No. 21-7893

In The
Supreme Court of the United States

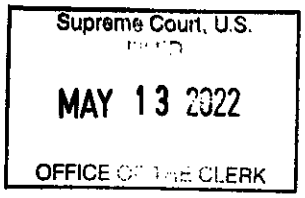
Paul Mueller,

Petitioner,

v.

Bert Parnall,

Respondent.



On Petition for a Writ of Certiorari to the New Mexico Supreme Court

PETITION FOR A WRIT OF CERTRIORARI

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QUESTIONS PRESENTED

(1) Whether my right to sue was violated in New Mexico under the 14th amend., and § 1981, after a state court denied my right to sue, when it decided to toll the statute of limitations at the time of the negligent acts, and not at the time of the "discovery" of the negligent acts, which was in direct conflict with the Court's own holdings', and the California holding that the New Mexico law was based from?

(2) Whether the statute of limitations on a legal malpractice claim, in any state, can begin before any cognizable damages occur, and whether the client/myself can be reasonably expected to know the facts of my attorney's negligence, prior to being injured when I obtained the training manual that made my claim have merit?

(3) Whether the New Mexico Court violated my civil rights under the 14th amend., and § 1981, when the court decided that both the discovery of the facts, and the injury on my malpractice claim, could not reasonably be argued as a fact issue for a jury, and decided on this issue as a matter of law, and dismissed my case?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the final judgment of New Mexico's Court of Appeals after being denied a writ of certiorari in the Supreme Court of New Mexico.

OPINIONS BELOW

To my knowledge. None of the opinions below are published.

JURISDICTION

The New Mexico Supreme Court denied my writ of certiorari on this case on February 15th, 2022, and this writ of certiorari is timely filed. The US Supreme Court has jurisdiction on any appeal from a state court of last resort, under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. VII

42 U.S.C. § 1981 (a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983

STATEMENT

On November 14th 2011, I stopped at the Allsup's gas station to purchase gas. When I left the store, a boy named James began to creep up behind me as I was walking to my car alone, and I turned to confront him. He begged me for help for a ride home, because he and his friend were left stranded in the cold when his mom's car had broken down. I refused at first, but while I was pumping gas, I saw one boy in shorts and a basketball jersey who seemed be in pain from the cold, and I changed my mind. I waited to see if someone would help but when no one did, I decided to help after being motivated by the factor of having boys of the same age.

I drove up to the boys and told them I would give them a ride. I had no idea they wanted to take me to a secluded place to rob and kill me. I took them a few miles away to a dark cul-de sac, when the first boy got out. Then the boy in the back pretended to leave when he turned to stab me. I immediately turned and smashed my head up against the door jamb to avoid what he had in his hand. He hit me with something in the shoulder when I opened the door and attempted to leave, but I was held back by my seatbelt. I used my arm to block the knife from hitting me in the chest, but realized I had to re-enter the jeep to get the seatbelt off.

I used my elbow to block the knife and re-entered the car in an attempt to get the seat belt off. The knife was pushed back on his hand by my elbow and I attempted to grab him, but I was restricted by the seatbelt. The boy got the knife back in his hand and became excited when he realized I was caught on the seatbelt, then in tomahawk fashion, he struck his knife for the face and neck. Blow after blow he inflicted as I tried to get the seatbelt off. The boy attempted to hit the side of my face that was uncovered from the hand reaching for the seatbelt. I would have to retreat from my attempt to get the seatbelt off to block the knife blows and return to the attempt.

I finally pushed him back and covered my head under my right arm and shoulder blade, then used my left hand to detach the seatbelt. I detached the seatbelt and jumped out the jeep. The jeep was in drive and rolled forward when I got up and attempted to get help. I had been stabbed 24 times and had a paralyzed right hand. When no one in a house would help, I decided to use my left hand to throw a rock through a window and gained entry to a house. I entered the house and the homeowners called the police. I was later taken to the hospital where I was treated for my wounds in the trauma center and in surgery.

After 36 hours in the hospital, I left due to my fear of the hospital. The day after that, I got a new phone for my number and I got a call from the mom of the boy who had stabbed me as she was looking for him. The boy had used my phone that was left in the car to call his mom. I called the police with the name she gave me, Rikki, and I was given a line-up. I identified the boy with the name I obtained as being my attacker. My stabbing was on the news that night, and the next day a lawyer from my judo class I participated in, called me and offered his help. I would later go to his office and not understanding the process, hired him as the attorney for all my claims.

The boy who stabbed me was arrested late that night of the news story, but his accomplice, James, was not. I was furious with this issue. It was just one of the many problems and issues that arose out of my attempted murder. This process of prosecuting the boys would take years. The second boy would only get arrested after I tirelessly fought to make sure he went in front of a grand jury and would go to jail for his part in my crime. He would later plead no contest and went to jail. I could not let any one get away with attempting to kill me. This meant Allsup's too, the store that allowed me to be kidnapped by boys allowed to use their property to procure a victim, myself, so they could lead the victim/me to a secluded place to rob me and get away with it.

Bert Parnall, my attorney, knew I was having difficulty dealing with all these issues. He would act as if he wanted to do the right thing. He became my victim advocate to the federal prosecutor, James Tierney, who was thinking of bringing federal carjacking charges on the boys. Something the government would later not do, because the boys were minors and would do the same jail time that the state would impose. Bert would act as my advocate when I pressured the district attorney to charge the second kid. He was of no real help, but I helped myself and pushed James's neighbors to call the district attorney, and with my constant pressure, the boy's case went to the grand jury.

Although Bert represented me with many issues, secretly and unbeknownst to me, the only issue he wanted to deal with, was my uninsured motorist claim, and property damage claim. He would get the insurance company to settle for the full amount, and Bert took more than a third of everything paid out, as he claimed expenses. What he did, unknowing to me at the time, was to take away the only tool I could have used to motivate a lawyer to sue Allsup's.

Once Bert got what he wanted. He would call me into his office, and tell me all my other claims were worthless,

including the Allsup's case that I could not let go. I told Bert that I believed Allsup's had to pay in some form or fashion, and security had to change to protect people from predators. Bert would have none of it, and I was left to stew in my own pot. I would call hundreds of attorneys looking for help, "but no attorney would help" (Appendix G). All of the attorneys said they were not interested or that I had no case as Bert had already explained (Appendix E, pg. 22a). I paid to register the information on the bar association so all attorneys could see it. The only call I got was from an attorney asking if Bert took my uninsured motorist claim, and if not, he was interested, but as for the Allsup's claim, he was not interested.

When I confronted Allsup's over security issues, the manager blamed me for the incident and stated, "If I was stupid enough to believe the boys, then it was my fault." Allsup's refused to believe the way they did business had anything to do with my stabbing. My anger over his statement was the final blow. I sued Allsup's in Metro Court in April of 2013. I had to make them pay at least lawyers' fees for their part in my attempted murder, and try and get them to change security, which did happen in the future (they now have video of the outside of the store that the clerks can view from inside the store).

I did this lawsuit pro se, since Bert or other attorneys would not help. I never fired Bert, because I did not know he did anything wrong and I always hoped he would change his mind. Bert would just ignore my pleas for help and went on with his practice. I could not quit and move on until I had my pound of flesh from Allsup's, and that was what I pursued. What I did would be frowned upon in the legal community, as the legal community believed I brought a meritless claim in Metro Court. I did not know anything would ever come from it. I just had to voice my discontent, as guaranteed by the 1st amendment, win or lose, and Metro Court was the easiest way for me to voice my anger.

I lost the Metro Court case against Allsup's by summary judgment on the foreseeability issue connected to Duty, but I appealed. I thought that foreseeability was subjective, and the Supreme Court already knew that, and after I filed my Notice of Appeal, the Supreme Court decided the case of *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 326 P.3d 465 (N.M. 2014), and said foreseeability was no longer allowed to be used as an issue to decide Duty in Negligence cases for judges. Public Policy was the only issue for which a judge could now dismiss the case, but the Judge in my Metro case only ruled on foreseeability, and after I appealed, I would win.

This is where another law firm in the community manipulated me, and took my case against Allsup's for completely selfish reasons. I thought I found my hope, but this law firm, and an attorney in the law firm, only wanted to settle the case. They moved the case from Metro Court to District Court, so as to have a higher damage possibility, but they never believed the case had any merit. No investigation was done on my case. Only one set of discovery was served on just Allsup's, and none of the other 3 Defendants, and when Allsup's did not answer, no supplemental request was done, and no Motion to Compel was completed, nor was any other work completed in the case. After having the case for a year and a half, the lawyer asked me to settle, and he told me that I had no case since I voluntarily took the boys off property, but when I would not settle, and of course Allsup's would not settle, the attorney would quit.

I did sue those attorneys over their part for my loss, but I did it separately from this case. I am not a lawyer. I only learned after I sued Bert, that I could hold the future attorneys accountable for their negligent acts since it was a foreseeable consequence of the original negligence of Bert Parnall. I sued them separately, and those two cases are now in the Court of Appeals. The fact scenario is a little different for those attorneys, but those attorneys argued, just like Bert

Parnall, that my Metro Court case was proof I knew those attorneys were negligent and they had injured me over my meritless claim. I hired those attorneys in 2014, so it is a stretch to say the Metro Court complaint in 2013, proved I knew my future attorneys were negligent, plus, the case was meritless and all their actions proved they believed that as well. Hopefully the Court of Appeals sees my point and I will not have to appeal those cases.

I was now back to representing myself. I actually tried to hold Allsup's accountable. I conducted discovery on 3 Defendants, as the fourth could not be found. I went to mediation, and Allsup's said I had no case and they sent a retired Chief District Court Judge, Ted Hartley, to communicate this to me, and to the Court. He entered his affidavit in District Court which communicated his denying me a settlement offer was done in good faith as my claim could not result in a trial on the merits.

The mediator tried to console me and ironically told me what I needed to know. That I had no proof of a "standard of care" for loitering, and without that, I had no case. I went home and wrote a Motion to Compel for several things, including the training for clerks per state regulation. I wrote my Motion and filed it the next day, before Allsup's filed its Motion for Summary Judgment, and I was granted the material for the training of clerks per the regulation. The Court wrote the order on March 16th, 2017. This is when the statute of limitations could begin, because with that order, the negligence was now going to be uncovered, and my case will have merit at the same time, although it would be in April that I possessed the evidence. When I obtained the training manual, it had a policy to deal with loitering, and I had the "standard of care" needed to have a trial on the merits. The Motion for Summary Judgment was in May of 2017, and I entered the training manual as evidence for a "standard of care" in which the actions of the clerks could be

compared. The Allsup's Motion was denied, and I was granted a trial in July of 2017.

I hired an attorney to conduct the trial. I did not want the jury to know the case was done pro se. I won at trial with an award of two million for pain and suffering, and Allsup's was held 10% liable. I would later settle. I believed if my evidence of crime on the property, and if my PTSD claim could have been heard, I would have won millions more. The settlement took the foot off my neck if only for a while. Afterwards, due to my chronic PTSD, the best job I could get was cart pusher at Walmart. I saw a friend while working that had a car accident in 2019, and he told me he hired Bert. He told me Bert talked about me, but he made it seem like Bert was clowning me. I was not there, but it made me angry, and my mind thought about all the money I lost due to Bert's negligence. That was when I looked to sue him for malpractice.

It would take me some time to research and file a complaint. I filed a complaint against Bert in January of 2020. I believed I was well within the statute of limitations for the claim, which was 4 years. After he was served with the complaint, his lawyer never even filed an answer to it. Bert went straight to the Motion to Dismiss, and stated I had passed the statute of limitations. Bert argued that because I said Allsup's had a loitering policy in my complaint in Metro Court, and because I proceeded with my complaint on Allsup's alone, that I knew the facts of Bert's negligence, and that I was injured at the time of the negligent acts, and not later, after the training manual was discovered, or when the court had a trial on the Allsup's case. Bert would win on his Motion to Dismiss in District Court.

I would file for an appeal, and I argued in the appeal that I could not have known the facts for a cause of action against my attorney, until my case against Allsup's had merit, because I did not know he did anything wrong

previous to that, and minus damages there was no negligence or cause of action for legal malpractice. I forgot to argue the case law of *Encinias,* from the Court of Appeals, or *Richardson,* and the court refused to undertake the issue of whether my claim had merit, or if it was essential to a cause of action for legal malpractice that the underlying claim have merit before the elements in a legal malpractice action could be met for my case. I was denied my appeal, and denied a writ of certiorari in the Supreme Court.

REASONS FOR GRANTING THE WRIT

Both the District Court, and the Affirming Court of Appeals Ruling, Were in Conflict with Their Own Case Law and the Case Law from California

I argue to this Court, that the Court of New Mexico cannot just ignore the law and not apply it, and hope I go away. New Mexico has taken my right to sue away from me, simply because I am not a lawyer, and I was not equal in the courtroom. Their actions can only be seen as protecting another attorney from the punishment he so rightly deserves, after denying me a right everyone should be afforded. The right to sue.

Under the 14th amend, § 1981, the government is supposed to care about equality, to make everyone equal in a courtroom, and to allow my right to sue. Equal rights were the foundation on which our country was built, and a civil war was fought to ensure this equality, but in my case, both the 2nd Judicial District Court, and the Court of Appeals in New Mexico, contorted the facts to fit a made-up fantasy, in order to re-write reality. The burden of proof for dismissal on my case, was "when it appears that Plaintiff could not recover under any state of facts provable under the claim," *McCormick v. United Nuclear Corp.,* 87 N.M. 274, 532 P.2d 203 (Ct. of App. 1974). Obviously, I was silenced by a power greater than me. If the facts of my case were looked at in

accordance to the law, and are presumed to be true, then I should be given a trial on the merits beyond any doubt.

The New Mexico Court of Appeals has stated, that the statute of "limitations period for legal malpractice commences when (1) the client sustains actual injury and (2) the client discovers or through reasonable diligence should discover, the facts essential to the cause of action." *Sharts v. Natelson*, 1994-NMSC-114, ¶11, 118 N.M. 721, 885 P.2d 642. I do again contend, that I could have never met either of those things until 2017, and that it was not reasonable or truthful to dictate anything different, and the California cases that the New Mexico law was modeled after, are in conflict with this decision made in New Mexico, and California would clearly allow me to take my claim to a jury.

The Discovery of the Facts to my Cause of Action for Legal Malpractice

The District Court manipulated the facts and stated I knew in 2013, after I filed a lawsuit in Metro Court, that my attorney errored. It has imposed a false reality that me, a traumatized victim, could not have some other motive for suing, other than my belief my attorney had errored, and not because the store gave the boys the opportunity to hunt me off their property. The Court used various things I stated in my complaint, such as, "Defendant refused to sue Allsup's because he said it was not an actionable offense, and Plaintiff was forced to pursue litigation against Allsup's on his own," (Appendix B, 7a) to demonstrate my knowledge of my attorney's errors, but those facts do not mean I know my attorney errored, and are not legally cognizable acts for a malpractice action in 2013. The Court of Appeals came to conclude I knew "there may have been serious errors," *id.* in Defendant's work in 2013, "when Plaintiff terminated representation," *id.*, but I never terminated Bert's representation.

The court simply made this fact up. My attorney refused to help on the Allsup's case so I brought a case in Metro Court on my own, but I always begged and hoped for

my attorney's help afterwards, and I never terminated representation (Appendix G). "I know this may not be your area of law, but no other attorney would take this," *Id.* My email showed that I hoped Bert would help, and not that I ended our relationship.

The facts I wrote in my complaint about Bert were written after all the experience and knowledge I had gained from the past. I had none of this knowledge in 2013. I never stated in my complaint, that any of those facts were known against my attorney, in 2013. I just stated some of those things happened in 2013, but there is and was no proof that demonstrated I knew my attorney errored in 2013.

Why would I ask him to be my attorney in 2014, if I thought he had errored in 2013? I can tell you, if I thought he had errored on the case, then I would not have asked him for help afterwards. His advice, in 2013, was what every attorney had given me, so I continued to pray for help from someone, including Bert.

The view the Court of Appeals has used was in conflict with the two California cases that the New Mexico law was directly derived from for the statute of limitations. The first case, was where California recognized the "discovery rule," when it held "that the cause of action in tort does not accrue until the client both sustains damage, and discovers, or should discover, his cause of action." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 491 P. 2d 421 - Cal: Supreme Court 1971.

In addition to this law, New Mexico has also adopted the rule that a meritless claim cannot lead to a cause of action against an attorney. "Our malpractice case law that holds that a case for legal malpractice cannot lie where the underlying action would not be viable," *Encinias v Whitener,* 2013-NMCA-003, 294 P.3d 1245 *See Richardson v. Glass,* 114 N.M. 119, 122, 835 P.2d 835, 838 (1992). Simply put, I could not sue the Defendant in 2013 over the Allsup's case if my underlying claim against Allsup's was meritless in 2013. I had no cause of action for legal malpractice, because I was

not injured, which explains why most victims need to be injured before they can know the facts of their attorney's negligence.

The Court of Appeals omits the public policy reasons, stated in *Neel*, for why sometimes malpractice should be tolled. "In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 491 P. 2d 421 - Cal: Supreme Court 1971. *Neel* continued to explain,

> "Corollary to this expertise is the inability of the layman to detect its misapplication; the client may not recognize the negligence of the professional when he sees it. He cannot be expected to know the relative medical merits of alternative anesthetics nor the various legal exceptions to the hearsay rule. If he must ascertain malpractice at the moment of its incidence, the client must hire a second professional to observe the work of the first, an expensive and impractical duplication, clearly destructive of the confidential relationship between the practitioner and his client." *Id.*

In my case, I tried to hire another attorney, and I got 100's of second opinions from other attorneys and all the lawyers supported the Defendant attorney's opinion in 2013, that my Allsup's claim was meritless, and they did not want to take my case. If no other attorney stated I had a case, then how would I have known that I did have a case that could collect damages, until I found the training manual? The Courts in New Mexico cannot hold me to a higher standard than an attorney.

In the opinion from the Court of Appeals, the Court changed my words to mean something else in their Notice of Proposed Disposition (Appendix 5a). I quote, "Plaintiff additionally asserts that any legal malpractice claim he filed against Defendant prior to obtaining the training manual in 2017 would have been dismissed, because the training manual demonstrated that Defendant gave erroneous advice." The Defendant did give erroneous advice, but I explained clearly in my Docketing Statement, that any

malpractice action would have been dismissed because my Allsup's claim had no merit. It was a frivolous lawsuit to anyone but me, and I am not a lawyer, so my professional opinion was not professional, and did not matter.

The Court of Appeals also twisted the facts in its Notice of Proposed Disposition (Appendix 7a), when it stated, "Accordingly, we suggest that in 2013 Plaintiff was on notice of the facts constituting a cause of action against Defendant, though he may not have known whether his malpractice claim was viable." Clearly switching the word viable from the Allsup's case and onto the malpractice action. The cart does not come before the horse, and unless the underlying claim/Allsup's claim was viable, I did not have the facts for a cause of action against the lawyer. A lawyer is allowed to commit negligence on cases that do not have merit, because there would be no damages that could have occurred, so therefore, there was no negligence. It is a moot point to discuss that the lawyer's negligence occurred at a time before an injury, because in my case, there was no injury in 2013.

When I complained to the Court of Appeals that they twisted my words, they acknowledged the distinction in their memorandum that I was talking about the viability of the claim of Allsup's, and agreed I meant, "[t]he viability of the underlying case against Allsup's was a necessary fact in a cause of action for legal malpractice," and "[only] after obtaining the training manual [did] the claim against Allsup's become viable[.]" (Appendix A, 2a) But they still proposed to disagree with my argument, without stating why it was wrong, and merely claimed that, "Plaintiff has not asserted any facts, law, or argument in his memorandum that persuades this court that our notice of proposed disposition was erroneous," *id.* The Court is not applying the law, to protect one of their own, when the court denied its own holding that, "Our malpractice case law that holds that a case for legal malpractice cannot lie where the underlying action would not be viable," *Encinias v Whitener,* 2013-NMCA-003, 294 P.3d 1245 *See Richardson v. Glass,* 114 N.M. 119, 122, 835 P.2d 835, 838 (1992). It matters if my claim

against Allsup's had merit in 2013, that is, if equality matters, and if attorneys are not above the law.

The Court of Appeals in New Mexico has perverted the ruling of *Neel*, when it put the "occurrence rule" for the time when to toll the statute of limitations on legal malpractice. If the Court was to use the "occurrence rule," and not the "discovery rule," the legislature would have had to have enacted legislation to do so. This has not happened, and attorneys don't get to change the rules to the game for when the statute of limitations begins for legal malpractice, in New Mexico. The Defendant attorney would state in his Motion to Dismiss that I knew of a loitering policy that my lawyer did not find, and because I knew this fact, it was when the statute of limitations should start, but I never knew if a loitering policy existed, and if a lawyer did not believe one existed, then why must I be held to a higher standard?

Later, in 2017, it was revealed that Allsup's did not have a loitering policy, but it was a state loitering policy implemented by Allsup's. The evidence to prove this fact was denied by the District Court Judge in the hearing for the Motion to Dismiss, but it proved I knew of no facts in 2013 that my attorney had errored. I pursued vengeance. There is nothing rational about pursuing vengeance.

The District Court Judge based his ruling on the things I stated in hindsight, to make his case that I knew the attorney did something wrong, and therefore, "it appears that if Plaintiff was to suffer any harm as a result of the alleged errors or poor advice of Mr. Parnall, the wrong and harm occurred in April of 2013 for purposes of the accrual of Plaintiff's claims." (Appendix C, pg. 16a) The Judge never dictated anything in pgs. 13a-15a, that were "actual injuries" for which I could collect on in a malpractice action, in 2013. Nothing existed that I could sue my attorney for, in 2013. For the purpose of the Motion to Dismiss, everything I said must be construed as true, and the Court can't just cover up my words and violate my 1st amend. rights. The fact issue of when my claim was viable was, and is, disputed, and a reasonable member of a jury could easily believe my claim.

The Court of Appeals in my case, ended its analysis of the "discovery rule," by stating "a Plaintiff need not know an injury constitutes a breach of the legal standard of care, it is sufficient if Plaintiff is on notice of facts constituting the cause of action," and the Court, "therefore proposed to disagree with plaintiff's assertions that either his discovery of the training manual or his success in the Allsup's suit were essential facts in the case against Defendant."

The only way to say finding the training manual was not an essential fact, was if the Judge believed the Allsup's case had merit in 2013, and could proceed to trial at that time, and that I knew my attorney lied, but if the Defendant stated, "any defense attorney would prevail in a defense against Allsup's," and no other attorney would help me, and a retired Chief District Court Judge said my claim was frivolous, than the Judge's own assertion that my claim had merit in 2013 is disputed, and my case should not have been dismissed.

When I obtained the training manual by court order, in 2017, I discovered my attorney committed negligence, and at the same time, I now had the evidence that allowed me a trial on the merits against Allsup's, which meant a future injury was possible, and no longer speculative. It is at this time I have the facts that constitute a cause of action for legal malpractice, in New Mexico. "A cause of action for legal malpractice is established when the client can allege the following facts: "(1) the employment of the defendant attorney; (2) the defendant attorney's neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the [client]." *Sharts v. Natelson*, 885 P. 2d 642 - NM: Supreme Court 1994. This third element did not happen until March of 2017, and is when the statute of limitations should begin on this claim. To hold me to a standard of knowing my claim in Metro Court in 2013 had merit, when no other attorney would agree it did, is an injustice. My meritless claim resulted in no legally cognizable damages for a malpractice cause of action, in 2013, and dismissing my case violated my rights under the 14th amend.,

§ 1981, and allowed attorneys/Judges, instead of juries, to be the ultimate gatekeepers for determining who has the right to sue, with no consequences when it would later be discovered they were wrong.

The Injury Analysis, and the Fact I Could not be Injured on a Meritless Claim in 2013

The second California case used to create the *Sharts* case, and that the *Sharts* case based its holding after, was *Budd v. Nixen*, 491 P. 2d 433 - Cal: Supreme Court 1971, and this case decided when an "actual injury" occurs in a malpractice action and what is considered an injury that would start to accrue the statute of limitations for legal malpractice. It was the sister case of *Neel,* and after *Neel* set forth the "discovery rule," it was *Budd's* purpose to determine "actual injury." *Budd* explained, "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort." Something the New Mexico Court of Appeals ignored for my case when it contradicted its own holding in *Encinias* and *Richardson,* to help out fellow attorney, Bert Parnall, since my case against Allsup's, in 2013, could have resulted in no "loss" to myself.

"The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm — not yet realized — does not suffice to create a cause of action for negligence." *Budd v. Nixen*, 491 P. 2d 433 - Cal: Supreme Court 1971. Not one of the things mentioned in the District Court's order on pgs. 13a-15a, that Victor Lopez used to start the tolling for the statute, could be deemed an injury in *Budd* for which the statute of limitations would accrue, in 2013. All of what was written by the District Court Judge could only be seen as nominal damages, or speculative harm, in 2013. I cannot sue my attorney for the mental damages of pursuing the Allsup's claim.

Bert's acts may have been negligent, in 2013, but they caused no damage since the Allsup's claim was meritless, nor could I have had the experience to know the facts of my attorney's negligence, or that he gave me erroneous advice

and quit without "good cause," before I was injured in 2017 when my claim against Allsup's had merit. Lawyers can't eat their cake, and have it too, and get cases dismissed against clients when attorneys claimed the case had no merit, but when the client goes on to win, say the client knew the advice was erroneous from the start and toll the claim when the attorney quit, and not when the claim became viable and an actual injury occurred. Bert Parnall can argue against this fact, but he should only be allowed to do it in front of a jury, or my rights are violated under the 1st and 14th amendments.

By rule, the District Court needed to accept the facts that I asserted in my complaint and response to Defendant's motion as true under the law, "the factual allegations of the pleadings which, for the purposes for ruling on the motion, the court must accept as true." *Walsh v Montes*, 2017-NMCA-015, ¶6, 388 P.3d 362. If this rule is followed, then it must be accepted my Allsup's case was not viable, in 2013, nor could I have been expected to know it was unless I am held to a higher standard than attorneys. "Cognizable means capable of being known or considered. It means capable of being judicially tried or examined before a designated tribunal. A cognizable claim or controversy is one that meets the basic criteria of viability for being tried or adjudicated before a particular tribunal," *Jordache Enterprises, Inc. v. Brobeck*, 958 P. 2d 1062 - Cal: Supreme Court 1998. The Judge in my case decided what a victim should know, against California's definition of cognizable, when a jury could have ascertained that fact more easily and evenly for society and myself. The Judge deemed me a fortune teller, and not an angry victim lashing out.

The Court of Appeals admitted that I argued, "the district court did not view facts favorably to Plaintiff because the facts were not addressed in the order and because the district court denied Plaintiff's request to admit exhibits related to the Allsup's litigation." The exhibits denied, included an affidavit from a former Chief District Court Judge saying my claim was not viable in 2016 (Appendix F), so it was impossible for my claim to have merit in 2013.

Silencing affidavits in District Court cannot be considered an equal interpretation of the law. The Supreme Court of New Mexico silenced my voice to protect their own, and because it did not apply the law, it violated my right to sue and my free speech rights under the 1st and 14th amendments. It's not a reasonable argument to say I knew my attorney lied so I sued Allsup's in Metro Court. The reason I sued Allsup's was so they would be punished for their part in my attempted murder.

The Court of Appeals backed up the District Court and stated that when I asserted that I lost some of my claims due to my inexperience, that the injury occurred at the time I took over the case.

> "Because he was forced to conduct litigation on his own" and "because Plaintiff did not know how to navigate the legal system, he "could not collect on damages for PTSD, and Negligent training." So that, "It therefore appears that Plaintiff's injury occurred at the time of Defendant's alleged errors-2013 at the latest- even though it was not until 2017 that a court declared Plaintiff did not prevail on some of his claims."(Appendix B pg 8a)

The Judge was being unreasonable when she considered the claims of PTSD and Negligent Training, claims not made until 2014 in District Court, to be deemed actual injuries in 2013 and toll the statute of limitations on that date. I could not be injured on the Negligent Training claim in 2013, when it was not made until 2014. The Judge never even knew the facts of my case.

For the Allsup's claim to be a viable claim for legal malpractice against my attorney, it must be able to survive a summary judgment, and obtain a trial on the merits, but my 2013 claim lost on summary judgment. I could not have known the fact my Metro Court case would win on appeal from a change in the law that would lead to a trial in District Court. I was suffering from severe mental impairment, and it would have been impossible. I explained this fact in ¶¶ 18, and 19 of my Civil Complaint.

"The proper answer to the question when plaintiff sustained actual damage before the filing of plaintiff's suit must await either a trial of the cause or a motion for summary judgment with declarations and points and authorities directed to that issue." *Budd v. Nixen*, 491 P. 2d 433 · Cal: Supreme Court 1971. The Motion to Dismiss for my case was not proper, and my rights under the 14th amend., and § 1981 were violated when the court quashed my exhibits and silenced the truth, and never allowed me a chance to prove my claim had no merit, in 2013.

California has clarified further the need for a trial on the merits for legal malpractice,

> "As this court recognized in *Adams,* the determination of when attorney error has caused actual injury under section 340.6, subdivision (a)(1), cannot depend on facile, "bright line" rules," as it continued its explanation, "the particular facts of each case must be examined in light of the wrongful act or omission the plaintiff alleges against the attorney. When the alleged error causes injury or harm recoverable in a legal malpractice action, the plaintiff has "sustained actual injury" that ends tolling under section 340.6, subdivision (a)(1)." Jordache Enterprises, Inc. v. Brobeck, 958 P. 2d 1062 · Cal: Supreme Court 1998.

I could have recovered nothing from Allsup's in 2013, hence, I could have recovered nothing from Bert either.

This fact issue of when my Allsup's claim had merit, and when I had the facts that constituted a cause of action for legal malpractice, should be left to the trier of fact to decide under both *Budd,* and *Sharts*, "only the trier of fact can ascertain when the damage was sufficient to trigger the plaintiff's cause of action," *Budd v. Nixen*, 491 P. 2d 433 · Cal: Supreme Court 1971. Which was written into the New Mexico law in *Sharts*, "The question when a client is deemed to have discovered an attorney's malpractice and the resulting injury is generally a question of fact." *Sharts v. Natelson*, 885 P. 2d 642 · NM: Supreme Court 1994.

The Supreme Court of the United States Ruled the Time Should Toll if Victim was Given a Negligent Second Opinion

The Supreme Court has ruled it would toll the statute of limitations on medical malpractice cases, if the victim gets a second opinion and that opinion was wrong, and the claim would not accrue until he finds a doctor that gives the opinion that exposes the negligence.

> "We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government. If competently advised to the contrary, he may be dissuaded, as he should be, from pressing a baseless claim.
>
> If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about injury." *United States v. Kubrick*, 444 US 111 - Supreme Court 1979

If other lawyers advised me wrong about my case against Allsup's, then a malpractice action should toll because I was given the same bad advice, which meant I could not know the facts of Bert's negligence. I was advised by 100's of attorneys in New Mexico that stated I did not have a case against Allsup's after my attorney quit, and hence, they advised me that my attorney did nothing wrong to quit and not sue Allsup's. My attorney's advice was only shown to be wrong when I obtained the evidence that not only gave me a chance to have a trial on the merits, but demonstrated that my attorney was negligent at the same

time, which was the training manual. If he believed my case would not prevail, in 2013, then he quit with "good cause," under the rules of professional conduct, and until I was injured, I had no cause of action for legal malpractice.

Other Federal Cases Acknowledge an Injury Must Occur Before a Malpractice Action Can Accrue

In an employment cause of action for discrimination, the Court held, "Accrual is the date on which the statute of limitations begins to run; under federal law, a claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action," Lukovsky *v. City and County of San Francisco*, 535 F. 3d 1044 - Court of Appeals, 9th Circuit 2008. The key factor should be knowing of the injury. "[a] plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful," *Dring v. McDonnell Douglas Corp.,* 58 F.3d 1323, 1327-28 (8th Cir.1995). I never discovered I was injured until I obtained the training manual in April of 2017.

"We noted that once a plaintiff knows that harm has been done to him, he must "determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make." *Id.* (internal quotation marks omitted)." *Lukovsky v. City and County of San Francisco*, 535 F. 3d 1044 - Court of Appeals, 9th Circuit 2008. In my case, I had 4 years from March 16th 2017, the date of the actual injury, for which to file the lawsuit after my claim was able to obtain a trial on the merits. A reasonable person could easily believe, that the training manual was the key factor in my case becoming viable.

> "The general rule in tort law is that the claim accrues at the time of the plaintiff's injury. In the area of medical malpractice this has been felt to be unduly harsh in those cases where the fact of injury remains undisclosed. The rule accordingly has widely been modified to provide that a claim does not accrue

> until the injury has manifested itself," *Davis v. United States*, 642 F. 2d 328 - Court of Appeals, 9th Circuit 1981.

My claim fits the standard for these other cases as well. That the time should be tolled when no injury exists or can be known under the reasonable person standard. "With knowledge of the fact of injury and its cause, appellant was at the time of his injury placed on the same footing as other negligence plaintiffs. The claim, then, accrued at the time of injury and the statute started to run," *id.*

New Mexico Courts Hold a Different Standard for the Statute of Limitations in Other Professional Malpractice Cases

To allow New Mexico Courts to make an exception to the rule of professional malpractice for lawyers, and say clients of an attorney could know and recognize an attorney's negligence prior to being injured, puts attorneys above other professionals, and denies all victims of attorney malpractice equality to have their cases adjudicated equally with the same laws, and the same due process, as guaranteed in by the 14th amend.

In New Mexico, an accountant's malpractice does not toll at the time of the negligent act, but when the negligent act creates an injury, and a client is not expected to know of the negligence prior to being injured.

> "Our Supreme Court has held that the period of limitation begins to run when the cause of action accrues; and there is no cause of action for negligence until there has been a resulting injury to the plaintiff. The injury to plaintiffs in this case was the assessment made by the Internal Revenue Service; and a taxpayer does not owe a tax deficiency until the IRS renders its assessment in written notice to the taxpayer." *Chisholm v. Scott*, 526 P. 2d 1300 - NM: Court of Appeals 1974.

The court expressed the importance to hold professionals accountable for malpractice,

> "A person needs special training to know whether his tax return has been erroneously prepared. No special training is required to feel pain. In the relationship of accountant and client, the trust and confidence that the client places in the professional person places him in a vulnerable position should that trust and confidence be misplaced. It is the policy of the law to encourage that trust and confidence; likewise it is the duty of the law to protect the client from the negligent acts of the professional person." *Chisholm v. Scott*, 526 P. 2d 1300 - NM: Court of Appeals 1974.

A victim of violence is forced to place his total trust in his attorney, and for the state to not protect clients of attorneys from predatory behavior is simply bad public policy for everybody's future.

Public policy made it necessary to codify the "occurrence rule" to the statute of limitations for medical malpractice in New Mexico, to make malpractice insurance affordable for doctors and qualified health care providers, to ensure there are enough doctors to work in New Mexico, but it does not apply to medical malpractice under the Torts Claims Act, or for medical malpractice on non-qualified health providers, *Roberts v. Southwest Com. Health Serv.*, 837 P. 2d 442 - NM: Supreme Court 1992. Instead, the court reverts back to the "discovery rule," and the injury must happen before it can be discovered. When the Judge decided the fact of when the injury occurred, and not the jury, it violated the case law of New Mexico, and my rights to equality under the 14th amendment, 7th amendment, §1981.

The Issue of Equality in the Courtroom is Mandatory for Justice

If the gatekeepers of the court cannot be trusted to dole out justice equally, then the system loses its credibility. My attorney denied me equality for reparations on my crime. He decided I was not worthy of justice, instead of allowing a jury to decide that. If the gatekeepers decide who gets in the door, instead of the facts, the country cannot be equal. There must be checks and balances. This case is a perfect case for which the Court could investigate whether rogue lawyers are

denying the right for clients to sue. Attorneys cannot begin a practice to discriminate against people simply because it is not based on race or religion. Denying my individual right to sue, based on personal prejudice, violated my rights under the law. I was kept out of the courthouse for illegitimate reasons, by my attorney, who believed that was what I deserved.

The Court could allow this case to be transferred to federal court under a Title 42 § 1983 claim over the loss of my right to sue in § 1981, and take up the issue of the violation of my individual right to sue. I had three years to bring a claim under § 1983, and was within the time limits when I brought my lawsuit forward against Bert. The Court must hold attorneys accountable when they deny a victim the right to be compensated equally to another victim for illegitimate reasons. The discrimination may not be based off color, but it was still based off hate, and still denied me my equal right to gain reparations for my victimization.

Conclusion

The Court should grant certiorari.

Respectfully submitted,

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