No. 1028971

SUPREME COURT OF THE
STATE OF WASHINGTON

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON No. 580578-II

GEORGE R. "RUSTY" GILL, JR.,

Petitioner,

v.

HILLIER, SCHEIBMEIR, KELLY & SATTERFIELD, P.S., a Washington Professional Services Corporation, and MARK C. SCHEIBMEIR, Individually and on Behalf of the Marital Community Comprised of MARK C. SCHEIBMEIR and JAN DOE SCHEIBMEIR,

Respondents.

ANSWER TO PETITION FOR REVIEW

BYRNES KELLER CROMWELL LLP
Joshua B. Selig, WSBA #39628
1000 Second Avenue
38th Floor
Seattle, WA 98104
(206) 622-2000
Attorney for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

I. INTRODUCTION

Pursuant to RAP 13.4(d), Respondents Hillier, Scheibmeir, Kelly & Satterfield, P.S., and Mark Scheibmeir (collectively "HSKS") hereby submit their Answer to Petitioner George R. "Rusty" Gill, Jr.'s ("Gill") Petition for Review.

Simply put, the Court of Appeals' unpublished opinion is not in conflict with a decision of this Court or a published Court of Appeals decision. Nor does it raise a Constitutional issue or involve an issue of substantial public interest. There is, therefore, no basis for this Court to accept review. RAP 13.4(b)(1)–(4).

Rather, the Court of Appeals—like the trial court before it—properly applied well-settled principles of the statute of limitations to legal malpractice claims under Washington law. Indeed, Division II's denial of Gill's Motion to Publish demonstrates that it did not view its opinion as conflicting with a prior opinion, modifying or clarifying any established principle of law, or being of general public importance. RAP

12.3(e). This Court's review should result in the same conclusion.

HSKS respectfully requests that the Petition for Review be denied.

II. BRIEF SUMMARY OF THE CASE

A. Factual Background Preceding the Litigation.

In 2013, Gill decided to sell his company, RG Construction Inc., to his employee Fred Hicks. CP 229. After agreeing with Hicks on the basic terms of the sale, Gill approached HSKS to draft the paperwork for the transaction. CP 232. HSKS drafted a Stock Purchase Agreement, Stock Pledge Agreement, and Promissory Note (the "Agreement"). CP 64–84. The deal was structured as a stock purchase agreement with Hicks receiving all the shares of RG Construction in exchange for $2,273,000. *Id*. The Agreement, which was signed in January 2014, required Hicks to make monthly payments of at least $20,000 starting on February 1, 2015. In the event of a default, the Agreement allowed Gill to

reclaim his shares of the company without forfeiting any payment he had already received. CP 70. The Agreement was structured as a stock purchase with a right of repossession so that Gill could quickly retake control and management of the company in the case of Hick's default. CP 70, 214, 216.

Hicks failed to make his first 32 scheduled monthly payments, leaving him $640,000 in arrears. CP 236, 245. Despite nearly 3 years of default, Gill did not send Hicks a notice to cure default. CPS 238–40. And, despite discussing other legal matters with HSKS during that period, Gill did not inform the firm of Hicks' defaults or otherwise consult with HSKS regarding his legal rights under the Agreement. CP 239–40.

Meanwhile, while Gill went unpaid, Gill learned from Hicks that the IRS had issued "fairly sizable" tax liens on RG Construction's assets. CP 235–37, 245. In 2016, the IRS filed three separate federal tax liens totaling more than $235,000. CP 274–80.

From November 2017 to June 2019, Hicks made monthly payments to Gill. CP 241. In August 2019, Gill reminded Hicks that his outstanding balance was coming due. CP 282. Concerned about non-payment, on October 1, 2019—four years and eight months after Hicks' initial default—Gill first informed HSKS of the situation. CP 247–48. Between 2015 and October 2019, Gill had changed tact and was no longer interested in regaining ownership and control of the company. CP 249–50. Instead, Gill raised to HSKS the idea of taking possession of certain company assets, and HSKS reminded him that the Agreement was structured as a stock purchase that allowed him to take back the company but there was no security interest in any specific assets. CP 49–50.

From October 2019 through early 2021, Gill attempted to negotiate a payment plan directly with Hicks. CP 291–93. When that proved unsuccessful, Gill initiated a breach of contract suit against Hicks and RG Construction. CP 306–12. In April 2022, Gill obtained a judgment against Hicks for the

full amount of the money owed to him and RG Construction filed for bankruptcy. CP 332–37.

B. Procedural History of the Litigation.

Gill filed this lawsuit on June 29, 2022. CP 3–12. His complaint alleges that the structure of the deal which provided a security interest in the company itself without separate security interests in the company's assets fell below the standard of care. *Id*. The complaint also alleges that "[t]he recordation of the IRS liens thus impaired Gill's interest in collecting on the Promissory Note." CP 7 (Complaint ¶ 3.11). Indeed, the liens granted the IRS an interest in "all property and rights to property belonging to" the company. *See, e.g.,* CP 274.

Among the affirmative defenses asserted was a statute of limitations defense. CP 16. Gill filed a motion for partial summary judgment seeking, in relevant part, dismissal of that defense. CP 19–36. The motion and opposition focused on the issue of when the claim accrued and the discovery rule. CP 30–

35, 200–06. At the conclusion of the hearing, after explaining its rationale, the trial court stated that it:

> [Does] not believe that reasonable minds can differ in this case as to whether or not the statute of limitations expired prior to the filing of the lawsuit in this case. There's not a motion for summary judgment by the defendant at this time. The motion for summary judgment is by the plaintiff asking that the statute of limitations defense be dismissed and I'm denying that motion. But - but I - I believe I'm making it clear to the – to counsel today that if I were presented with a motion for summary judgment to dismiss this based on the statute of limitations, I would feel compelled to grant it.

RP at 22.

Rather than have HSKS bring its own motion for summary judgment and raise all arguments available to him in opposition, Gill chose to stipulate to the dismissal of his claims with a right to appeal. CP 359–62.

In an unpublished opinion, Division II of the Court of Appeals affirmed. Appendix to Pet. For Review ("App.") at 1–7. The appellate court then denied Gill's motion for reconsideration and motion to publish. App. at 8, 9.

III. ARGUMENT

A. The Court of Appeals' Decision Properly Applied a Robust Body of Washington Authority on the Statute of Limitations for Legal Malpractice Actions.

Washington appellate courts have had numerous opportunities to address the contours of the statute of limitations to legal malpractice claims. The appellate court's decision here squarely and properly applied that precedent. It neither conflicts with governing law nor creates new law.

The statute of limitations period for legal malpractice claims is three years. RCW 4.16.080(3); *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268 (2005). The statute of limitations period "begins to accrue when the plaintiff has a right to seek legal relief." *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 816, 120 P.3d 605 (2005). In the legal malpractice context, "the elements of negligence are duty, breach, causation, and injury." *Huff*, 125 Wn. App. at 729. "The 'injury' element refers to 'damage' as opposed to 'damages.' 'Damages' are the monetary value of the injury or

damage proximately caused by the breach of the alleged duty." *Id*. For legal malpractice claims, "injury is the invasion of another's legal interest[.]" *Id*. at 730; *Lavigne v. Chase, Haskell, Hayes & Kalamon*, 112 Wn. App. 677, 683–84, 50 P.3d 306 (2002). In making the distinction between injury and damages, the appellate court directly relied upon this Court's precedent. *Huff*, 125 Wn. App. at 729 (citing *Keller v. City of Spokane*, 146 Wn. 2d 237, 242, 44 P.3d 845 (2002)); *cf. 1000 Virginia Ltd. P'ship v. Vertecs Corp.,* 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (recognizing that breach of contract claim accrues at breach, noting "that the fact that damages did not occur until later did not postpone running of the limitations period"); *Mayer v. City of Seattle,* 102 Wn. App. 66, 76, 10 P.3d 408 (2000) (landowner's claim for negligent injury to real property accrues when he becomes aware property is contaminated because landowner will know value of property is likely diminished; accrual not triggered by landowner incurring remediation costs or other fixed economic damages).

In *Huff*, the attorney's alleged negligence was a missed statute of limitations. In the subsequent malpractice action, the clients (Huffs) alleged that they did not suffer damages until the statute of limitations defense was raised. In rejecting that argument, the court first noted that the Huffs were injured "when [the lawyer] missed the statute of limitations, effectively invading their legal interests." 125 Wn. App. at 730. The Court then explained that accepting the Huffs' position that the claim did not accrue until the defense was asserted and damages were certain would allow the limitations period to be "indefinitely extended simply by filing a time-barred action, however late, and waiting until an adverse judgment is rendered to file a negligence suit." *Id*. at 732.

The appellate court's (and trial court's) decision and analysis is squarely consistent with the applicable case law. In affirming, the Court of Appeals held that Gill's argument "ignores that Gill's legal interest, his ability to collect against RG Construction's assets, was first invaded when the tax lien

took priority because Gill's interest was unsecured." App. at 5 (*Gill v. Hillier, Scheibmeir, Kelly & Satterfield, P.S.,* No. 58057-8-II, 2024 WL 334235, at *6 (Wash. Ct. App. Jan. 30, 2024). Indeed, as the lower court notes, Gill's own complaint acknowledged that the invasion of his legal right rights occurred when the IRS recorded its first tax lien. *Id*. (*Gill,* 2024 WL 334235, at *5). Under Gill's theory of the case, the Agreement should have been structured in a way that provided him a security interest in the company's equipment and accounts receivable. When the IRS recorded a lien against those same assets, the legal interests that Gill claims he should have received in the transaction became impaired.

Gill's argument that the claim did not accrue because he could not file damages until his monetary damages were fixed or certain has consistently been rejected in Washington. *See, e.g., Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000) ("The running of the statute of limitations is not postponed by the fact that substantial damages occur later, and

is not postponed until the specific damages occur for which the plaintiff seeks recovery."). Indeed, legal malpractice claims always involve a "case within the case" in which evidence is offered regarding how the plaintiff would have fared under the hypothetical situation in which the lawyer acted in the way the plaintiff says he should have acted. *See, e.g., Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.,* 180 Wn. App. 689, 707, 324 P.3d 743 (2014). If Gill had, in fact, been injured by this alleged negligence, he presumably could find a damages expert that could testify to the economic difference between structuring the deal with security for only the company's stock versus security for the company's assets.

Furthermore, under Gill's argument that his claim did not, or should not, accrue until he has suffered "legally certain" "actual" damages, his claim has not actually accrued. Gill presently has a judgment against Hicks for the full amount owed for Hicks' breach of the contract. CP 335. That judgment is good for at least ten years, through April 2032.

RCW 6.17.020. If Gill collects his judgment, presumably he has not been damaged. Thus, currently, his alleged monetary damages are neither certain nor actual. Thus, under his own theory that damages must be legally certain, Gill's claim has not accrued, and he had no right to seek relief in the courts until his judgment fully expires without payment in full. *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001) (cause of action accrues when the plaintiff has the right to seek relief in the courts).[1]

Gill's petition concedes that *Huff's* holding "has been cited no less than 15 times by Washington State and Federal Courts" in the nearly two decades it has been published authority. Pet. for Review at 14. It is a solid fixture in the legal

[1]The Petition misleadingly argues that "Gill did *not* sustain any 'actual' or 'legally certain' injury prior to Hicks' bankruptcy filing." Pet. for Review at 17 (underline added, italics in original). However, there is no evidence or allegation in the record that Hicks filed for bankruptcy, rather it was RG Construction that filed for bankruptcy. *See* CP 332.

malpractice jurisprudence. It is not limited to alleged litigation malpractice, it also has been applied to transactional malpractice claims highly analogous to those alleged here. *See Velocity Capital Partners, LLC v. Lasher, Holzapfel, Sperry & Ebberson*, *PLLC*, No. 71902-5-I, 2015 WL 4610969 (Wash. Ct. App. Aug. 3, 2015) (unpublished).[2]

Gill's attempt to identify a conflict that would be worthy of having this Court take review only serves to demonstrate the soundness of the lower court's decisions. For example, Gill argues that the lower court opinion "directly conflicts with this Court's decision in *French v. Gabriel*." Pet. for Review at 14 (citing *French v. Gabriel,* 116 Wn.2d 584, 595, 806 P.2d 1234 (1991)). However, *French* did not even address the application of the statute of limitations. The *French* opinion concerned

[2]HSKS is not citing *Velocity Capital Partners* for any precedential value. Rather, it is being cited for any persuasive value to be had by the fact that the lower court's application of *Huff* to a transactional malpractice claim in this case is not novel or inconsistent with *Huff's* treatment by other divisions of the Court of Appeals.

personal jurisdiction and insufficient service of process. Moreover, in the dicta discussion of the statute of the limitations, the Court noted that "French has consistently maintained, and the trial court found, that he did not learn that he was an unsecured creditor until September 1984." *French*, 116 Wn.2d at 595. That makes *French* highly distinguishable from the facts here where the lower courts found that Gill knew, or in the exercise of reasonable care, should have known he was an unsecured creditor years in advance of three years preceding the filing of his malpractice complaint. *See infra* Part III(B).

Similarly, Gill's reliance on *Murphey v. Grass,* 164 Wn. App. 584, 267 P.3d 376 (2011) as conflicting authority is entirely misplaced. *Murphey* involved an accounting malpractice claim in which the parties "agree[d] that Murphey's claims accrued at latest when the Department [of Revenue] issued its 'final assessments.' They disagree[d], however, about when that occurred." *Id*. at 590. Thus, the narrow issue in *Murphey* was when did the taxpayer receive the injury-

causing final tax assessment. Because, by statute, the initial assessment did not trigger the tax authority's ability to collect, there was no "injury" until the statutory review process was complete and the tax authority took a final position. *Id*. at 591–93. Just as the *Murphey* court found that its decision was not inconsistent with *Huff* and presented different issues, the lower court's decision here is not inconsistent with *Murphey* and presented a different issue. *Id*. at 594. *Murphey* recognized that "injury" triggered the running of the statute, the parties just disagreed on when injury occurred. Here, *Gill* seeks a new rule different from *Murphey*, *Huff*, and *Keller* that damages—and not injury—be the trigger.

The Court of Appeals declined Gill's motion to publish its opinion because it recognized that it had not determined an unsettled question of law or modified, clarified, or reversed an established principle of law. RAP 12.3(e). To the contrary, the decision below simply adhered to a long line of legal

malpractice authority on the application of the statute of limitations.

B. The Court of Appeals Properly Applied the Discovery Rule; It Did Not Make an Adverse Inference Against Gill.

It is blackletter law that when reasonable minds can reach only one conclusion, resolution of a question of fact by a fact finder is unnecessary and courts may decide the question as one of law. *See, e.g. Old City Hall, LLC v. Pierce Cnty. AIDS Found.*, 181 Wn. App. 1, 9–10, 329 P.3d 83 (2014) (citing *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 924, 296 P.3d 860 (2013)). Thus, where reasonable minds could reach only one conclusion, the court may grant summary judgment, even where the issue normally requires resolution by a fact finder. *Id*.

Under the discovery rule, the statute of limitations begins to run when the plaintiff discovers—or, in the exercise of reasonable diligence, should have discovered—the facts giving rise to the claim. *Cawdrey*, 129 Wn. App. at 816. Thus, if

reasonable minds could reach only one conclusion about when Gill discovered (or in the exercise of reasonable diligence should have discovered) that he did not have a security interest in RG Construction's equipment and that other creditors (IRS) had a lien on those same assets more than three years before his complaint was filed, then summary judgment was proper.

The trial court explained, in detail, when Gill knew or should have known that he did not have a security interest in the company's assets and when Gill knew or should have known about the liens. RP 20:1–21:3, 21:23–22:15.

In reviewing the summary judgment order, the Court of Appeals engaged in the same exercise as the trial court and reached the same result. *See* App. at 5 (*Gill*, 2024 WL 334235, at *5).

Neither the trial court nor the Court of Appeals drew any "adverse inferences" against Gill. *See* Pet. for Review ¶¶ 18–20. Instead, they merely took the undisputed facts in the record and concluded that a reasonable juror must conclude Gill knew,

or should have known, that he did not have a security in the equipment more than three years before filing suit.

C. The Court of Appeals Properly Applied the Rules of Appellate Procedure When It Declined to Consider Gill's Continuous Representation Argument.

On appeal, Gill argued that the statute of limitations should have been tolled by the continuous representation rule. Relying on RAP 9.12, the Court of Appeals declined to address the issue because it was not raised by the trial court. App. at 6 (*Gill*, 2024 WL 334235, at *6). The Court of Appeals did not err in applying the Rules of Appellate Procedure, much less make an error that provides grounds for review under RAP 13.4.

As discussed above, in the trial court, Gill moved to have HSKS's statute of limitations affirmative defense dismissed. In making that argument, Gill focused entirely on accrual and the discovery rule; he did not argue that the continuous representation rule tolled the statute. *See* CP 30–35 (argument in opening brief), CP 339–41 (reply). Likewise, the oral

argument totally lacks any discussion or argument about the continuous representation rule. RP 1–23. The Petition's claim that "Gill expressly raised the continuous representation rule in the trial court," is belied by the record, and his willingness to play loose with that record speaks volumes. Pet. for Review at 20.

When the trial court indicated that it was inclined to grant summary judgment in HSKS's favor if HSKS moved on the statute of limitations, Gill had a choice to make. He could muster up all his arguments for why the claim was not barred and present them to the trial court in opposition to such a motion or he could do what he did—stipulate to the dismissal of the claims based on the record as it existed and pursue his appeal. However, RAP 9.12 is clear, on review of a summary judgment order, the "appellate court will consider only evidence *and issues* called to the attention of the trial court." RAP 9.12 (emphasis added). RAP 9.12 speaks of "issues" not

claims or defenses. The issue of tolling under the continuous representation rule was not raised to the trial court.

The Court of Appeals properly applied RAP 9.12 and reasonably explained the rationale behind its decision to not consider Gill's continuous representation argument on appeal.

D. Even if the Continuous Representation Rule Were Considered, It Provides No Basis for Tolling the Statute of Limitations Under the Facts of This Case.

Despite having not raised the issue to the trial court, Gill insists that there is sufficient evidence in the record for this Court to consider whether the continuous representation rule tolled the statute of limitations. Pet. for Review at 21. However, taking up the merits of continuous representation rule fails to provide good cause for review.

The continuous representation rule does not apply to these facts. The continuous representation rule only tolls the statute of limitations "until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred." *Janicki Logging*, 109 Wn. App.

at 661. It "does not toll the statute of limitations until the end of the attorney-client *relationship*, but only during the lawyer's representation of the client in the *same matter* from which the malpractice claim arose." *Id*. at 663–64 (emphasis in original). As an exception to the statute, it must be narrowly construed. *Id.* at 663; *Cawdrey,* 129 Wn. App. at 819. The purpose of the rule is to give attorneys an opportunity to remedy their errors, while still allowing the aggrieved client the right to later bring a malpractice action. *Cawdrey*, 129 Wn. App. at 819; *see also Burns v. McClinton,* 135 Wn. App. 285, 295–97, 143 P.3d 630 (2006).

Here, HSKS's drafting of the Agreement constituted a single "matter" for purposes of the continuous representation rule. Once the Agreement was signed, it was out of HSKS's hands—it could not be altered without Hicks' consent. Indeed, after the Agreement was signed, for five years, Gill did not discuss the Agreement with HSKS despite Hicks' failure to make payments for the first 32 months. CP 236, 239–40.

HSKS's representation of Gill on the matter giving rise to the malpractice claim (i.e., documenting the sale transaction) indisputably concluded years before 2019. The "continuous representation" rule does not toll the statute under the facts here.

Finally, the Court of Appeals' decision not to address the continuous representation rule does not provide a basis for review under any of the enumerated standards of RAP 13.4(b)(1)–(4).

IV. CONCLUSION

For all the foregoing reasons, Gill's Petition for Review should be denied.

DATED this 24th day of April, 2024.

BYRNES KELLER CROMWELL LLP
By /s/ Joshua B. Selig
Joshua B. Selig, WSBA #39628
1000 Second Avenue, 38th Floor
Seattle, WA 98104
Telephone: (206) 622-2000
jselig@byrneskeller.com
Attorneys for Respondents

I certify that this document contains 3,728 words, excluding the parts of the document exempted from the word count by RAP 18.17.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 24th day of April, 2024, a true copy of the foregoing was served on each and every attorney of record herein via E-Service:

Brian J. Waid, WSBA #26038
Waid Law Office, PLLC
P.O. Box 16737
Seattle, WA 98116
Phone: (206) 388-1926
E-mail: bjwaid@waidlawoffice.com
Attorney for Petitioner

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 24th day of April, 2024.

/s/ Joshua B. Selig
Joshua B. Selig
Byrnes Keller Cromwell LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104
Telephone: (206) 622-2000
Facsimile: (206) 622-2522

BYRNES KELLER CROMWELL LLP

April 24, 2024 - 2:27 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,897-1
Appellate Court Case Title:	George Rusty Gill Jr. v. Hillier, Scheibmeir, Kelly & Satterfield P.S. et al.
Superior Court Case Number:	22-2-00487-6

The following documents have been uploaded:

- 1028971_Answer_Reply_20240424142211SC139920_4677.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2024 04 24 Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- bjwaid@waidlawoffice.com
- docket@byrneskeller.com
- ssandusky@byrneskeller.com

Comments:

Sender Name: Shara Sandusky - Email: ssandusky@byrneskeller.com
Filing on Behalf of: Joshua Bacon Selig - Email: jselig@byrneskeller.com (Alternate Email: mzafra@byrneskeller.com)

Address:
1000 Second Avenue
38th Floor
Seattle, WA, 98104
Phone: (206) 622-2000

Note: The Filing Id is 20240424142211SC139920