury did not identify the negligence of the decedent as the act of suicide itself, but instead was with regard to contentions that the decedent "was not completely truthful or forthcoming in his statements to [the health care professionals] about his … intentions." Also, defendants presented evidence that he "failed to keep a follow up mental health appointment the next day, deciding instead to play softball."[2]

What that all lead up to, however, was the court of appeals describing a much broader rule that "we [are not] persuaded by plaintiff's argument that comparative negligence principles should not apply in wrongful death suicide cases in which it is alleged that health care providers failed to prevent the suicide."[3] The court as well quoted language from an out of state case[4] that "contributory negligence of a mentally disturbed person is a question of fact unless the evidence discloses that the person whose actions are being judged is so mentally ill that he is incapable of being negligent."[5] Thus, whether well-founded or not, a viable argument existed that any comparative fault by the decedent, including the decision to commit suicide itself, could be considered by the trier of fact and conclusions concerning such could be utilized to reduce or eliminate any recovery by the survivors. This obviously had a chilling effect on this type of litigation.

K.W. v. Children's Hosp. Colo. (In re K.W.)[6], however, has overruled contentions by healthcare providers who assumed heightened duties of suicide prevention, to later contend comparative fault for actions taken by suicide victims, when the defendants' assumed duties were designed to prevent such and they failed to abide by them.

K.W. involved noteworthy facts. K.W. was a 16-year-old boy. He had repeatedly manifested well-defined suicidal ideation. He was admitted to Children's Hospital, and based upon its assessment was placed on a protocol of "high suicidal precautions"—specifically with regard to K.W.'s suicide ideation by "hanging and cutting self."[7] The hospital's "high suicide precautions" required that the patient "be in sight at all times except when using the bathroom during which time 'staff should stand just outside the door and communicate with patient at least every 30 seconds.'" The policy also stated that "the patient should be checked every fifteen minutes."[8]

Notwithstanding this, the hospital staff allowed K.W. into the bathroom at approximately 9:55 p.m., and at 10:15 p.m., a hospital employee discovered that during the time K.W. had been unattended in the bathroom he had hanged himself with his scrub pants. When the employee discovered him, K.W. was unconscious, pulseless to the touch and not breathing. The hospital was ultimately able to revive him, but not until after he had been pulseless for approximately 20 minutes. K.W. was ultimately diagnosed with severe and permanent anoxic brain injury.

K.W.'s father, P.W., sued the hospital both individually and on behalf of K.W. The hospital asserted affirmative defenses of comparative negligence and assumption of risk and K.W. moved to dismiss the defenses. The trial court granted plaintiff's motion and held that the hospital assumed a duty to prevent K.W. from engaging in self-harm, and thus could not complain that K.W. had taken actions that the hospital's invoked protocols, if followed, would have prevented.

The issues of the case were presented on appeal to the Supreme Court based upon a C.A.R. 21 petition. In this regard, the hospital's contentions went beyond the type of allegations of comparative fault in *Sheron*, where they were directed merely at the victim's lack of candidness in his interviews as well as his failure to follow up with regard to scheduled appointments. Instead, in *K.W.* the alleged comparative fault was directed to the victim's efforts to kill himself.

In an opinion written by Justice Rice, the Supreme Court agreed with the plaintiff and the trial court that comparative fault arguments were not available to the hospital because the hospital had assumed the duty to invoke and maintain heightened precautions to prevent the suicide. Thus, the hospital had allegedly failed to abide by the duty it assumed and thereby caused the suicide attempt. It could not thereby complain of actions taken by the person sought to be protected doing the very things that its precautions were designed to prevent. Thus, the court reasoned that although individuals have a general duty to act with ordinary care to protect themselves, if a hospital agrees to assume that duty itself and protect the individual from that risk, there properly can be no comparative fault assessment, inasmuch as comparative fault only applies to risks and duties not assumed by the defendant. Hence, as stated by the court, "[i]f the duty undertaken by the defendant and the harm to the plaintiff precisely match—in that the purpose of the undertaking was to prevent the harm—then it would be improper to allow the defendant to use the occurrence of that type of harm as a defense, 'since that was the very thing that he was obliged to prevent.'"[9]

The Supreme Court, however, was careful to note the limitation of its findings as follows:

> We also caution that our holding is limited by the factual situation presented here. It is undisputed that the Hospital had knowledge of K.W.'s suicidality and his recent suicide attempts. With this knowledge, the Hospital admitted K.W. to its secure mental health unit and placed him under "high suicide precautions" for the purpose of preventing him from attempting to commit suicide. The same day he was admitted, while in the Hospital's exclusive custody, K.W. hung himself with material that was in his room and suffered a devastating brain injury. Under these circumstances, the Hospital assumed the duty to prevent just such an injury, and it cannot assert K.W.'s fault as a defense.[10]

Regardless, *K.W.* seems to be a significant decision that affects malpractice cases involving suicide or attempted suicide, as well a defined position by the Colorado Supreme Court clearly embracing Section 323 of the *Restatement (Second) of Torts*, regarding the "negligent performance of an undertaking to render services." It seems, as well, that although *K.W.* involved the application of § 13-21-111 regarding comparative fault, it is no stretch to reason that the analysis applies with equal force to non-party at fault designations pursuant to C.R.S. § 13-21-111.5. Thus, any professional in a malpractice action should not be entitled to claim proportionate fault that would lessen or eliminate his or her liability with regard to the consequences of acts by the plaintiff or any other party, against whose acts he or she has specifically agreed or assumed the duty to protect the plaintiff from.

Legal Malpractice

Supreme Court Decision

Baker v. Wood, Ris & Hames, P.C.

> The Supreme Court Adopts a Bright Line "Strict Privity" Standard in Legal Malpractice Cases Regarding Duty and Dispels the Notion that Duties Might Likely Be Extended Beyond Such Consistent with National Trends:

On February 3, 2014, the Supreme Court accepted certiorari review in *Baker v. Wood, Ris & Hames, PC*.[11] *Baker* involved the issue of whether a duty in a legal malpractice setting would extend from an attorney to individuals not in privity of contract with the attorneys, or more specifically from an attorney to beneficiaries of an estate plan.

The extent of an attorney's duties to individuals not in privity of contract with attorneys had received increased attention in the State of Colorado, although for various reasons it remained a largely undecided area of law. It had, however, received much more definition on a national level, with the modern

trend seeming to embrace the recognition of attorney-client duties in selected areas not restricted by privity.[12] At the forefront was the issue of the recognition of duties to non-client beneficiaries of wills and trusts.[13] As one commentator noted, "only a few American jurisdictions have refused to find a duty of care to an intended beneficiary or injured heir."[14] *Baker* involved such a case.

Previously, in *Allen v. Steele*,[15] although the Supreme Court had addressed the issue of whether Section 522 of the *Restatement (Second) of Torts* involving allegation of negligent misrepresentation in a business transaction would apply, it left open the question of whether a professional duty existed between a prospective client and an attorney. In particular, it left open the question of the applicability of Section 15 of the *Restatement (Third) of the Law Governing Lawyers*, which states in pertinent part:

> (1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must. . .
>
> (c) use reasonable care to the extent the lawyer provides the person legal services.

On a national level, a more expansive and balancing approach that does not require privity originally started to take hold almost sixty years ago. The California Supreme Court broke ground in a 1958 decision, *Biankaja v. Irving*,[16] which eliminated strict privity as a requirement in a claim against a notary public. It instead set forth a six-prong test to determine the existence of a duty. *Lucas v. Hamm,*[17] followed this with the analysis thereupon applying to attorneys, and the resultant *Biankaja/Lucas* standard, fully applicable to attorneys, described as follows:

> A defendant's liability to a third person not in privity in a particular case "is a matter of policy and involves the balancing of various factors, among which are: [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm."[18]

The *Restatement (Third) of the Law Governing Lawyers*, §51, thereafter rejected a strict privity rule as well, and instead adopted, a modified balancing test, imposing a "duty to use care."

> (3) To a non-client when and to the extent that:
>
> (a) The lawyer has reason to know that the client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client; and

> (b) Such a duty would not significantly impair the lawyer's performance of obligations to the client; and
>
> (c) The absence of such a duty would make enforcement of those obligations unlikely.[19]

More restrictive approaches not requiring privity typically involved a third-party beneficiary analysis,[20] which the Supreme Court in *Baker v. Wood, Ris Hames, P.C.* referred to as the "Florida-Iowa Rule."

The case presented to the Colorado Supreme Court, i.e., *Baker v. Wood, Ris Hames, P.C.*,[21] involved contentions by the beneficiaries of an estate that the attorneys who drafted the will and testamentary trust affecting their interests were negligent and thereby frustrated the testator's intent, which in turn caused significant losses to the beneficiaries upon the testator's death. The district court dismissed the case for lack of duty and the court of appeals affirmed it in an unpublished decision.[22] The Supreme Court, however, granted certiorari review. Anyone looking forward to the Supreme Court adopting a flexible rule not confined by principles of strict privity, however, was disappointed. In a unanimous decision, the Supreme Court pronounced its rule as follows:

> We decline to abandon the strict privity rule, and we reaffirm that where non-clients like Baker and Kunda are concerned, an attorney's liability is generally limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation.[23]

In the decision, written by Justice Gabriel, the court gave four policy reasons, which in its mind were "sound policy reasons justifying this limitation on attorney liability,"[24] as follows:

First, it noted, "limiting an attorney's liability to his or her clients protects the attorney's duty of loyalty to and effective advocacy for the client."[25] In this respect, the court stated that a strict privity rule supports the notion that an attorney must direct his or her full attention to the needs of the client. Any other rule might result in "an attorney's preoccupation or concern with potential negligence claims by third parties … [and thus] a diminution in the quality of the legal services received by the client as the attorney might weigh the client's interests against the attorney's fear of liability to a third party."[26]

Second (which seems to be closely related to the first), the court noted that "expanding attorney liability to non-clients could result in adversarial relationships between an attorney and third parties and thus give rise to conflicting duties on the part of the attorney.[27] The court noted as well, that "allowing a nonclient beneficiary [of an estate] to maintain a cause of action against an attorney for professional malpractice may require the attorney to reveal confidences the testator would never want revealed."[28]

Third, the court commented on the scope of duties that a non-strict privity rule would create, which in its mind would be much too extensive. As stated by the court, "[I]f an attorney's duty of care were extended to third parties, then the attorney could be liable to an unforeseeable and unlimited number of people," and thus push the scope of an attorney's duties to an "impracticable extreme."[29] This, in the court's mind "could deter attorneys from undertaking certain legal matters, thus compromising the interests of potential clients by making it more difficult for them to obtain legal services."[30]

Finally, the court noted that extending an attorney's duty to beneficiaries of an estate might "cast doubt on the testator's intentions long after the testator is deceased and unavailable to speak for himself or herself."[31] This would undermine the "cardinal rule" that "the testator's intent should be ascertained from the instrument itself and given effect."[32] The court noted as well, that "[a]llowing disappointed beneficiaries to question a deceased testator's intentions would also contradict the policy underlying Colorado's dead man's statute, §13-90-102, C.R.S.," which seeks "to guard against perjury by living interested witnesses when deceased persons cannot refute the testimony, thus protecting estates against unjust claims."[33]

With regard to the plaintiffs' argument that it should adopt what they referred to as the "California Test," or the *Biankaja/Lucas* analysis described above, the Supreme Court not only rejected the rule in this jurisdiction, but went to the trouble of emphasizing that even if such a rule had been in place, plaintiffs' claim still would not have qualified as one where a duty was owed. Among other things, the court noted that the cases underlying the California Test "involved situations in which a beneficiary did not receive what the testator expressly intended because of the attorney's poor draftsmanship or failure to follow through to achieve the testator's desired result."[34] Having said all that, however, and to make itself perfectly clear, the court again reiterated that "an attorney's liability to a non-client is limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious tort or tortious act, including negligent misrepresentation."[35]

The court also addressed what it referred to as the "Florida-Iowa Rule," regarding a third party beneficiary approach, which the court rejected as well.[36] It noted, again that even if that had been the rule, it would not have saved plaintiffs' contentions in the present case.

For whatever reason, the approach taken by the *Restatement (Third) of*

the Law Governing Lawyers, §51, as described above, was not taken into account. Nor did the court address §15 of the *Restatement*, dealing with the duties of an attorney to **prospective clients**, which it had referenced in *Allen* and seemingly reserved ruling on.

One can only interpret the rule of *Baker* as a "bright line" type approach, where lawyers not in privity of contract with individuals have no legal duty to them other than, in the court's words, "the narrow set of circumstances in which the attorney has committed fraud or a malicious tort or tortious act, including negligent misrepresentation."[37] For better or worse, this type of approach seems to be the law in Colorado now and well into the foreseeable future. The only possible exception might be the viability of Section 15 of the *Restatement (Third) of the Law Governing Lawyers*, with regard to the duties of attorneys to prospective clients, which did not seem to be addressed one way or the other in *Baker*. As set forth in *Baker*, as well, the strict privity rule does not apply to fraud, malicious torts, or a claim for negligent misrepresentation in a business transaction.

Court of Appeals Decision

Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC

> Knowledge of a Legal Wrong is Necessary to Start the Running of the Statute of Limitations, A Case within a Case Analysis Is Not the Exclusive Measure for Damages in Legal Malpractice Cases, and Proximate Cause Limitation for Recoverable Damages

Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC[38] is an informative, well written, and important case concerning legal malpractice, which dispels the notion that a "case within a case" analysis is the exclusive measure of damages in legal malpractice cases, as well as describes and defines the proper proximate cause analysis regarding recoverable damages. It is recommended reading for anyone who practices in this area.

The facts in the case were with regard to a developer, Boulders at Escalante LLC ("the developer"), which was a real estate development company formed to develop townhouses on a lot owned by one of the companies' principals in a subdivision in Durango. The developer hired the defendant, Otten Johnson Robinson Neff & Ragonetti PC ("the law firm") to represent it in a lawsuit the general contractor filed against it to foreclose the contractor's mechanic's lien. The law firm filed several compulsory counterclaims against the contractor for breach of contract and negligence. The developer was concerned, however, that the contractor would be unable to pay a judgment if the developer succeeded in the counterclaim, and it asked the law firm to review the insurance policies to ensure that coverage would be available. The law firm ultimately advised the developer that there was $2 to $4 million of coverage available under the policies to pay such a judgment.

In April 2009, however, after the law firm withdrew from the lawsuit and the developer retained new representation, the developer learned for the first time that the insurance policies contained a "cross-liability exclusion," which precluded coverage. Given this new revelation, the developer contended that it was thereupon compelled to enter into a settlement agreement with the contractor under which both parties agreed to dismiss the claims against the other with prejudice, without payment by either party. Its only other alternative it contended was to continue to pursue a winnable but very expensive lawsuit against an insolvent defendant.

Thereafter, in 2011, the developer filed an action against the law firm with respect to the advice by the law firm that contractor was covered by insurance with regard to the developer's counterclaims. Damages that the developer alleged included the legal fees and related expenses for continuing to litigate the counterclaims against the contractor, which it contended that it would not have done, but for the fact that it believed that the contractor had insurance.

Beyond that, however, the developer made a further-reaching and more significant damage claim, which was to become one of the primary focuses on appeal. The principals of the developer testified that in 2006 and early 2007, the developer had sold 20 townhomes (units) at a loss of $50,000 each. It had nine other units under contract for a price that would have also resulted in a $50,000 loss on each and eight unsold units. A new appraisal on those 17 remaining units assessed their value significantly higher than that of the contracted or previously sold units.

The developer testified as well, that because it believed that there was $2 to $4 million in insurance coverage to pay a potential judgment against the contractor, in 2007, it decided to cancel the nine existing contracts and pull all 17 remaining units off the market. They also cancelled two of the existing contracts. The developer had to buy out those contracts for $30,000 each. The principals testified that they believed that when they put the units back on the market they would sell for a price significantly higher than the either nine units that had been under contract as well as the price of the initial 20 units that already sold. This would significantly reduce the losses sustained by the developer.

However, by the time the developer put the units back on the market in 2008 the real estate market had collapsed and the developer ultimately suffered severe losses. The developer contended

that had the law firm correctly advised them in 2006 about the cross-liability exclusion they would not have made the same decisions. Rather, they would have sold the nine units under contract at the contract prices, and they would have sold the remaining eight units by the end of 2007 for whatever prices they could get. This essentially resulted in the developer sustaining a $5 million loss instead of a $1.7 million loss, which it would have sustained had the units been sold prior to the end of 2007. Thus, the developer contended that it suffered a financial loss of almost $3.2 million that it would not have sustained but for the law firm's negligent advice.

After a trial on the merits, the jury awarded significant damages, including damages for the attorneys' fees and costs incurred in pursuing the counterclaim, but also most significantly for the development losses. The trial court ultimately entered a judgment for the developer in the amount of $2,712,079.91, plus pre- and post-judgment interest. The court later ordered prejudgment interest for $1,611,459.01. It was anything but a good result for the law firm.

On appeal, the law firm contended:

1) That the plaintiff filed the matter beyond the two-year statute of limitations for negligence actions;

2) That damages had not been determined based upon a proper "case within a case" analysis; and

3) That the development losses were not a foreseeable and proximate cause of the law firm's negligence.

The court of appeals rejected the first two arguments, but agreed with the third.

The contention with regard to the statute of limitations is significant as it addresses the issue of whether knowledge by the client of a bad result is tantamount to knowledge by the client that the law firm may have been negligent. The law firm argued that the statute of limitations began to run no later than February 2009 when the developer first learned that the law firm's advice regarding insurance coverage **might** be wrong, and the client was incurring legal fees to obtain a separate opinion. The client did not obtain the second opinion, however, until April 2009 and filed the case against the law firm on April 1, 2011. In this regard, the court of appeals rejected the law firm's arguments that the statute of limitations had necessarily begun to run in February 2009. In doing such, it emphasized that per *Morrison v. Goff*[39] "legal malpractice cases accrue when the plaintiff learns 'facts that would put a reasonable person on notice of the general nature of damage **and that the damage was caused by the wrongful conduct of an attorney**.'"[40] Thus, in malpractice cases, for the statute to begin to run, the plaintiff must have knowledge not only of a bad result, but also that the professional's negligence may have caused the bad result.[41] The court of appeals concluded that given the facts, this was properly an issue for the jury. In this regard, the court of appeals emphasized that the developer had presented evidence that its principals were "shocked" when informed in April 2009 that there was no coverage. Additionally, the court noted the record did not clearly establish the developer was incurring additional legal fees before April 2009 for the purpose of ameliorating the law firm's negligent advice. The court of appeals concluded that the factual issues pertaining to the statute of limitations contention were properly decided by the jury.

The second issue was indeed significant, as well. The law firm contended at the trial court level that causation cannot be established in legal malpractice claims without the plaintiff following a "case within a case" methodology that the law firm contended would require the developer to prove that it would have succeeded on its underlying counterclaims. Both the trial court and the court of appeals, however, rejected this contention. The court of appeals noted "that not every legal malpractice case requires proof of a case within a case," and specifically approved comments to the *Restatement* that "the plaintiff in a previous civil action may recover without proving the results of a trial if the party claims damages other than loss of a judgment."[42] It noted that the law firm's argument in this regard "would lead to the absurd result that a plaintiff's ability to recover for an injury unrelated to the outcome of an underlying action would depend on the outcome of the underlying action. Moreover, it would immunize certain attorneys from the consequences of their negligence, a result that finds no support in the law."[43] As *Mallen* states, "[t]he manner in which the plaintiff can establish but for causation … depends on the nature of the attorney's error. ... Where the injury claimed does not depend on the merits of the underlying action or matter, the case-within-a-case methodology is not applicable."[44] Thus, the court of appeals concluded that:

> [W]hen the injury claimed does not depend on the merits of the underlying action or matter, the plaintiff does not need to prove a case within a case. Rather, the plaintiff must prove that the attorney's negligent acts or omissions caused him or her to suffer some financial loss or harm by applying the generally applicable test for cause in fact negligence actions: that the plaintiff would not have suffered the harm but for the attorney's negligence. See CJI-Civ. 4th 15:18 (2014); see also Restatement (Third) of Law Governing Lawyers at §53 cmt. e

("Generally applicable principles of causation and damages apply in malpractice actions out of a nonlitigated matter.").[45]

This is a clearly significant passage for anyone who practices in the area where, as the court of appeals points out, a case within a case proof may be virtually impossible to present. It emphasizes, as well, that damages flowing from a legal malpractice action are determined as in any other tort action by utilizing conventional methods of establishing proof of causation.

Other sources describe this analysis. As set forth in the text of *Restatement of the Law Governing Attorneys*, § 53, "A lawyer is liable … if the lawyer's breach of duty of care … was a legal cause of injury, as determined under generally applicable principles of causation and damages." *Mallen* states, "If the injury occurred because of negligence in handling litigation, the measure of direct damages is the difference between the amount actually recovered and the amount that should have been recovered or paid."[46]

Although not mentioned in *Boulders at Escalante*, the Colorado Supreme Court in *Gibbons v. Ludlow*,[47] also describes a similar causation analysis involving a professional negligence claim against a transactional broker, where the court described the standard of proof as follows:

> Consistent with professional malpractice cases in Colorado, we hold that to sustain a professional malpractice claim against a transactional real estate broker, a plaintiff must show that, but for the alleged negligent acts of the broker, he either: (1) would have been able to obtain a better deal in the underlying transaction; or (2) would have been better off by walking away from the underlying transaction.[48]

This type of a "better deal" or "walk away" causation analysis, not dependent upon a projected conclusion to a litigation process, is largely believed to be applicable to legal malpractice claims as well.

The law firm's third contention in *Boulders at Escalante*, i.e., the recovery of remotely related development losses, however, presented significant issues regarding proximate cause, and prompted a scholarly discussion of the lessons of *Palsgraf v. Long Island Railroad Company*[49] and the distinction between cause in fact and proximate cause.

Judge Berger's opinion in this regard is quite instructive. As he described, although cause in fact is a determination based upon a simple "but for" analysis, proximate or legal cause is subject to further limitations, including policy considerations and most significantly foreseeability. Thus, once cause in fact is established, legal cause or proximate cause must still be determined before there can be recovery. As noted by the court, "'[t]he concept of legal cause is essentially 'an attempt to spell out rules of law limiting the liability of a negligent actor.'"[50] It continued,

"foreseeability is a touchstone of proximate [or legal] cause. To establish a negligence claim, a plaintiff must prove that the damages sustained were a 'reasonably foreseeable' consequence of the defendant's negligence."[51] The court further stated, "The test for legal cause has also been described as limiting liability to those harms that result from the risks that made the actor's conduct tortious."[52] It also stated, "Damages resulting from attorney negligence can have multiple causes. However, in some cases, 'the chain of causation … may be so attenuated that no proximate cause exists as a matter of law.'"[53]

In this vein, the court of appeals concluded that although the attorneys' fees incurred by plaintiff as a result of its false impression that insurance coverage existed for the contractor were foreseeable and thus recoverable, the "Law Firm's advice regarding the insurance coverage was not the legal, or proximate, cause of the developer's [unforeseeable or attenuated] business losses…"[54] even though there was a logical connection between the two, and thus was a "cause in fact" of the negligence. ▲▲▲

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Endnotes:

[1] *Sheron v. Lutheran Med. Ctr.*, 18 P.3d 796 (Colo. App. 2000).

[2] *Id.* at 801.

[3] *Id.*

[4] *Hobart v. Shin*, 185 Ill.2d 283, 705 N.E.2d 907 (Ill. 1998).

[5] *Sheron*, 18 P.3d at 801.

[6] *K.W. v. Children's Hosp. Colo.* (In re P.W.), 2016 CO 6.

[7] *Id.* at ¶ 7.

[8] *Id.*

[9] *Id.* at ¶ 22. *See also* DAN B. DOBBS, THE LAW OF TORTS AN B. DOBBS, THE LAW OF TORTS § 200 at 500 (2000).

[10] *K.W.*, 2016 CO 6, ¶ 27.

[11] 2014 Colo. LEXIS 65; 2014 WL 351016.

[12] 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7:8 (ed. 2010).

[13] *Id.* at §34:5.

[14] 4 MALLEN, supra n. 12, § 34:5 at 3.

[15] *Allen v. Steele*, 252 P.3d 476 (Colo. 2011).

[16] *Biankaja v. Irving*, 320 P.2d 16 (1958).

[17] *Lucas v. Hamm*, 364 P.2d 685 (1961).

[18] *Biankaja*, 320 P.2d at 19.

[19] 1 MALLEN, supra n. 12 at §7:8.

[20] *E.g. Blair v. Ing*, 21 P.3d 452 (2001) and *Succession of Killingsworth*, 292 So. 2d 536 (La. 1973).

[21] *Baker v. Wood, Ris & Hames, P.C.*, 2016 CO 5.

[22] *Baker v. Wood, Ris & Hames*, PC, 2013 Colo. App. LEXIS 915 (Colo. Ct. App. June 13, 2013).

[23] *Baker*, 2016 CO 5 at ¶ 2.

[24] *Id.* at ¶ 22.

[25] *Id.* at ¶ 23.

[26] *Id., quoting Noble v. Bruce*, 709 A.2d 1264, 1270 (Md. 1998).

[27] *Id.* at ¶ 24.

[28] *Id.* at ¶ 25.

[29] *Id.* at ¶ 26.

[30] *Id.* at ¶ 27.

[31] *Id.* at ¶ 28.

[32] *Id.*

[33] *Id.*

[34] *Id.* at ¶ 33.

[35] *Id.* at ¶ 35; *see Allen*, 252 P.3d at 482.

[36] *Baker*, 2016 CO 5 at 48.

[37] *Id.* at ¶ 35.

[38] *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 COA 85.

[39] *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004).

[40] Boulders at Escalante, 2015 COA 85 at ¶ 22 (emphasis added).

[41] *See e.g. Quiroz v. Goff*, 46 P.3d 486 (Colo.App. 2002).

[42] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 53 cmt. b (2000).

[43] *Boulders at Escalante*, 2015 COA 85 at ¶ 43.

[44] 4 MALLEN, supra n. 12 §37:87.

[45] *Boulders at Escalante*, 2015 COA 85 at ¶ 49.

[46] 3 MALLEN, supra n. 12 at §21:1, p. 3.

[47] *Gibbons v. Ludlow*, 2013 CO 49.

[48] *Id.* at ¶17.

[49] *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, 101 (N.Y. 1928).

[50] *Boulders at Escalante*, ¶ 50.

[51] *Id.* at ¶ 51, (citations omitted).

[52] *Id.* at ¶ 53.

[53] *Id.* at ¶ 54, (citations omitted).

[54] *Id.* at ¶ 65