

No. 70126-6-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVID MONK, an individual; and
WHITE RIVER FEED COMPANY, INC.,
a Washington corporation,
Appellants/Cross-Respondents,

v.

RICHARD PIERSON and JOAN ASKEY,
individually and as the marital community comprised thereof;
KINGMAN PEABODY PIERSON & FITZHARRIS, P.S.,
a Washington corporation,
n/k/a KINGMAN RINGER & HORNE, INC., P.S. and
WILLIAMS & WILLIAMS, P.S.C.,
a Washington professional service corporation,
Cross-Appellants/Respondents.

FILED
DIVISION I
COURT OF APPEALS
STATE OF WASHINGTON
JAN 14 2014

**OPENING BRIEF OF
APPELLANTS/CROSS-RESPONDENTS**

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I. INTRODUCTION

The statute of limitations on a legal malpractice claim does not begin to run until the attorney's representation of his client ceases. Moreover, a legal malpractice cause of action does not accrue until the client has sustained injury proximately caused by the negligence of his attorney.

In the matter at bar, Monk¹ suffered no legally cognizable injury, until September 22, 2008, the date that the trial court judge in the underlying matter, The Hon. Jay White, issued his order ruling on Monk's request for an award of attorneys' fees and costs. Monk's lawsuit against Pierson was filed on August 1, 2011, within three years of Judge White's September 22, 2008 ruling, and therefore in compliance with the three-year statute of limitations governing legal malpractice cases, and the four-year statute of limitations applicable to Consumer Protection Act claims. RCW 19.86.120.

It is undisputed that Pierson undertook representation of Monk in the underlying eminent domain lawsuit, and that Monk understandably and appropriately considered Pierson to be his attorney at least until the date of Judge White's September 22, 2008 ruling. Indeed, Pierson never

¹ Appellants will be collectively referred to as "Monk" and Respondents as "Pierson."

withdrew as Monk's attorney, nor did he ever give Monk any indication that the attorney-client relationship had terminated. Therefore, Monk's subjective belief that the attorney-client relationship existed is appropriate.

II. ASSIGNMENTS OF ERROR.

1. The trial court erred in granting Pierson's motion for summary judgment, ruling that Monk had not commenced this suit within the applicable statute of limitations period.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR.

A. Does the discovery rule apply when Monk had no legally cognizable injury until the trial court in the underlying matter issued its memorandum decision awarding fees and costs on September 22, 2008?

B. Does the continuous representation rule toll the statute of limitations when, as in this matter, the attorney-client relationship continues after the attorney has erred in representing his client?

IV. STATEMENT OF THE CASE.

Monks' claims arise out of a condemnation lawsuit filed against the cities of Kent and Auburn (hereafter "Cities"). David Monk owns realty located in Kent occupied by White River Feed Company, Inc., a business owned by David Monk. (CP 505).

Monk's property borders a road improvement project commenced

by the Cities in 2001. Shortly after construction on the road improvements began, Monk grew concerned that the Cities' road project had encroachment upon his property. (CP 505). Monk consulted with engineers and surveyors who referred him to attorney Richard Pierson. Pierson met with Monk and Pierson assured him that the Cities would have to answer for the taking of his property, and that the Cities would have to reimburse Monk for his attorneys' fees and costs pursuant to the condemnation statute. (CP 23, ¶ 3.8).

Pierson met with Monk and assured him that the Cities would have to answer for their taking of his property and that the Cities would have to reimburse Monk for his attorneys' fees and costs. (CP 23, ¶ 3.9; CP 24, ¶ 3.10). Based upon these assurances, Monk retained Pierson in February 2002. (CP 531, ¶ 1).

Trial of the matter was bifurcated. Monk was awarded judgment following the damages phase of the trial, which occurred in March 2004. (CP 506).

Following the damages phase of the trial, Pierson petitioned for an award of Monk's costs and attorneys' fees pursuant to RCW 8.25.075(3). (CP 578). The trial court initially found that the Cities had timely tendered a \$150,000.00 pre-trial offer to Monk, which exceeded the verdict Monk

received, thereby precluding an award of Monk's attorneys' fees and costs pursuant to RCW 8.25.075(3). (CP 506).

Pierson advised Monk to appeal the denial of attorneys' fees and costs. (CP 575, ¶ 5). Also at issue on appeal was Judge White's earlier decision on summary judgment to dismiss Monk's impairment of access claim, as well as Judge White's imposition of sanctions on Pierson and co-counsel James Dore, which was consolidated with Monk's appeal. (CP 505).

This Court set forth the following rationale in reversing Judge White's denial of fees and costs pursuant to RCW 8.25.075(3):

In a case of inverse condemnation, the property owner can recover 'reasonable attorneys' fees and reasonable expert witness fees', but only if the judgment awarded 'as a result of trial' exceeds by 10 percent or more the highest written settlement offer submitted by the acquirer 'at least thirty days prior to trial.' RCW 8.25.075(3). The Cities proposed an interpretation of the statutory term 'trial' as referring to a distinct proceeding devoted solely to the determination of the amount of just compensation. In the view of the Cities, preliminary proceedings to determine the amount of land taken were not included in the term 'trial.' They wanted to know the extent of their encroachment on Monk's property

before 'trial' so that they would be in a better position to make him an offer of settlement that would be within 10 percent of the verdict. Judge White adopted the Cities' interpretation over Monk's objection and ordered that the issue of how much land was actually taken would be tried separately to the court on December 15, 2003. The 'trial' to determine just compensation would come later. (CP 505 – 506).

In December 2003, the trial court established the property line based on Monk's evidence. In January 2004, the Cities offered Monk \$150,000 in settlement, which was rejected. In mid-March 2004, a jury returned a verdict establishing just compensation as \$39,918 for the permanent taking of approximately 2,334 square feet, and \$7,470 for a temporary construction easement. Because the verdict did not exceed the settlement offer, under the trial court's earlier ruling, Judge White ruled that Monk was not entitled to attorneys' fees. (CP 506).

This Court in an Unpublished Opinion on August 8, 2005 (Case No. 54223-1-I) held that the Cities' offer of settlement was not made within 30 days of the "trial" which was determined to have commenced in December 2004; the first prong of the bifurcated case which determined the amount of land taken. The Cities waited until January 2004, prior to the damages phase of the bifurcated trial, to make their offer, which this

court found did not comply with RCW 8.25.075(3). Consequently, the Cities' offer wasn't timely, and Monk was therefore entitled to an award of his reasonable fees and costs on remand. (CP 506 -507).

Prior to the appeal, Pierson told Monk that he would continue on as his attorney during the appellate phase but recommended that attorney John Groen should be retained because Mr. Groen was an "expert in appeals." Monk followed Pierson's advice and retained Groen. (CP 575, ¶5).

Monk testified in his deposition as follows with regard to his first meeting with Groen:

A. Well, when I was speaking to John Groen I kept one real clear thing in my mind, a question that I just was dying to ask somebody, and it was on inverse condemnation, fees and costs are paid. And he told me that – and I knew that Richard told me and showed me the *Brazil v. Auburn* case.

And I said: What about that?

And he said: That's bad law.

And I said: What do you mean it's bad law?

I didn't understand what he meant by that. And he then (CP 493, lines 16-25) explained that it was a case that had been overturned.

Q. Okay. And when was that conversation with John [Groen]? Was that while you were waiting for the court to decide it on appeal, for the Court of Appeals to decide it? When was that?

A. It was on my initial engagement . . . on the first engagement I had

in his office. . .

Q. OK. So on the occasion of your first meeting John Groen in his office you asked him the question which had been on your mind about the recovery of attorneys on an inverse condemnation, correct?

A. Yeah.

Q. And you'd been led to believe by Mr. Pierson that those fees would be recoverable?

A. Very much so.

Q. Okay did John Groen tell you that that was not the case, then? Or what did he tell you?

A. He said that was bad case law that he was quoting to me.

Q. Well, how did you feel about that when he told you that that was bad case law?

A. I felt I was taken advantage of.

Q. Because it was pretty clear that Mr. Pierson had told you the opposite, correct? (CP 494).

A. Yes, he told me on an inverse condemnation claim that expert witness fees and attorneys' fees and costs would be paid.

Q. Okay. Did you learn anything else from Mr. Groen on this occasion as to any other errors or mistakes or misrepresentations by Mr. Pierson?

A. No. The only other thing is he thought he did a bad job, or maybe not as good a job with access as he could. But he didn't really, he didn't really specify why. (CP 494, Lines 1- 8).

Following remand, pursuant to the Court of Appeals ruling issued

in August 2005, extensive briefing was submitted by the parties on the fees and costs issue. On September 22, 2008, Judge White issued his 109 page memorandum awarding attorneys' fees and costs. (CP 117-225).

Judge White noted that Pierson was seeking \$488,539.09 in fees and costs from the Cities pursuant to RCW 8.25.075(3). Judge White awarded Monk \$253,519.40 of the \$488,539.09 in fees and costs requested. Additionally, Monk discovered after review of Judge Whites' September 22, 2008 memorandum, that Monk was responsible for an additional \$243,852.40 in attorneys' fees and costs to which had not been submitted for consideration, as those fees and costs could not be recovered under the condemnation statute. (CP 146 -147).

The first time that Pierson gave any indication of any action inconsistent with his role as an attorney for Monk was his filing of an attorneys' lien on October 8, 2008, after Judge White had issued his decision on fees and costs. (CP 234).

On August 1, 2011, Monk commenced suit against Pierson alleging causes of action for legal malpractice, breach of fiduciary duty and violation of the Consumer Protection Act. (CP 1) The gravamen of Monk's claims are based upon the fact that Pierson told Monk that he would recover all of his attorneys' fees and costs, and that Pierson caused

Monk to incur exorbitant and unreasonable fees in his representation of Monk. (CP 1 – 18).

V. ARGUMENT.

A. **This Court engages in *de novo* review of the trial court's grant of an order of summary judgment.**

An appellate court reviews summary judgment orders *de novo* and performs the same inquiry as the trial court, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. Hisle v. Todd Pac. Shipyards Corp., 151 Wash.2d 853, 860, 93 P.3d 108 (2004) (citing Kruse v. Hemp, 121 Wash.2d 715, 722, 853 P.2d 1373 (1993)). The grant of summary judgment is appropriate only where there is "no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." (c). "A material fact is one that affects the outcome of the litigation." Owen v. Burlington N. Santa Fe R.R., 153 Wash.2d 780, 789, 108 P.3d 1220 (2005) (citing Hisle, 151 Wash.2d at 861, 93 P.3d 108).

B. **The discovery rule applies to bar Pierson's statute of limitations defenses to Monk's claims.**

The statute of limitations for legal malpractice does not begin to run until the client discovers, or in the exercise of reasonable diligence should have discovered, the facts that give rise to his cause of action

("discovery rule"). Peters v. Simmons, 87 Wash.2d 400, 406, 552 P.2d 1053 (1976) (en banc); Quinn v. Connelly, 63 Wash.App. 733, 736, 821 P.2d 1256 (1992).

The discovery rule applies to legal malpractice actions because "ultimately the client has little choice but to rely on the skill, expertise, and diligence of counsel." Peters, 87 Wash.2d at 406, 552 P.2d 1053. "The primary reason for extending and applying the [discovery] rule [in professional malpractice cases] is because the consumer of professional services frequently does not have the means or ability to discover professional malpractice." Peters, 87 Wash.2d at 405, 552 P.2d 1053.

1. Pierson's assertion that Monk knew all elements of his claims at the time the Court of Appeals issued its decision in August 2005, ignores the fact that Monk could not have known that he suffered any cognizable injury until Judge White issued his ruling on fees and costs in September 2008.

Pierson posited two arguments in support of the proposition that Monk discovered the facts that gave rise to his causes of action more than four-years before this suit was commenced.

First, Pierson argues that Monk knew the essential facts of his causes of action at the time the Court of Appeals issued its decision in August 2005. But Monk could not have been alerted to the elements of his claims by the appellate ruling, for the simple reason that he prevailed

in the Court of Appeals, which reversed Judge White's previous denial of Monk's fees and cost request, and remanded for a determination of reasonable fees and costs. The relevant portion of this Court's holding states:

In summary, the judgment is reversed and remanded solely for an award of Monk's reasonable attorney and expert witness fees under RCW 8.25.075(3). The trial court shall include in the award Monk's reasonable attorney fees on appeal for the portion of the appeal related to RCW 8.25.075(3). The order dismissing Monk's claim for impaired access is affirmed. The order of sanctions against Richard Pierson and James Dore, Jr. is affirmed.

Until September 22, 2008, when Judge White subsequently ruled on Monk's request for attorneys' fees and costs, Monk could not have known whether Judge White was going to award all fees and costs, some fees and costs or no fees and costs. He had no way of knowing that he would suffer any injury or damage at all.

This Court, in Murphey v. Grass, 164 Wn.App 584, 267 P.3d 376 (2011) addressed the application of the discovery rule in this context. Murphey concerned an accounting malpractice claim. The discovery rule is applicable in accounting malpractice claims, just as it is in legal malpractice claims. *Id.*

In Murphy, the plaintiff was made aware that his accountant had

underpaid taxes. In 2004, the State Department of Revenue conducted a random audit. Murphey also discovered the existence of IRS tax liens in 2004. Murphey fired Grass, his accountant, and Murphey's attorneys wrote to Grass warning that the errors, omissions and deceitful actions of the accountants had caused damage to Murphey.

The Department of Revenue finalized its audit of one of the Murphey entities in February 2006, and determined there was an underpayment of taxes. The Department issued an assessment of \$70,340.00 in March 2006. Murphy timely petitioned for correction of the Department's assessments, which was revised to \$64,615. On February 13, 2009, the Department denied Murphey's subsequent petitions for correction. Murphey then appealed to the Board of Tax Appeals.

While the appeal was pending, Murphey filed suit against Grass in November 2009, alleging breach of contract and breach of fiduciary duty. Grass moved for summary judgment, contending that the three-year statute of limitations had began to run in 2005, when Murphey learned of Grass's mismanagement.

This Court framed the question in Murphy as follows:

The question here is when Murphey suffered actual and appreciable damage, causing his claim to accrue. The statute of limitations for his claims is three years, and

begins to run **when all elements necessary to the claim exist and the plaintiff has a right to seek relief in the courts.**

Injury is a necessary element in a professional negligence case. An accounting malpractice claim does not accrue until the client discovers or in the exercise of reasonable diligence should have discovered **an injury, which must be "actual and appreciable damage, not speculative or merely potential liability.** (Emphasis added).

This Court, in Murphey, went on to analyze and distinguished two legal malpractice cases relied upon by Pierson in this matter. Huff v. Roach, 125 Wn.App. 724, 106 P.3d 268 (2005), *review denied*, 155 Wn.2d 1023, 126 P.3d 1279 (2005), and Janicki Logging v. Schwabe Williamson, 109 Wn.App. 655, 37 P.3d 309 (2001), *review denied*, 146 Wn.2d 1019 (2002) the Court held:

Grass's reliance on these cases is misplaced. Huff and Janicki are not inconsistent with Feddersen and, in any event, presented different issues. **In all three cases, the claims accrued when the plaintiffs learned of injury that was certain. In Huff and Janicki, the attorneys' failure to bring an action within the statute of limitations caused certain injury, barring the clients' claims as a matter of law.** In Feddersen, the injury was certain and the claim accrued when the taxing agency issued its final determination and could collect.

Murphey's liability was not certain until the appeals division made the assessments final, binding, and due for payment. "[P]otential liability is not the equivalent of actual harm." Thus, the limitations period did not commence before the appeals division final determinations.

(Emphasis added).

In this matter, Monk could not have known that his “injury was certain” until September 22, 2008, the date that Judge White issued his ruling on Monk’s request for fees and costs because until such determination, there was only the “potential” that Judge White would disallow fees and costs, therefore, Monk’s injury was speculative until Judge White exercised his discretion in ruling on the fee request.

2. Monk’s conversation with Groen concerning the status of the *Brazil v. Auburn* case does not support the proposition that Monk knew he had a claim against Pierson prior to the commencement of the appeal because the information Monk purportedly gleaned has no relevance to his claims against Pierson.

Pierson argued that Monk knew of his injury when he spoke with Mr. Groen prior to the filing of the appeal.

Monk had a legal question on fees and costs paid in inverse condemnation claims. Pierson had advised Monk that the case of *Brazil v. Auburn*, 93 Wn.2d 484, 610 P.2d 909 (1980) applied. Monk asked Groen about that case and Groen told Monk it was “bad law.”

The holding of *Brazil v. City of Auburn*, 93 Wn.2d 484, 497, 610 P.2d 909 (1980), regarding the law on an award of fees and costs in an inverse condemnation case states:

RCW 8.25.075 provides that a superior court rendering a

judgment for the plaintiff awarding compensation for the taking of real property for public use without just compensation having been first made to the owner, shall award or allow to such plaintiff costs including reasonable attorney fees. Since this statute is mandatory in its terms (see Snohomish v. Joslin, 9 Wn. App. 495, 513 P.2d 293 (1973)), and since this action must be treated as one of inverse condemnation, the respondent is entitled to his attorney fees in the Superior Court proceeding. The cause will be remanded to that court for the purpose of determining the reasonable amount of such fees.

Appellant counsel has conducted an exhaustive search and can find no case, nor other authority, that has overruled or otherwise invalidated the holding of Brazil v. Auburn. *Id.* Indeed, it is the law.

Perhaps Mr. Monk misunderstood Mr. Groen's comment concerning "Brazil v. Auburn being bad law," or perhaps Mr. Groen was incorrect in his analysis; either way, Pierson's reliance on this fact is irrelevant. A seed that is not a seed cannot germinate. Mr. Monk could not have based any claim against Pierson on Pierson's citation to a case that is not bad law. Consequently, Monk's misunderstanding of the status of the Brazil v. Auburn, *Id.* case cannot be claimed to have put Monk on notice of the facts of a claim that could never have matured into a claim. Moreover, the issue on appeal had nothing to do with the holding of Brazil v. Auburn, *Id.* but rather concerned whether the Cities timely served their offer of settlement. Monk prevailed on that issue at appeal.

3. Prior to Judge White's ruling on fees and costs in September 2008, the question as to whether Monk had suffered any injury was purely speculative.

The gravamen of Monk's claims are that Pierson advised Monk that Monk would recover all of his attorneys' fees and costs, which induced Monk to retain and continue with Pierson as counsel, and/or that Pierson caused Monk damage by incurring unreasonable fees and costs in violation of his fiduciary duties and the standard of care.

In order for Monk to have been on notice that he had a claim for the foregoing causes of action prior to Judge White's September 22, 2008 ruling, Monk would have had to have known that Judge White would find that either all, or a portion of the fees and costs Pierson incurred in the inverse condemnation claim were unreasonable.

The foregoing begs the question: Is a client then forced to file suit against his attorney, prior to the determination of a post-trial statutory fee and cost award, or lose his cause to a statute of limitations defense, on a claim that may or may not be viable, depending on the ruling of the court?

Presumably, the fees and costs an attorney incurs on behalf of a client are reasonable, and in most instances, one would expect the trial court to then award all the requested fees and costs where allowed by statute.

The position that Pierson would have this Court adopt as the law is to put the uninitiated, lay consumer of legal services in the role of having to first assume that his attorney has incurred unreasonable costs and fees on his behalf, and then predict the future as to whether a trial court will determine whether fees and costs are reasonable or unreasonable.

As a matter of common policy, and based on common sense, placing the burden on a lay client to predict an uncertain future judicial decision, whose determination requires the exercise of a great deal of discretion by a trial judge, defies logic and rationale. Pierson's reliance on cases which hold that injury occurs, and the statute of limitations begins to run when a client knows his attorney has failed to file within a prescribed statutory deadline are inapplicable because in such instances, injury is assured as a matter of law. The client has lost his right to petition the court for redress at that time.

In matters such as this case, and Murphey v. Grass, *supra*, the statute of limitations does not begin to run until the client can know whether an injury has occurred, and the client cannot know whether an injury has occurred until the trial judge exercises his or her considerable discretion in ruling on the reasonableness of a statutory fee and cost request.

C. The continuous representation rule also applies to defeat Pierson's statute of limitations defenses.

Washington has adopted the continuous representation rule. Janicki Logging v. Schwabe Williamson, 109 Wn.App. 655, 37 P.3d 309 (2001), *review denied*, 146 Wn.2d 1019 (2002). The continuous representation rule tolls the statute of limitations until the end of the attorney's representation of the client in the same matter in which the alleged malpractice occurred.

[t]he continuous representation rule is... appropriate in those jurisdictions adopting the ... discovery rule[.] The policy reasons are as compelling for allowing an attorney to continue efforts to remedy a bad result, ... even if the client is fully aware of the attorney's error. The doctrine is fair to all concerned parties. The attorney has the opportunity to remedy, avoid or establish that there was no error or attempt to mitigate the damages. The client is not forced to end the relationship, though the option exists. This result is consistent with all expressed policy bases for the statute of limitations.

Citing 3 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 22.13, at 431 (5th ed.2000)

Determining whether an attorney-client relationship exists necessarily involves questions of fact. See 48 Am. Jur. Proof of Facts 2d, Existence of Attorney-Client Relationship 525 (1987); 1 R. Mallen & J.

Smith, Legal Malpractice § 11.2 n. 12 (3d ed. 1989). Summary judgment is proper on a factual issue only if reasonable minds could reach but one conclusion on it. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).; Bohn v. Cody , 119 Wn.2d 357, 362 832 P.2d 71 (1992).

In this matter, it is uncontested that Monk and Pierson formed an attorney-client relationship. The question is when did that attorney-client relationship end?

It is uncontested that Pierson never advised Monk at any time prior to Judge White's September 2008 ruling that Pierson was terminating the attorney-client relationship and that Monk considered Pierson to still be his attorney. (CP 575 ¶ 6).

David Monk has testified that Pierson told him that Pierson would remain as his attorney even though Mr. Groen was retained as an appellate expert.

Mr. Pierson strongly recommended to me that we appeal from Judge White's decision as it relates to the timing of the Cities' 30 day notice. . . It was Mr. Pierson who recommended to me that while he continued as my attorney that I hire Mr. Groen, who was, as I understood it, an expert in appeals to handle the appeal. (CP 575 ¶ 5).

Pierson sent correspondence to Groen indicating that Pierson would prepare the Notice of Appeal and handle issues pertaining to

recovery of legal fees and costs, showing his continued involvement as Monk's attorney. Monk was copied on this correspondence. (CP 578). The appellate caption from the Monk v. Cities case lists Pierson, along with Groen and Dore, as counsel for "Appellants." (CP 505). It is also uncontroverted that Pierson never filed, nor served upon Monk, any notice of withdrawal. (CP 555; CP 575 ¶ 4; CP 576 ¶ 9).

As set forth above, the determination as to whether an attorney-client relationship exists is a question of fact. Moreover, the standard used to determine the existence of an attorney-client relationship is one of the few areas in the law that is dependent upon the subjective belief of the client – provided it is reasonable based on the attending and surrounding circumstances. The Court in Bohn v. Cody, held:

The existence of the relationship "turns largely on the client's subjective belief that it exists" [citing In re McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983)]. The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, **including the attorney's words or actions.** (Emphasis added). See 1 R. Mallen & J. Smith § 8.2 n. 12. (Emphasis added.)

Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992).

It can only be reasonable for Monk to assume that Pierson continued to represent him throughout the appeal, up to and including the

time of Judge White's September 2008 ruling, for the very reason that Pierson told Monk he would continue to represent him and did nothing to indicate to Monk that he wasn't continuing to represent him.

The first indication that Pierson had ceased representing Monk came on October 8, 2008 when Pierson filed his attorneys' lien. (CP 234).

Defendants assert that the attorney-client relationship ended at the time that Groen undertook the appeal because Monk did not talk with Pierson after Groen was retained, and because Monk was mad at Pierson. In essence, Pierson would have this Court rule as a matter of law that the attorney-client relationship ended because Monk was mad at Pierson and didn't talk to him. If that were indeed the law, attorney-client relationships would be disrupted every time a client became upset with his attorney. That is not the law, as set forth in Janicki Logging v. Schwabe Williamson, 109 Wn.App. 655, 37 P.3d 309, 314 (2001):

The continuous representation rule avoids disruption of the attorney-client relationship and gives attorneys the chance to remedy mistakes before being sued. See Laird v. Blacker, 2 Cal.4th 606, 7 Cal.Rptr.2d 550, 828 P.2d 691, 698 (1992). The rule also prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired. Laird, 7 Cal.Rptr.2d 550, 828 P.2d at 698. Courts adopting the rule have found it to be "consistent with the purpose of the statute of limitations, which is to prevent stale claims and enable the defendant to preserve evidence.... The attorney-

client relationship is maintained and speculative malpractice litigation is avoided." 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 22.13, at 430 (5th ed.2000)

One of the critical components missing in Pierson's analysis is the import of "the attorneys' words or actions" in determining when the attorney-client relationship exists. Here, Pierson did nothing that is customary and standard practice for an attorney to do when terminating representation. He did not write a letter terminating the representation; he did not file or serve a notice of withdrawal; nor did he ever advise Monk orally that he was withdrawing from representation. A reasonable client would expect that his attorney would provide some notice to the client that the relationship was terminated, yet Pierson provided none.

Pierson also had a very strong monetary self-interest for remaining as Monk's attorney. If the appeal was successful, as it was, Pierson would be in a much better position to recover fees owed to him by Monk.

D. Groen's appearance as Monk's attorney for the appeal does not foreclose Monk's claims under the Janicki holding.

The Janicki Court noted that the continuous representation rule it adopted was limited, and held under the facts of that case, that it did not apply to a client who retains **new** counsel on appeal. At first blush, it may appear that Mr. Groen's retention as appellate counsel would vitiate the

Pierson - Monk attorney-client relationship. However, this matter is distinguishable. Pierson told Monk that he would continue representation even though Groen would handle the appeal. If Pierson continued his representation of Monk during the appeal, a question of fact, then Pierson is not “new” counsel on appeal.

Janicki is also distinguishable from the facts of this case, as set forth in the holding of Murphey. Janicki involved an issue where the law firm had not filed the underlying claim within the statute of limitations period. This Court found that in such an instance where an attorney fails to file within the statute of limitations, the client is charged with knowledge of the error at the time that judgment of dismissal is entered.

In this matter, the Court of Appeals overturned Judge White’s denial of an award of costs and fees to Monk, which denial was based on an issue wholly separate and distinct from the errors that form the basis of Monk’s claims against Pierson and further proceedings were required on remand, to determine whether Monk had in fact suffered any injury by Pierson’s conduct in causing Monk to incur unreasonable costs and fees. Until Judge White exercised his discretion and ruled on the fee and cost award, no injury could exist.

The holding of Janicki as proffered by Pierson to the trial court is

not applicable to the facts of this matter.

VI. CONCLUSION

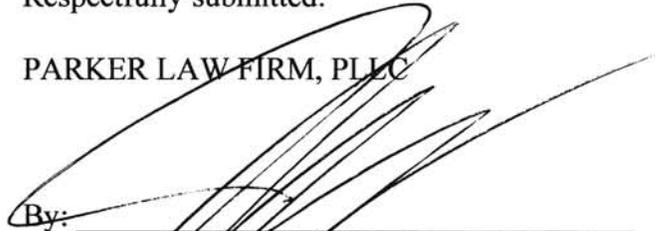
Monk had no legally cognizable injury until Judge White issued his ruling on attorneys' fees and costs on September 22, 2008. Until Judge White had ruled, it was purely speculative whether Monk had incurred any injury at all. This coupled with the client's reasonable subjective belief that Pierson was still acting as one of his attorneys – as their interests were aligned before Judge White to maximize the attorneys' fee award. Consequently, the elements of Monk's claims did exist until September 22, 2008. Monk filed this case prior to three years from that date.

For the foregoing reasons presented herein, Appellant respectfully requests this Court to vacate the trial court's order granting Respondents' motion to dismiss based on the statute of limitations.

DATED this 21st day of June, 2013.

Respectfully submitted:

PARKER LAW FIRM, PLLC

By: 

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DATED this 21st day of June, 2013.

Respectfully submitted:

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