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COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

JOSE BALAM-CHUC, REBEKAH BALAM-CHUC, MAYA BALAM-
CHUC and ERIC BALAM-CHUC,

Appellants.

v.

GABRIEL BANFI,

Respondent.

BRIEF OF RESPONDENT GABRIEL BANFI

Sam B. Franklin, WSBA No. 1903
Erin J. Varriano, WSBA No. 40572
Attorneys for Respondent Gabriel Banfi

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

5369012

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I. INTRODUCTION

This is a legal-malpractice action arising out of the DeDamm Law Firm's representation of Appellants, Mr. and Mrs. Balam-Chuc, while Respondent, Gabriel Banfi, was employed as an associate with the firm. The Balam-Chucs retained the DeDamm Law Firm in 2001 to assist them in applying for adjustment of status for Mr. Balam-Chuc under the Legal Immigration Family Equity Act ("LIFE Act"). Mr. Banfi was assigned the task of reviewing the petition for adjustment and did so on the Balam-Chuc file. Mr. Banfi then provided the completed forms to a paralegal at the DeDamm Law Firm for delivery. However, the Balam-Chuc petition never made it to the Immigration and Naturalization Service (INS) before the April 30, 2001 deadline. The Balam-Chucs were notified of the untimely petition by an INS officer in 2002, retained new counsel who was fully aware of any alleged malpractice issue, and embarked on a lengthy legal battle to keep Mr. Balam-Chuc in the country.

In 2010, nine years after the alleged act of malpractice occurred, the Balam-Chucs filed this action, alleging attorney malpractice against Mr. Banfi. They further asserted claims on behalf of their children, Eric and Maya, born in 2001 and 2005 respectively, for loss of parental consortium.

Both sides moved for summary judgment in June 2003. At the hearing, the trial court granted Mr. Banfi's motion for summary judgment on the grounds that the claims were barred by the statute of limitations. The Balam-Chucs motion was denied. This court should affirm the trial court's dismissal of the Balam-Chucs' claims against Mr. Banfi.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Respondent Banfi assigns no error to the trial court's decision.

Issues Pertaining to Assignments of Error

Mr. Banfi disagrees with the statement of Issues Pertaining to the Assignments of Error by Appellants Balam-Chuc. Mr. Banfi believes the issues on appeal are more properly stated as follows:

Whether the trial court properly dismissed the Balam-Chucs' claims as a matter of law on summary judgment, where:

1. The Balam-Chucs cannot bring a claim against Mr. Banfi where any alleged error or omission in the representation was by a paralegal over whom Mr. Banfi had no supervisory power;

2. The Balam-Chucs' claims were barred because they were filed well after the expiration of the three-year statute of limitations for attorney malpractice claims;

3. The Balam-Chuc children did not have any actionable claim against Mr. Banfi because they were not intended beneficiaries of the attorney-client relationship;

4. Mrs. Balam-Chuc and the children do not have a viable loss-of-consortium claim where the underlying tort is prohibited;

5. There is no authority extending a loss of parental consortium claim when the injurious conduct occurred pre-birth; and

6. A de minimis and temporary diminution of the spousal or parent-child relationship cannot be the basis for a claim of loss of consortium.

III. STATEMENT OF THE CASE

Respondent, Gabriel Banfi, first became licensed to practice law in the State of Washington in 1988. CP 92. From late 1988 to 1992, Mr. Banfi worked at a small law firm that primarily handled immigration cases; these cases required familiarity with all types of visas, labor certifications, and deportation and exclusion hearings before the Executive Office of Immigration Review and the Board of Immigration Appeals. CP 93. In 1992, Mr. Banfi joined the society of Counsel Representing Accused Persons. *Id.* He eventually returned to private practice in 1997 working on criminal defense matters along with immigration and limited civil litigation matters. *Id.* .

In October of 1999, the DeDamm Law Firm recruited Mr. Banfi to work as the firm's felony criminal defense attorney. CP 167. Rolf DeDamm, who is of Chilean descent and bilingual, was the owner and sole proprietor of the DeDamm Law Firm and was very active in the Hispanic community. CP 168. At some point Mr. DeDamm decided to expand the firm's practice and began an advertising campaign directed at the Hispanic community; he specifically advertised the DeDamm Firm's availability in immigration matters. *Id.* In furtherance of this expansion, Mr. DeDamm hired an immigration paralegal and registered immigration specialist, Raquel Inchauste. CP 93, 108, 168. Together, Mr. DeDamm and Ms. Inchauste appeared on marketing materials distributed to the Hispanic community. CP 168.

Ms. Inchauste had an extensive background in immigration law and had been registered as an Immigration Assistant with the State of Washington since 1993. CP 80. Because of this extensive experience, Ms. Inchauste, under the direct supervision of Mr. DeDamm, was the lead point of contact for the firm in immigration matters. CP 97. Her duties included conducting client interviews, completing pertinent paperwork, including but not limited to applications, and petitions to be submitted to what was then the Department of Immigration and Naturalization Services (INS), drafting simple legal memoranda and correspondence for the firm,

and attending appointments with INS on behalf of the firm's clients. CP 96, 107, 109. Throughout her employ, Mr. DeDamm was Ms. Inchauste's supervisor, set forth all of her responsibilities, and oversaw all of her work. CP 109. In contrast, Mr. Banfi never had supervisory authority over Ms. Inchauste, never conducted any of her performance reviews, and never dispensed compensation to her. CP 97, 109.

A. Mr. Banfi's scope of duties regarding immigration matters at the DeDamm Law Firm was narrow.

In 2000, the Legal Immigration Family Equity Act ("LIFE Act") was enacted by Congress. CP 20. The LIFE Act provided a mechanism whereby the spouses and minor children of lawful permanent residents could apply for immigrant visas sooner than had been previously allowed under law. *Id.* Ms. Inchauste was tasked with meeting with the clients and completing the necessary paperwork for that new mechanism, the I-130 Petition, and was responsible for mailing all the forms to INS. CP 107, 109. Because of Mr. Banfi's previous immigration experience, Mr. DeDamm assigned Mr. Banfi to assist with petitions under the LIFE Act. CP 93, 94, 169. Mr. Banfi's was assigned to review the files and forms prepared by Ms. Inchauste to ensure there were no disqualifying criminal history entries or other incidents which might bar relief for the clients under the Act, and to make sure nothing in the submittal could

result in deportation or otherwise prejudice the applicant. CP 169. Mr. DeDamm continued to oversee both Mr. Banfi and Ms. Inchauste's work. CP 97, 107, 109.

B. The Balam-Chucs retained the DeDamm Law Firm to assist them in applying for status adjustment under the LIFE Act.

Appellant, Jose Balam-Chuc, who had entered the United States illegally, married Appellant Rebekah Balam-Chuc, a U.S. citizen in 2000. CP 11. The Balam-Chucs saw the advertisements of the DeDamm Law Firm in the yellow pages and in February of 2001, retained the firm to file a family visa petition and apply for an adjustment of status under the LIFE Act. CP 11, 60, 111, 142. The Balam-Chucs met with Ms. Inchauste at the firm and she explained the procedures for relief under the LIFE Act, and provided them with a list of items necessary to complete the application. CP 143. The Balam-Chucs again met with Ms. Inchauste on or about March 20, 2011, to complete the necessary paperwork and provide the processing fees. *Id.* This was the only time the Balam-Chucs met with Mr. Banfi. *Id.*

On or about March 30, 2001, Ms. Inchauste called the Balam-Chucs to notify them that Jose had failed to sign on of the documents. *CP 143.* Mr. Balam-Chuc returned to the DeDamm Law Firm to complete the form and the paperwork was submitted to Mr. Banfi for review and

finalizing. *Id.*; CP 169. Mr. Banfi signed off on the petition on behalf of the DeDamm Law Firm on March 30, 2001. CP 65. According to Ms. Inchauste, the Petition was then mailed to the INS prior to the April 30, 2001 deadline. CP 109. Mrs. Balam-Chuc later called the DeDamm Firm and apparently spoke with Ms. Inchauste who assured her the petition would be hand-delivered on time. CP 29; CP 162. There is no claim that the Balam-Chucs ever spoke to Mr. Banfi about delivery of the petition to the INS. CP 162. The due date for the filing was April 30, 2001. CP 177.

C. The Balam-Chucs learned in July of 2002, that the petition had not been timely filed.

In July of 2002, Mr. Balam-Chuc appeared for his adjustment interview and learned for the first time that the I-130 petition had not been filed by the deadline. CP 29. The Balam-Chucs contacted the DeDamm Law Firm, but no one could provide proof that the petition had been submitted prior to the deadline. CP 29. The Balam-Chucs then contacted Mr. Banfi, who had since left the DeDamm Law Firm. CP 95. This was the first notice Mr. Banfi received that the Petition had allegedly not been filed in a timely manner. *Id.* Mr. Banfi referred the Balam-Chucs to several other immigration attorneys in Seattle. CP 95. The Balam-Chucs

eventually retained Seattle immigration attorney Carol L. Edwards. CP 20.

Although the INS eventually approved the I-30 Petition on October 14, 2002, it ultimately denied Balam-Chuc's application for an adjustment of status based on the untimely filing of the corresponding petition. CP 29. On February 3, 2003, Mr. Balam-Chuc was issued with a Notice of Intent to Deny Application for Permanent Residence because he had failed to submit proof that his petition was filed prior to the April 30, 2001 deadline. CP 177.

On May 10, 2004, the Department of Homeland Security advised Mr. Balam-Chuc via letter that his application for status as a lawful permanent resident was denied and that any permission to work that may have been granted to him was now disallowed. CP 175, 176. The May 10, 2004 letter also advised Mr. Balam-Chuc that there was no appeal from the Department's decision. CP 177. Mr. Balam-Chuc was served with a Notice to Appear, charging that he was subject to removal from the county. CP 29, 30, 177, 178.

On August 18, 2004, Mr. Balam-Chuc appeared with his attorney Ms. Edwards before the Immigration Judge and argued that he should be eligible for an adjustment of status because filed the petition on time; he argued alternatively that the deadline should be tolled due to ineffective

assistance of counsel. CP 30. (Prior to the hearing, on June 1, 2004, the Balam-Chucs filed a grievance against Mr. Banfi with the Washington State Bar Association. CP 172-73).

D. Mr. Balam-Chuc was deported to Mexico for approximately one year.

On January 20, 2005, the Immigration Judge decided that Mr. Balam-Chuc was ineligible for adjustment of status and sustained the charge of removability. CP 30. The Balam-Chucs appealed the decision to both the Board of Immigration Appeals and the Court of Appeals for the Ninth Circuit arguing that the filing deadline should be tolled due to ineffective assistance of counsel. CP 26. The Ninth Circuit Court of Appeals eventually denied the petition and Mr. Balam-Chuc was deported back to Mexico in November 2009. He was allowed to return to the United States approximately one year later. CP 13, 24, 27.

E. The Balam-Chucs bring suit against Mr. Banfi and their case is dismissed.

The Balam-Chucs filed their Complaint For Damages on March 26, 2010. CP 1-4. The Balam-Chucs alleged that Mr. Banfi was negligent in rendering legal services to Joes and Rebekah Balam-Chuc and that such negligence resulted in Mr. Balam-Chuc being forced to leave the United States. CP 4. Rebekah Balam-Chuc alleged that she suffered loss of consortium. *Id.* Eric and Maya Balam-Chuc, the two children, also

alleged a loss of consortium with Mr. Balam-Chuc as a result of Mr. Banfi's alleged negligence. *Id.*

Mr. Banfi filed his Motion for Summary Judgment of Dismissal on April 22, 2011. CP 38. Mr. Banfi moved for dismissal of Mr. and Mrs. Balam-Chucs professional malpractice claim on the basis that (1) the claim was barred because it was filed after the expiration of the statute of limitations; (2) the claim failed because they cannot prove the necessary elements for a legal malpractice claim; and (3) Eric and Maya Balam-Chuc were not intended beneficiaries of the attorney-client relationship. CP 38-55. Mr. Banfi specifically argued that because there was no negligence on his part as to Mr. and Mrs. Balam-Chuc, as a matter of law, there could be no damages for the loss of consortium recovered by the other plaintiffs. CP 51-52. Mr. Banfi, alternatively, argued that loss of consortium cannot constitute damages for legal malpractice. CP 52.

The Balam-Chucs also filed a motion for partial summary judgment. CP 11. They argued that the failure to file the petition by the deadline constituted negligence as a matter of law on behalf of Mr. Banfi. CP 15-18.

After hearing for both motions on June 3, 2011, the trial court granted Mr. Banfi's Motion. CP 200-01. The trial court denied the Balam-Chucs' Motion. CP 202-03.

IV. SUMMARY OF ARGUMENT

The trial court's June 3, 2011 Order Granting Motion For Summary Judgment of Dismissal, and the Order Denying Motion for Summary Judgment should be affirmed because: (1) Ms. Inchauste's alleged failure to timely file the I-130 Petition does not constitute negligence as a matter of law as to Banfi; (2) the Balam-Chucs' legal malpractice claim is barred by the applicable statute of limitations, (3) Mr. Banfi had no duty owing to the Balam-Chuc children, who were not contemplated to be third-party beneficiaries of the representation in 2001; (4) Mrs. Balam-Chuc and the children do not have a viable claim for loss of consortium where the underlying tort is prohibited; (5) there is no authority extending a loss of parental consortium claim when the injurious conduct occurred pre-birth; (6) a de minimis and temporary diminution of the parent-child relationship cannot be the basis of a loss-of-consortium claim..

V. ARGUMENT

A. The standard of review is de novo, but this court may affirm on any ground the record supports.

This court engages in the same inquiry as the trial court when reviewing a summary judgment order. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the

absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *See* CR 56(c). However, “[a] trial court’s decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof.” Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 (6th ed. 2010); *see also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (2007).

B. The trial court correctly dismissed the Balam-Chucs’ claim because Mr. Banfi did not owe a duty to supervise every administrative aspect of a subordinate employee.

To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) the existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney’s breach of the duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992) (citation omitted).

To meet the applicable standard of care, an attorney must exercise the degree of care, skill, diligence and knowledge commonly possessed by a reasonable, careful and prudent lawyer. *See, e.g., id.* at 261; *Hoffman v. Connall*, 108 Wn.2d 72, 75-76, 736 P.2d 242 (1987) (citations omitted). As elaborated by a relevant treatise, the standard of care for an attorney is what is reasonable under the circumstances of the particular case:

The duty of competence, like that for diligence, does not make the lawyer a guarantor of a successful outcome in the representation. **It does not expose the lawyer to liability to a client for acting only within the scope of the representation** or following the client's instructions. It does not require a lawyer, in a situation involving the exercise of professional judgment, to employ the same means or select the same options as would other competent lawyers in the many situations in which competent lawyers reasonably exercise professional judgment in different ways. The duty also does not require "average" performance, which would imply that the less skillful part of the profession would automatically be committing malpractice. **The duty is one of reasonableness in the circumstances.**

Restatement (Third) of the Law, The Law Governing Lawyers, § 52, comment b. Competence (emphasis added).

A supplemental ethical duty lies for all attorneys in Washington under the Rules of Professional Conduct (RPCs). Pursuant to the RPCs:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers **possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;**

(b) a lawyer having **direct supervisory authority** over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) **the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person,** and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RPC 5.3, “Responsibilities Regarding Nonlawyer Assistants” (emphasis added).

Mr. Banfi’s legal and fiduciary duty to Mr. and Mrs. Balam-Chuc was one of reasonableness under the circumstances. This duty did not include Mr. Banfi supervising every aspect of the work of paralegal Raquel Inchauste. Mr. Banfi was not Ms. Inchauste’s manager, nor did he have any role in the firm as a partner or owner. CP 97, 107, 109. Mr. Banfi was an associate attorney assigned to a limited role related to Mr. Balam-Chuc’s file. CP 169. Mr. Banfi cannot be liable for the actions or inactions of his co-workers at the DeDamm Law Firm over whom he had no control, particularly when Mr. DeDamm had direct supervisory control over Ms. Inchauste. CP 109. Ms. Inchauste had the specific duty to mail all forms, including Mr. Balam-Chuc’s I-130 Petition; Mr. Banfi’s duty, in contrast, was to review the substance of the forms, not to ensure

administrative completion. CP 107, 109. Moreover, Mr. Banfi had no reason to believe that Ms. Inchauste had failed in her duty, and in exercise of his limited role, discovering her failure was highly unlikely.

As such, Mr. Banfi did not breach any legal duty owing because he did ensure that the petition was complete and ready for mailing prior to the April 30, 2001 deadline. Because Mr. Banfi did not owe a duty to Mr. Balam-Chuc to manage Ms. Inchauste, but instead to act as a reasonable attorney in the same or similar circumstances. Any oversight or error that Ms. Inchauste committed as an employee of the DeDamm Firm cannot be imputed to Mr. Banfi.

C. Ms. Inchauste's failure to timely file the I-130 Petition does not constitute negligence as a matter of law as to Mr. Banfi.

The Balam-Chucs, relying on out-of-state case law, argue that the failure to timely file the I-130 Petition is negligence per se. App. Br. at 16-19. The Balam-Chucs cite *Bergin v. Grace*, 39 A.D. 1017 (N.Y. 2007) and *Hickox v. Hollerman*, 502 So.2d 626 (Miss. 1987), to support their argument that Mr. Banfi was negligent as a matter of law because the petition was not timely filed. This argument failed because neither of the cases cited by Appellants supports this theory of liability.

Both the *Bergin* and *Hickox* courts found that the defendant attorneys' conduct fell below the level of ordinary and reasonable skill

duty owed by all attorneys because the respective attorneys were not diligent in analyzing the facts and laws applicable to the respective cases, were **not aware of the applicable statute of limitations**, and failed to timely commence action. *See, e.g., Bergin*, 39 A.D. at 1018 (negligence found where attorney failed to notice insurance policy set forth a shortened statute of limitations); *Hickox*, 502 So.2d at 635-36 (attorney negligent where he made no effort to check any law to determine the nature of the claims, and the applicable statute of limitations).

Here, the Balam-Chucs do not claim that the failure to timely file the petition was due to Mr. Banfi's ignorance of the filing deadline. Rather, they admit that Mr. Banfi knew the deadlines and prepared the forms on time. App. Br. at 18. Their sole claim is based on a premise, unsupported by authority, that it was Mr. Banfi's duty to ensure that a paralegal — over whom Mr. Banfi had no supervision or control, as opposed to Mr. DeDamm — timely deposited the application in the mail. The cases that the Balam-Chucs cite speak nothing to that novel legal theory of liability, and thus do nothing to aid this Court's determination.

The issue here is whether the negligence of a paralegal can be properly imputed to an associate attorney that had no supervisory control over that paralegal, not whether an attorney missing a deadline for a legal filing, and whether missing the legal filing deadline proximately caused

cognizable injury and damages. The burden was not on Mr. Banfi to prove a negative, *i.e.*, that he was not negligent, but was on the Balam-Chucs before the trial court and now here, to put forth legal authority showing that the trial court erred. The cases the Balam-Chucs cite, which were filed before the trial court and presumably rejected as unpersuasive, are not on point whatsoever in this matter.

This court should thus affirm summary judgment for Mr. Banfi on the grounds that an associate attorney is not liable for malpractice as a matter of law when an employee, over whom they had no supervision, fails to timely perform a clerical task.

D. The statute of limitations began to run on all claims the date Mr. Balam-Chuc learned that the I-130 Petition was not timely filed.

Even if this court finds that Mr. Banfi breached a duty owing by not ensuring the petition was filed on time, the Balam-Chucs' claims are barred by the three year statute of limitations for attorney malpractice claims. RCW 4.16.080(3); *see also Davis v. Davis Wright Tremaine, L.L.P.*, 103 Wn. App. 638, 655, 14 P.3d 146 (2000). The discovery rule applies to legal malpractice actions and the cause of action accrues when the client discovers or, in the exercise of reasonable diligence should have discovered the facts which give rise to the cause of action. *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976); *see also Davis*, 103

Wn. App. at 648, 655. Further, the rule does not specifically require knowledge of the existence of a legal cause of action. *Matson v. Weidenkopf*, 101 Wn. App. 472, 482, 3 P.3d 805 (2000) (quoting *Peters* 87 Wn.2d at 406). Instead, the statute of limitations begins to run when “the plaintiff knew or should have known all of the essential elements of the cause of action.” *Id.* (quoting *Gevaart v. Metco Constr. Inc.*, 111 Wn.2d 499, 501-02, 760 P.2d 348 (1988)) (internal quotations omitted).

Here, the Balam-Chucs were aware of the “essential elements” of a malpractice action at least by June 2002. Malpractice refers to legal negligence. “The elements of negligence are duty, breach, causation, and **injury.**” *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002) (emphasis added). As the court of appeals explained in *Huff v. Roach*, 125 Wn. App. 724, 106 P.3d 268 (2005):

Frequently, recitations of the negligence elements inaptly refer to “damages” as an element of negligence rather than damage or injury. *See Janicki Logging*, 109 Wn. App. at 660, 37 P.3d 309 (using the terminology “damages” rather than injury or damage). Although “injury” and “damages” are often used interchangeably, an important difference exists in meaning. *See Lavigne*, 112 Wn. App. At 683, 50 P.3d 306 (citing 3 Rodney E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 20.1, at 119 (5th ed.2000)). **In the legal malpractice context, injury is the invasion of another’s legal interest, while damages are the monetary value of those injuries. Mr. and Mrs. Huff were injured by [defendant attorney] when he missed the statute of limitations, effectively invading their legal interests.**

Huff, 125 Wn. App. at 729-30 (emphasis added).

The present case is comparable. When the petition was not filed by the April 30, 2001 deadline, Mr. Balam-Chuc lost “the opportunity to process his adjustment of status application under the LIFE Act.” CP 20. That is the injury he is claiming here. In June 2002, Mr. Balam-Chuc was expressly notified that his I-130 Petition had not timely been filed, putting the Balam-Chucs on actual notice of the alleged breach of Mr. Banfi’s duty. At this point, it cannot be denied that Mr. Balam-Chuc knew all of the essential elements of his legal malpractice claim and this is the date his claim accrued.

The Balam-Chucs were again apprised of their potential cause of action against Mr. Banfi in 2004 when DHS informed Mr. Balam-Chuc that it was denying his application for status as a lawful permanent resident, terminated his right to work in the United States, and commanded him to appear for removal proceedings. Again, the Balam-Chucs did nothing. Moreover, the Balam-Chucs implicitly demonstrated that they had potential grounds for a suit in negligence against Mr. Banfi when they filed the bar complaint in June 2004.

The Balam-Chucs argue that their cause of action did not accrue until Mr. Balam-Chuc was actually forced to leave the country in 2009, some eight years after Mr. Banfi’s alleged negligent omission. This is

objectively wrong and without legal basis. As shown above, the statute of limitations commences upon injury – when an attorney’s acts or omission result in the loss of a right, regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred. *Huff*, 125 Wn. App. at 729-30 (quoting *Brown v. Beheles & Davis*, 135 N.M. 180, 183, 86 P.3d 605 (2004)). The statute of limitations began to run when the Balam-Chucs knew or should have known they lost a right, remedy, or interest, not when Mr. Balam-Chuc was deported. Furthermore, a cause of action accrues when the plaintiff has knowledge of **some** damage; accrual is not postponed because substantial damage occurs later. *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 63 P.3d 153 (2002) (emphasis added); *Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 (2000).

Besides the legal inadequacy of Appellants’ position, as a policy matter, accepting such a position would be contrary to Washington’s strong policy favoring the statute of limitations as the primary means of shielding defendants from stale claims. *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997). “When plaintiffs sleep on their rights, evidence may be lost and witnesses’ memories may fade.” *Crisman*, 85 Wn. App. at 19.

Additionally, accrual is not tolled pending outcome of a subsequent appeal. In *Richardson v. Denend*, 59 Wn. App. 92, 96-97, 795 P.2d 1192 (1990), the court held:

... [D]amages, if any, resulting from the errors or omissions of an attorney allegedly occurring during the course of litigation are embodied in the judgment of the court. The parties to such action, in turn, are formally advised of the judgment of the court and, hence, received notification of any damage which results from their attorney's representation. We conclude, therefore, that upon entry of the judgment, a client, as a matter of law, possesses knowledge of all the facts which may give rise to his or her cause of action for negligence representation.

Id.

The rule that the statute of limitations for an attorney malpractice claim does not toll pending the exhaustion of appeals was reiterated a decade later in *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001). In *Janicki*, plaintiff sued its former attorney firm because it had missed a one year deadline for filing in the court of claims. *Id.* at 658. The trial court dismissed the case as time barred on a CR 12(b)(6) motion. Plaintiff appealed, claiming, among other things, that the statute of limitations did not begin to run until all appeals had been exhausted. *Id.* at 660. *Janicki*, like Appellants, argued that it could not have known it was damaged before that time, since any damage was only speculative up to that point.

Id. The court, relying on *Richardson*, declined to adopt Janicki's proposed rule that any appeal in a civil matter delays discovery for the purposes of the statute of limitations. *Id.*

Washington case law is consistent on the principle reiterated in *Janicki*. See, e.g., *Quinn v. Connelly*, 63 Wn. App. 733, 821 P.2d 1256 (1992) (three-year statute of limitations commenced running on date attorney-client relationship ended, not at outcome of appeal); *Pectu v. State*, 121 Wn. App. 36, 86 P.3d 1234 (2004) (damage or injury flowing from a judicial or quasi-judicial determination occurs at the time of the initial ruling, notwithstanding the subsequent appellate activity).

The Balam-Chucs knew the facts regarding their claim against Mr. Banfi in 2002 when the Balam-Chucs learned that the I-130 Petition had not been timely filed and was subsequently denied. At a minimum, even absent actual notice, they would have known in the exercise of reasonable diligence. This is when the Balam-Chucs' claim for malpractice accrued, when the three-year statute of limitations began to run therefore barring their claim in 2005, approximately five years prior to the filing of suit in 2010. Moreover, the statute of limitations was not tolled pending exhaustion of appeals, or until alleged substantial damage (deportation) occurred. This is dispositive here, and the trial court did not err in granting summary judgment dismissal.

E. Mr. Banfi owed no legal duty to the Balam-Chuc children.

In the absence of privity of contract between an attorney and a putative client, as here with the Balam-Chuc children, there must be some other basis to establish a duty for the attorney to be held liable in a legal-malpractice action. *See Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987). The Washington Supreme Court has developed a composite multi-factor balancing test to determine whether such a duty exists. This test is a modification of the “California multi-factor test” and the “Illinois third party beneficiary test.” The multi-factor balancing test and the third-party beneficiary test were independently created by separate state courts to determine whether an attorney owes a duty to a non-client. *See Trask v. Butler*, 123 Wn.2d 835, 842, 872 P.2d 1080 (1994). The two tests are indistinguishable in that their primary inquiry focuses on the purpose for establishing the attorney-client relationship. *Id.* The first and threshold inquiry, under Washington’s composite multi-factor balancing test is the “intent to benefit the plaintiff” which constitutes the following elements:

- (1) the extent to which the transaction was intended to benefit the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant’s conduct and the injury;
- (5) the policy of preventing future harm; and
- (6) the extent to which the profession would be unduly burdened by a finding of liability.

Id. at 843; *Leipham v. Adams*, 77 Wn. App. 827, 832, 894 P.2d 576 (1995).

The *Trask* Court elaborated on the first factor by stating:

...under the modified multifactor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained. While the answer to the threshold question does not totally resolve the issue, no further inquiry need be made unless such intent exists.

Trask, at 843. In other words, a non-client does not have standing to sue an attorney for legal **malpractice if the representation by the attorney was not intended to benefit the non-clients**. See also *Leipham*, 77 Wn. App. at 832. A corollary rule is that the client's subjective belief as to whether an attorney-client relationship exists does not control "unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions." *Id.* at 833 (citing *Bohn v. Cody*, 199 Wn.2d 357, 832 P.2d 71 (1992)).

Here, the court must consider whether the putative plaintiffs had a reasonable, subjective belief that there was a cognizable relationship between Mr. Banfi and Eric and Maya Balam-Chuc. On balance, there simply is no reasonable argument that the children were intended beneficiaries to the attorney-client relationship between Mr. Banfi and Mr. and Mrs. Balam-Chuc. The Balam-Chucs retained the DeDamm Law

Firm to represent them in an immigration matter **prior** to the birth of the children. Appellants do not, and cannot, dispute this. There is no evidence to suggest that Mr. Banfi's services were ever intended for the benefit of Eric and Maya, who were not born and who were — by Mrs. Balam-Chuc's admission — not even planned until after “the legal battle was over.” CP 88. Mrs. Balam-Chuc admits in writing that the couple did not plan to have children until after Mr. Balam-Chuc's immigration status was settled. CP 88.

In addition, there is no evidence that the Balam-Chucs' words or actions led Mr. Banfi to believe that Eric and Maya would benefit from the firm's services. CP 64-66; CP 97-98. From a common sense standpoint, such a belief by Mr. Banfi would in reality be impossible. Mr. Banfi never had any discussion with the Balam-Chucs about their plans for children. Appellants cite no authority from Washington, or any other state for that matter, as they must, establishing that an attorney's professional duty can extend to this factual scenarios, where an intended beneficiary does not even exist at the time of the representation.

Accordingly, the trial court correctly dismissed any purported legal-malpractice claim by Eric and Maya Balam-Chuc against Mr. Banfi, because they cannot even meet the threshold inquiry of their claim under *Trask*.

F. Mrs. Balam-Chuc and the children do not have a viable claim for loss of consortium where the underlying tort is prohibited.

Because the claim for malpractice fails as a matter of law, as correctly determined by the trial court below, the claims for loss of consortium brought by Mrs. Balam-Chuc and the children necessarily fail as well.

Generally, a loss-of-consortium claim requires the presence of a viable underlying tort.

Loss of consortium involves the loss of love, affection, care, services, companionship, society and consortium suffered by the “deprived” spouse as a result of a tort committed against the “impaired” spouse. No claim for loss of consortium will arise if no tort is committed against the impaired spouse. ... Even though loss of consortium has been held a separate, independent, nonderivative action of the deprived spouse and not affected by the negligence of the impaired spouse, **nevertheless, an element of this cause of action is the tort committed against the “impaired” spouse. Moreover, a consortium claim by a lone spouse will not be recognized where the underlying tort has been prohibited or abolished.**

Conrad v. Four Star Promotions, Inc., 45 Wn. App. 847, 852-53, 728 P.2d 617 (1986) (citations and internal quotation marks omitted) (emphasis added).

In addition, sound policy reasons exist for barring claims for loss of consortium where the injured spouse/parent’s claim is prohibited. Mrs. Balam-Chuc and the Balam-Chuc children claim that they did not

suffer any loss of consortium until November 2009, when Mr. Balam-Chuc was deported to Mexico, well after the statute of limitations had run on Mr. Balam-Chuc's claims. If no restriction is placed on the class of spouses or children who are eligible to recover for loss of consortium, a defendant may become liable for the loss of consortium several years, perhaps even decades, after the injury to the spouse/parent. Such a scenario is easily imaginable if this court was to accept Appellant's novel theory of liability; Appellants are essentially asking this Court to legislate from the bench and create a new cause of action for a class of persons where none stood before. It is difficult to envision how parties who have settled claims with an injured party would be able to withstand this overbroad and potentially never-ending liability. This is directly contrary to the strong policy in Washington, as well as all other jurisdictions, of enforcing statutes of limitation.

Because Mrs. Balam-Chuc and the children allege they did not suffer any loss of consortium until 2009, according to the Balam-Chucs, their claims accrued after Mr. Balam-Chuc's claims were barred. The trial court concluded the same. Accordingly, Mrs. Balam-Chuc and the children should not be allowed to enforce their claims.

G. There is no authority that would permit a claim of loss of parental consortium claim when the injurious conduct occurred pre-birth.

Related to the previous argument, the fact that the Balam-Chuc children were not born at the time of the injury should preclude their claim. In 1984, Washington recognized for the first time a cause of action by children for loss of parental consortium (loss of the love, care, companionship and guidance of a parent) when a parent is tortiously injured by a third party. *See Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 132, 140, 991 P.2d 190 (1984). This separate consortium claim must be joined with the parent's underlying claim unless the child can show why joinder was not feasible. *Id.* at 132.

However, there is no authority that allows a child to maintain an action for loss of parental consortium who was not born at the time of the tortious conduct. Appellants' failure to cite any is notable in this regard. Unlike the Balam-Chuc children, in *Ueland*, the minor children **already** had some form of parental consortium, or legally-recognized interest, and which could be the sort of cognizable interest that could be compensated if lost via another party's negligence. Here, the parent suffered injury, the loss of the right for status adjustment, long before the children existed.

The well established rule that a spouse cannot maintain a loss-of-consortium claim where the injury occurred pre-marriage should apply to

loss of parental consortium claims as the reasoning behind that rule is directly applicable. *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998), restates the majority rule that this state generally follows. *Green* was a products liability action against manufacturers of a pregnancy drug, Diethylstilbestrol (DES). The wife suffered a T-shaped uterus due to toxic exposure to DES while in utero. The injury was unknown to her until years later — after she was married and attempted to have children. One of the claims in *Green* was brought by the husband by Joshua Green, for the loss of consortium stemming from his wife’s difficult pregnancy. The *Green* Court started its analysis of this claim by noting that the court of appeals had correctly identified the rule in this and most jurisdictions: “a loss of consortium claim does not lie when the injury to the spouse that caused the loss of consortium occurred prior to the marriage.” *Green*, 136 Wn.2d at 101. The *Green* Court went on to identify three policy reasons for the general rule:

- (1) a person should not be permitted to marry a cause of action;
- (2) one assumes with a spouse the risk of deprivation of consortium arising from any prior injury;
- [and] (3) as a matter of policy, tort liability should be limited.

Id.

Likewise, this court should refuse to recognize loss of parental consortium claims where the non-latent injury occurred prior to the child’s

birth. Here, the alleged injury occurred in 2001, before either child was born. Balam-Chucs knew that Mr. Balam-Chuc had lost his right to apply for adjustment status and was subject to deportation at least by 2002. The Balam-Chucs made the choice to have two children, despite the likelihood that Mr. Balam-Chuc would be forced to leave the country thereby assuming the risk that the children would lose the consortium of their father. A party's decision to procreate should not give rise to a claim for negligence to another, and Appellants cite no authority establishing such a theory.

Like claims for spousal loss of consortium, as a matter of policy, tort liability should be limited. After a parent is negligently injured by a defendant, he or she may continue having children, essentially giving birth to more causes of action. Taking the Balam-Chucs' asserted theory of liability to its logical end, would force defendants to be potentially liable years and decades from now for loss-of-consortium claims from people who do not presently exist and for alleged negligent actions that occurred already over a decade ago.

H. A de minimis and temporary diminution of the spousal or parent-child relationship cannot be the basis of a loss-of-consortium claim.

Even if this court recognized the Balam-Chucs' novel and unsupported theory of liability on the loss-of-consortium claims for the

wife and children here, the claims must fail because they did not “lose” consortium as contemplated by the law. Mrs. Balam-Chuc and the children’s claim are actually for **less than ideal** consortium, not **loss** of consortium. *Ueland* expanded loss of consortium to minor children of living parents when the parent “suffered **severe and permanent** mental and physical disabilities when struck by a metal cable during the course of employment as a lineman for Seattle City Light.” *Ueland*, 103 Wn.2d at 132. The Court defined loss of consortium in the parent-child relationship as the “loss of a parent’s love, care, companionship, and guidance.” *Id.* at 132 n.1 (internal citations omitted). The Court noted that, when the parent suffers an injury leaving him or her in a vegetative state, “[s]urely the child’s loss of the parent’s love, care, companionship and guidance is nearly the same [as when a parent dies as a result of another’s negligence].” *Id.* at 134.

The *Ueland* Court reasoned that loss of parental consortium claims should be allowed to “aid in ensuring the child’s continued normal and complete mental development into adulthood.” *Id.* at 138. The Court elaborated:

[t]he premise that money can mitigate the impact of a loss may be especially appropriate in the case of a child deprived of a parent’s love and guidance. Compensation awarded the child might enable the family to obtain live-in help that could provide not only domestic services, but,

incidentally, a measure of guidance and companionship. The child who has suffered an emotional maladjustment as a result of his deprivation would have funds available to pay for needed psychiatric treatment. It is not unrealistic to assume that in many cases monetary compensation could make the difference between a child who suffers a permanent handicap due to the loss of a parent's love and guidance and a child who is able to make a reasonable adjustment to his loss.

Id. (citing 56 B.U. L. Rev. at 734).

However, these considerations are not present where a child suffers only a temporary loss of parental consortium, as here. Mr. Balam-Chuc's temporary deportation is not a loss of consortium in the sense contemplated by the *Ueland* Court because at no point did the children entirely "lose" the ability to communicate and engage with their parent because of Mr. Banfi's presumed negligence. Any examination of this subject is of a completely different nature regarding the impact on a minor child of the outright loss of consortium of a parent previously alert and aware as discussed in *Ueland*. The same considerations are present in a claim for loss of spousal consortium.

Allowing recovery for temporary injuries would allow a spouse or child to have a potential claim in every situation where a spouse or parent is injured. The number of suits engendered by such a ruling would be far greater than the number of wrongful death or permanent injury actions involving loss of parental or spousal consortium. This multiplication of

litigation counsels against expending liability for loss of consortium where the “loss” is de minimis and temporary.

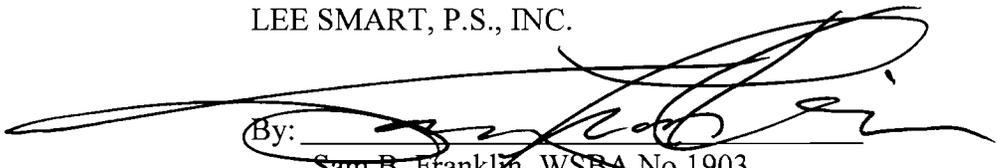
In sum, this court should affirm the trial court’s dismissal of the loss-of-consortium claims because the children’s’ cause of action is prohibited by *Green*, the claims are not feasibly comparable to a true loss-of-consortium claim as explained in *Ueland*, is not supported by the policy reasoning for recognizing such a claim, and is not apparently supported by any precedent in Washington or elsewhere.

VI. CONCLUSION

The trial court was correct to grant Mr. Banfi’s motion for summary judgment. As a matter of law, an associate attorney cannot be held liable for the acts or omission over an employee over whom the attorney had no supervisory opinion. Even if Mr. Banfi could be held responsible for a paralegal’s alleged failure to perform a clerical task, the Balam-Chucs failed to timely pursue their claims and they are now time barred by the statute of limitations.

Respectfully submitted this 14 day of October, 2011.

LEE SMART, P.S., INC.

By: 

Sam B. Franklin, WSBA No. 1903

Erin J. Varriano, WSBA No. 40572

Of Attorneys for Respondent Gabriel Banfi

DECLARATION OF SERVICE 2011 OCT 14 PM 3: 17

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 14, 2011, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

John Rothschild
Attorney at Law
705 Second Avenue, Suite 1100
Seattle, WA 98104

Suzanne Lee Elliott
Attorney at Law
Hoge Building
702 Second Avenue, Suite 1300
Seattle, WA 98104

DATED this 14th day of October, 2011 at Seattle, Washington.


Wendy A. Larson, Legal Assistant