Comparative Fault in Malpractice and Professional Negligence Cases

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When a professional is engaged to perform services for a client, it is not unusual that the relationship commences with an engagement letter or retention agreement of some kind. While there are myriad reasons why this is often a prudent course of action, it is important to note that such a practice introduces an express contract into the relationship. What happens, though, when the client is later dissatisfied with the professional, and brings claims assailing the professional's performance? Can the standards of performance owed by a professional be raised or lowered by the contract, or is the professional to be judged by the familiar standard of care commensurate with other professionals in the field?

A related question is how a contract might affect whatever responsibilities a client might have in that relationship—because in virtually every professional/client relationship, there is the need for each to provide something to the relationship. Clients hiring lawyers to litigate business disputes must provide their counsel with access to the information from which the lawyer can work. An accountant must be provided accurate financial information before attesting to it in a compilation, review, or audit. Architects need accurate soil samples, and actuaries need accurate understanding of past performance of whatever they are reviewing. If there is some reciprocal obligation on the client, depending on the nature of the engagement and the relationship, how does a contract affect that?

If the client is negligent, does that negligence count against the client when the professional defends by claiming that the client shirked an obligation? Or can the client insist that suit is brought pursuant to contract, and comparative negligence has no application to contract? What if there is no distinction between the claims brought in negligence or contract—can a claim survive in contract that would otherwise have been defeated by a finding of more than 50% negligence, under Ohio's comparative negligence statute? While the answers should be easier to apprehend, an analysis of Ohio law on this point requires patient divining of basic tort and contract principles, as well as reliance on case law that needs mosaic construction.

In Ohio, we must first consider the distinction between "ordinary" and "professional" negligence. The primary distinction between these negligence-based torts pertains to the heightened duties owed by a professional when compared with the duties owed by a non-professional. A professional must act in accordance with a standard of care commensurate with other professionals in the field. *See Wheeler v. Wise*, 133 Ohio App. 3d 564, 569 (1999); *Ballreich Bros., Inc. v. Criblez*, 2010-Ohio-3263, ¶19 (Hancock County July 12, 2010) (noting the a plaintiff "must establish that the professional fell below the standard of skill and knowledge commonly possessed and utilized by members within the profession"). A non-professional, on the other hand, is held to an ordinary standard of care: the reasonably prudent person. This is why expert testimony is required in claims against professionals, but not in ordinary negligence cases.

Ohio's Comparative Fault Scheme: A Brief Overview

At common law, contributory negligence of a plaintiff precludes a negligence claim against another party where the plaintiff is even slightly at fault—subject, of course, to certain other common law exceptions that are better left to first year law school torts class. *See Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 108 (1988) ("contributory negligence . . . had been, under the common law, a complete defense to any recovery, since it constituted an intervening cause of the plaintiff's injury"). Ohio, like most states, has statutorily abrogated this doctrine.

Ohio has adopted a modified comparative negligence approach under which a claimant's contributory negligence bars recovery if the claimant's negligence is greater than

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