

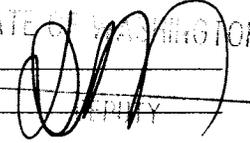
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COURT OF APPEALS
DIVISION II

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NO. 398028

STATE OF WASHINGTON

BY



**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

ROBERT B. HIPPLE, JR., Respondent

v.

DEBORAH GRACE MCFADDEN; JOHN DOE MCFADDEN and the
marital community thereof; and CAROLYN ELSEY; JOHN DOE ELSEY
and the marital community thereof; and COUNTY OF PIERCE,
Appellants

APPELLANTS' REPLY BRIEF

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Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. ANALYSIS.....	2
A. PLAINTIFF FAILS TO MEET ANY CR 12(b)(6) STANDARD.....	2
B. LIMITATIONS PERIOD CANNOT BE HYPOTHECATED AWAY	4
1. Facts of Alleged Malpractice Was and Should Have Been Discovered More Than Three Years Before Filing Suit.....	4
2. Complaint Precludes "Continuous Representation Rule"	14
C. PROXIMATE CAUSE IS STILL ABSENT FROM COMPLAINT	21
IV. CONCLUSION.....	25

Table of Authorities

	<u>Page</u>
Cases	
<i>Armstrong v. Guccione</i> , 470 F.3d 89, 151 (2d Cir. 2006)	24
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)	2
<i>Bennett v. Dalton</i> , 120 Wn.App. 74, 84 P.3d 265 (2004)	3, 20
<i>Berge v. Gorton</i> , 88 Wn.2d 756, 763, 567 P.2d 187 (1977)	1, 3
<i>Burns v. McClinton</i> , 135 Wn.App. 285, 297, 143 P.3d 630 (2006)...	passim
<i>Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.</i> , 129 Wn.App. 810, 816, 120 P.3d 605 (2005)	passim
<i>City of Pasco v. Shaw</i> , 127 Wn.App. 417, 426, 110 P.3d 1200 (2005)	7, 12
<i>Cotton v. Kronenberg</i> , 111 Wn.App. 258, 44 P.3d 878 (2002)	12
<i>Crisman v. Crisman</i> , 85 Wn. App. 15, 931 P.2d 163, <u>rev. denied</u> , 132 Wn.2d 1008 (1997)	14
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 258, 704 P. 2d 600 (1985)	21
<i>Davis v. Rogers</i> , 128 Wash. 231, 235, 222 P. 499 (1924)	17
<i>DeLeo v. Nusbaum</i> , 263 Conn. 588, 597, 821 A.2d 744 (Conn. 2003)	18
<i>Frenchman v. Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP</i> , 24 Misc.3d 486, 884 N.Y.S. 2d 596, 609-10 (N.Y. Sup. 2009)	19
<i>Geer v. Tonnon</i> , 137 Wn.App. 838, 844-45, 155 P. 3d 163 (2007)	21
<i>Gevaart v. Metco Constr., Inc.</i> , 111 Wn.2d 499, 502, 760 P.2d 348 (1988)	passim

<i>Gonzalez v. Kalu</i> , 140 Cal.App.4th 21, 43 Cal.Rptr.3d 866 (Cal.App. 2006)	17, 18
<i>Hartley v. State</i> , 103 Wn.2d 768, 772-74, 698 P.2d 77 (1985).....	3
<i>Havsy v. Flynn</i> , 88 Wn.App. 514, 520, 945 P.2d 221 (1997).....	3
<i>Hiltz v. Robert W. Horn, P.C.</i> , 910 P.2d 566, 571 (Wyo., 1996)	18, 19
<i>Huff v. Roach</i> , 125 Wn.App. 724, 106 P.3d 268 (2005).....	8, 13, 20
<i>In re Detention of Brock</i> , 126 Wn.App. 957, 110 P.3d 791 (2005).....	9
<i>In re Estate of Toth</i> , 138 Wn.2d 650, 981 P.2d 439 (1999).....	3
<i>In re King</i> , 110 Wn.2d 793, 804, 756 P.2d 1303 (1988)	23, 24
<i>Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt</i> , 109 Wn. App. 655, 659, 37 P.3d 309 (2001).....	6, 11, 19, 20
<i>Lambert v. Montana</i> , 545 F. 2d 87 (9th Cir. 1976).....	24
<i>Lyons v. Nutt</i> , 436 Mass. 244, 763 N.E. 2d 1065, 1070 (Mass. 2002)	19
<i>Matson v. Weidenfopf</i> , 101 Wn.App. 472, 484, 3 P.3d 805 (2000).....	5
<i>Matter of Estates of Hibbard</i> , 118 Wn.2d 737, 749, 826 P.2d 690 (1992).....	6, 12
<i>Maynard Inv. Co. v. McCann</i> , 77 Wn.2d 616, 465 P.2d 657 (1970).....	7, 12
<i>McCurry v. Chevy Chase Bank</i> , 144 Wn.App. 900, 193 P.3d 155 (2008), <u>rev. granted</u> 165 Wn.2d 1027 (2009)	2, 3, 12
<i>O'Neil v. Estate of Murtha</i> , 89 Wn.App. 67, 73-74, 947 P.2d 1252 (1997).....	17, 20
<i>Peters v. Simmons</i> , 87 Wn.2d 400, 404, 552 P.2d 1053 (1976)	5, 6
<i>Powell v. Associated Counsel for the Accused</i> , 146 Wn.App. 242, 249, 191 P.3d 896 (2008).....	21
<i>Quinn v. Connelly</i> , 63 Wn.App. 733, 736-37, 821 P.2d 1256 (1992)	4

<i>Reichelt v. Johns-Manville Corp.</i> , 107 Wn.2d 761, 769, 733 P.2d 530 (1987).....	5, 11
<i>Richardson v. Denend</i> , 59 Wn.App. 92, 98, 795 P.2d 1192 (1990).....	passim
<i>Riemers v. Omdahl</i> , 687 N.W.2d 445, 451 (N.D. 2004).....	20, 21
<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn.App. 709, 726, 189 P.3d 168 (2008).....	1
<i>Sahlie v. Johns-Manville Corp.</i> , 99 Wn.2d 550, 554, 663 P.2d 473 (1983).....	5, 11
<i>Schoenrock v. Tappe</i> , 419 N.W.2d 197, 201 (S.D. 1988).....	18, 19
<i>Sherry v. Diercks</i> , 29 Wn.App. 433, 438, 628 P.2d 1336, <u>rev. denied</u> 96 Wn.2d 1003 (1981)	21
<i>Stangland v. Brock</i> , 109 Wn. 2d 675, 676, 747 P.2d 464 (1987).....	3, 9, 12, 23
<i>State ex rel. Long v. Petree Stockton, L.L.P.</i> , 499 S.E.2d 790, 797 (N.C. App., 1998).....	21
<i>Steckman v. Hart Brewing</i> , 143 F.3d 1293, 1295-96 (9th Cir. 1998).....	1, 23
<i>Stenberg v. Pacific Power & Light Co., Inc.</i> , 104 Wn.2d 710, 714, 709 P. 2d 793 (1985).....	17

Other Authorities

5 C. Wright & A. Miller, <i>Federal Practice and Procedure</i> § 1357, at 597 (1969).....	3
K. Tegland, 3A <u>Wash. Prac.</u> , 264 (5 th Ed. 2006)	3

Rules

California Code of Civil Procedure section 340.6 17

CR 12(b)(6)..... 1, 2, 3, 12

RPC 1.4(a)(2-4)..... 10

RPC 1.5(c)..... 16

I. INTRODUCTION

Plaintiff's appellate brief agrees his complaint establishes that in 2004 he had been "found in contempt of court for intentionally failing to comply with [a] child support order" and on May 5, 2005, had been ordered "confined" until he made "payment" of back support -- all of which "predated [defendants'] representation of Mr. Hipple." RB 1, 9; CP 3. However, the brief also repeats statements in his complaint that have been proven contrary to the Court record. See *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977) (on CR 12(b)(6) motion in malpractice action, Court examines the complaint and takes "judicial notice of matters of public record"); *Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 726, 189 P.3d 168 (2008) ("Documents whose contents are alleged in a complaint but are not physically attached to the pleading may also be considered in a ruling on a ... motion to dismiss"); *Steckman v. Hart Brewing*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("we are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint"). For example, the brief repeats his disproved claim that in September 2006 he was released from home monitoring because a Commissioner supposedly found the May 2005 order "at least void or voidable at a minimum." Id. at 29, n. 1. In fact, the 2006 order nowhere contains such language and simply terminates Hipple's "home monitoring." CP 69.

Further, plaintiff's brief also asserts facts nowhere found in the

complaint. For example, now on appeal he claims that in 2006 "Hipple finally received some kind of response from Pierce County Department of Assigned Counsel in the form of another attorney, Robert Way," RB 2 -- despite the fact nothing in his complaint states DAC, rather than plaintiff himself, retained this new attorney. Compare CP 5. As demonstrated below, plaintiff's brief's overstatement of the facts of record is exceeded only by its undermining of Washington's settled law of legal malpractice.

II. ANALYSIS

A. PLAINTIFF FAILS TO MEET ANY CR 12(b)(6) STANDARD

Though his brief opaquely acknowledges the issue is now pending before our Washington Supreme Court, see *McCurry v. Chevy Chase Bank*, 144 Wn.App. 900, 193 P.3d 155 (2008), rev. granted 165 Wn.2d 1027 (2009), plaintiff argues our state has not yet adopted the United States Supreme Court's rejection of the "no set of facts" test for Rule 12(b)(6) upon which he exclusively relies. See RB 4-5; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (because "no set of facts" test holds "optimism would be enough" to avoid dismissal, it "is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint"). Though Washington's Supreme Court presumably will have resolved the applicable test by the time of decision in this

case, even the most generous articulation of Rule 12(b)(6) upon which plaintiff's opposition depends fails to support his appellate argument.

It is well settled, even under the disputed test cited by plaintiff, that "where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Berge*, 88 Wn.2d at 759. Indeed, "[t]ypical examples are cases in which the plaintiff's claim is clearly barred by the statute of limitations" K. Tegland, 3A Wash. Prac., 264 (5th Ed. 2006). See also e.g. *In re Estate of Toth*, 138 Wn.2d 650, 981 P.2d 439 (1999) (dismissal under CR 12(b)(6) for violation of statute of limitations); *Hartley v. State*, 103 Wn.2d 768, 772-74, 698 P.2d 77 (1985) (reversing denial of CR 12(b)(6) motion because proximate cause absent); *Bennett v. Dalton*, 120 Wn.App. 74, 84 P.3d 265 (2004) (reversing denial of CR 12(b)(6) motion for erroneously holding limitations period tolled).

Further, under even plaintiff's test, any hypothecated "set of facts" must be those "which plaintiff could prove, consistent with the complaint, [and that] would entitle the plaintiff to relief on the claim." *McCurry*, 144 Wn.App. at 905 (emphasis added). See also *Stangland v. Brock*, 109 Wn. 2d 675, 676, 747 P.2d 464 (1987) (in opposing motion to dismiss plaintiff only may allege a "set of facts" that is "consistent with the complaint"); *Havsy v. Flynn*, 88 Wn.App. 514, 520, 945 P.2d 221 (1997) (hypothetical must be alleged "without violating CR 11"); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 597 (1969) (complaint's con-

clusory allegations ignored if they "do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself"). Here, Hipple cannot avoid dismissal because his newly minted "set of facts" are not those "which plaintiff could prove," are not "consistent with the complaint," and would not "entitle the plaintiff to relief on the claim" even if it had been in the complaint to begin with.

B. LIMITATIONS PERIOD CANNOT BE HYPOTHECATED AWAY

1. Facts of Alleged Malpractice Was and Should Have Been Discovered More Than Three Years Before Filing Suit

For the first time plaintiff now argues the "discovery rule" was a ground for evading the statute of limitations. Compare CP 41-44, 86, 94-99. This and other divisions of our Courts of Appeal hold that "application of the discovery rule generally presents questions of fact," but in "the context of actions for attorney malpractice premised upon errors or omissions allegedly occurring during the course of litigation, however, we find that the application of the discovery rule presents a question of law because the pertinent facts are susceptible of but one conclusion." *Richardson v. Denend*, 59 Wn.App. 92, 98, 795 P.2d 1192 (1990) (emphasis added). See also *Quinn v. Connelly*, 63 Wn.App. 733, 736-37, 821 P.2d 1256 (1992) (same). Despite this repeated holding, Hipple argues the discovery rule is for the jury because his complaint's allegations supposedly "are susceptible of more than one conclusion." RB 6. Though he cites as

alleged support, *Matson v. Weidenfopf*, 101 Wn.App. 472, 484, 3 P.3d 805 (2000), RB 6, such concerned not only an attorney who had expressly "encouraged the Matsons not to act quickly on their claim" but also an appeal of a jury verdict where apparently the jury was allowed to decide causation because its status as a legal question was not contested. Plaintiff cites no decision overruling defendant's precedent or holding on a motion to dismiss a malpractice claim for a litigation error the discovery rule is not a legal question for the court. In any case, the complaint shows it presents a question of law even under plaintiff's discovery test because it is susceptible to but one reasonable conclusion: he discovered, or should have discovered, the facts of his claim more than three years before filing suit.

As to the discovery rule, this Court has explained:

The discovery rule merely tolls the running of the statute of limitations until the plaintiff has knowledge of the "facts" which give rise to the cause of action; it does not require knowledge of the existence of a legal cause of action itself. See Sahlie v. Johns-Manville Corp., 99 Wn.2d 550, 554, 663 P.2d 473 (1983); Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 769, 733 P.2d 530 (1987); Gevaart v. Metco Constr., Inc., 111 Wn.2d 499, 502, 760 P.2d 348 (1988). In professional malpractice cases, the pivotal factor which tolls the running of the statute of limitations is the absence of knowledge of injury. See Peters[v. Simmons], 87 Wn.2d [400,] 404, 552 P.2d 1053 [(1976)]; Gevaart, 111 Wn.2d at 501, 760 P.2d 348.

Richardson, 59 Wn.App. at 95-96 (emphasis added). Hence, the statute of limitations begins to run when plaintiff "discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to

his or her cause of action." *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn.App. 810, 816, 120 P.3d 605 (2005) (quoting *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001)) (emphasis added). See also *Richardson, supra.* at 95 (citing *Peters, supra;* *Gevaart, supra.*) ("discovery rule has consistently been applied by our courts" to start the limitations period when "plaintiff discovers, or should have discovered, his or her damage or injury resulting from the professional malpractice") (emphasis added). In short, the discovery rule tolls the limitations period "where plaintiff lacks the means and resources to detect wrongs within the applicable limitation period." *Matter of Estates of Hibbard*, 118 Wn.2d 737, 749, 826 P.2d 690 (1992). The complaint and record preclude such tolling here.

Here, the basis given for this malpractice action is the claim Hipple had a "right" as a matter of law: 1) to a ruling that his detention was unlawful after May 5, 2005, because DAC had not appeared despite promising to defend him at that show cause hearing; 2) to be released when a few days later DAC attorney McFadden filed an appearance and DAC attorney Elsey spoke with him because they immediately should have raised this alleged defect to the Court; and 3) thereafter to have one of defendants at least obtain his release from home detention sometime before he retained new counsel more than a year later -- either by showing he could not purge his contempt or arguing the duration of his contempt proved he

could not be coerced but had "steadfastly refuse[d]" to comply. RB 16, 23-29. However, because plaintiff is "presumed to know the law," *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 465 P.2d 657 (1970) ("every person is presumed to know the law"); *City of Pasco v. Shaw*, 127 Wn.App. 417, 426, 110 P.3d 1200 (2005) ("citizens, are presumed to know the law"), it is presumed plaintiff knew under his asserted view of the law his "rights" were violated when he appeared alone at the May 5, 2005, show cause hearing despite DAC's prior "promise[]," knew he had not been released soon after DAC counsel appeared or contacted him, and knew every day thereafter for more than a year that he was remaining on home detention improperly while counsel ignored his "numerous" writings and telephone calls rather than immediately obtaining his release. CP 3-5. Reasonable minds cannot differ that the complaint alleges facts confirming that on May 5, 2005 -- as well as a few days later when DAC counsel first appeared or later spoke with him, and yet again every evening thereafter during the more than full year while he was on home detention for contempt while DAC attorneys were ignoring "numerous" attempts to contact them -- Hipple knew or with due diligence should have discovered "the facts which give rise to his or her cause of action." Because more than four years before he filed his June 2009 suit plaintiff "in the exercise of reasonable diligence should have" discovered his "damage or injury resulting from the professional malpractice," his action is statutorily barred.

Indeed, the complaint's allegations concerning DAC and attorney McFadden establish his discovery of their alleged malpractice specifically occurred in May 2005. Concerning DAC as a distinct defendant, the complaint alleges within days of being arrested plaintiff realized he needed a lawyer and applied to DAC for one, that a DAC representative supposedly "promised an appointed counsel would contact plaintiff before the next hearing," but at that next hearing of May 5, 2005, he was still "pro se and still in custody." CP 3. Hence, the face of the complaint shows plaintiff knew any "facts which gave rise to his ... cause of action" against DAC by at least May 5, 2005, when no counsel appeared and the show cause order was entered -- more than four years before his June 2009 suit. CP 1. Indeed, knowledge of that claim is presumed by the order's entry. *Richardson, supra.* at 96-97 ("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 negligent representation").¹

As to defendant McFadden, the complaint also shows that over four years before filing suit plaintiff knew she had never had any contact with him and that she only filed a special notice of appearance on May 10,

¹ Plaintiff notes presumed knowledge as to DAC does not apply to Elsey and McFadden since they did not represent him then. RB 8-9. Defendants have never claimed otherwise. However, this legal presumption does not also mean Hipple was unable to bring suit against Elsey and McFadden until entry of some later order because there are "numerous Washington cases in which clients brought legal malpractice claims prior to suffering an adverse judgment." *Huff v. Roach*, 125 Wn.App. 724, 106 P.3d 268 (2005).

2005 -- which expressly disclosed her representation was limited to "the contempt show cause hearing only." CP 4 (emphasis added). Because plaintiff knew the one and only "contempt show cause hearing" occurring after he contacted DAC already had been held five days earlier on May 5, 2005, the one action alleged by McFadden -- i.e. her May 10, 2005, filing -- gave him immediate notice she had not provided him the only representation for which she had filed a notice of appearance.² Hence, the face of the complaint likewise establishes that on May 10, 2005, plaintiff knew, or in the exercise of due diligence should have discovered, the facts of any malpractice claim against McFadden -- yet he waited four years to sue.

In contrast to these express assertions in his complaint and the aforementioned precedent, plaintiff argues various hypotheticals he claims might "contraindicate a belief the DAC attorneys had acted negligently." RB 8. Specifically he argues the "complaint does not establish Mr. Hipple knew or should have known he was being held in custody but for the inac-

² Plaintiff's new assertion on appeal that McFadden's representation somehow extended to all "contempt matters" directly contradicts the expressly contrary statement of his complaint. Compare RB 12-13 with CP 5 ¶ 3.10. See also *Stangland*, 109 Wn.2d at 676 (plaintiff's proposed "set of facts" must be "consistent with the complaint"). As a matter of law "a show cause hearing 'is to simply determine whether the factual assertions are sufficient and whether, when taken as true, the evidence establishes probable cause.'" *In re Detention of Brock*, 126 Wn.App. 957, 110 P.3d 791 (2005). The first hearing after his arrest was on May 5, 2005, and would have been such a hearing. CP 3. In contrast, the complaint notes he actually was released instead pursuant to "plaintiff's motion to revise terms of release" -- not after a "show cause hearing." CP 5 ¶s 3.20-3.21. See also CP 65-74. For the same reason, because his complaint states attorney Elsey only spoke to him about "modification of his child support order" and that "a discussion regarding plaintiff's conditions of release did not take place," CP 4 ¶s 3.13, 3.14 (emphasis added), he cannot now claim to the contrary that she spoke "regarding the contempt matter." RB 12.

tion of the DAC attorneys" and "may well have assumed that his detention was legitimate, at least initially." RB 7-8. He also hypothecates that during his over a year of home detention he somehow "may have assumed, notwithstanding the lack of contact, that the DAC attorneys were actively attempting to remedy Commissioner Gelman's error, but that remedying such an error was a complicated and lengthy procedure." RB 8.

First, of course, it has been shown elsewhere as a matter of law his complaint even now nowhere establishes his detention continued "but for the inaction of the DAC attorneys," see discussion AB 16-21; infra at 21-25 -- and such hardly supports affirming the failure to dismiss. Second, any analysis cannot be made "notwithstanding the lack of contact" by DAC attorneys because his "numerous" unsuccessful efforts beginning in May 2005 show by that time plaintiff actually had concluded they had a role in his continued detention and needed his prompting to act.³ Third,

³ Though he admits his unsuccessful efforts to contact counsel starting in May 2005 "suggest Mr. Hipple at some point concluded he was being wrongfully detained," plaintiff argues it might "also suggest [his] belief the DAC attorneys would assist him, and contraindicate a belief DAC attorneys had acted negligently." RB 8. However, the discovery rule concerns "knowledge of facts," not hypothecated subjective "belief" -- especially one that cannot be reasonably maintained for over a year of home detention. Second, even an unreasonable "belief the DAC attorneys would assist him" after months of ignoring his "numerous" writings and calls while he remained on home detention simply does not "contraindicate a belief DAC attorneys had acted negligently" -- it would merely indicate a hope he might persuade them to stop being negligent and start getting him released. Third, as to the actual question of "knowledge," in addition to the facts noted above as known by him: 1) plaintiff is presumed to know the law and therefore to know RPC 1.4(a)(2-4) required counsel to "consult with the client about the means by which the client's objectives are to be accomplished," "keep the client reasonably informed about the status of the matter" and "promptly comply with reasonable requests for information;" 2) the complaint shows he knew defendants had done none of these things, CP 4-5; and 3) such alleged conduct alone would have been notice of grounds for him to sue

the accrual of his cause of action does not depend on the date of plaintiff's "belief the DAC attorneys had acted negligently" nor is the statute of limitations tolled by what he unreasonably "may have assumed" during his more than year long home detention while his alleged "numerous" attempts to contact counsel "in writing and by telephone" were being ignored. CP 5. This is so because "the discovery rule does not require that the plaintiff know of the negligent character of the conduct alleged as the cause of his or her injury." *Richardson*, 59 Wn.App. at 97 n. 6 (citing *Gevaart*, 111 Wn.2d at 502 ("the discovery rule does not require knowledge of the existence of a legal cause of action.")). See also *Sahlie*, 99 Wn.2d at 554 (same); *Reichelt*, 107 Wn. 2d at 769 (same).

Instead, the test is whether "in the exercise of reasonable diligence" he "should have discovered the facts which give rise to his or her cause of action." *Cawdrey*, *supra*. at 816; *Janicki*, *supra*. at 659 (emphasis added). Here, it is undisputed the complaint establishes more than three years before suit plaintiff at least possessed "the pivotal factor" for accrual of his action -- i.e. "knowledge of injury." *Richardson*, *id.* at 96. Neither the complaint nor any hypothetical explains why due diligence thereafter would not have caused a reasonable person -- long before a year of home detention had passed -- to direct some of his calls, writings, and daytime

for breach of duty. See *Cotton v. Kronenberg*, 111 Wn.App. 258, 44 P.3d 878 (2002).

freedom of movement elsewhere to confirm the reason for the continued restraint on his evenings. Because plaintiff had "the means and resources to detect wrongs within the applicable limitation period," *Matter of Estates of Hibbard*, 118 Wn.2d at 749, he cannot make the discovery rule into an exception that swallows the statute of limitations. In short, plaintiff's hypotheticals of what he unreasonably "may have assumed" would not "entitle the plaintiff to relief on the claim" as required even under his preferred CR 12(b)(6) standard. See *McCurry*, 144 Wn.App. at 905.

Finally, in any case, plaintiff's proposed hypotheticals are invalid because they are neither "consistent with the complaint" nor with his own asserted theory of liability. See *Stangland*, 109 Wn.2d at 676; *McCurry*, 144 Wn.App. at 905. As noted above, plaintiff is presumed to know the law, *Maynard*, supra.; *City of Pasco*, supra., and therefore presumed to know on May 5, 2005, his theory of the applicable law gave him a supposed "right" to be released and to have DAC attorneys obtain his release soon thereafter. RB 16, 22-29. Accordingly, he cannot hypothecate that he somehow instead might "have assumed that his detention was legitimate, at least initially," because he claims it was not legitimate as a matter of law. Id. In addition to presumed knowledge of what he claims the law required, his complaint confirms he in fact knew beginning in May 2005 and every day for over a year thereafter that: 1) DAC counsel had not obtained his release; 2) he had no information they even were trying to get

him released; 3) he was aware of no future court hearing; and 4) for over a year thereafter DAC counsel were not responding to any of his "numerous" writings and telephone calls to them as would have been their duty. CP 3-5. Hence, plaintiff's presumed knowledge of what he claims to be the law, the obvious fact of his continued detention, and his personal knowledge of his situation and of DAC counsel ignoring him and his case, establish Hipple knew or in the exercise of due diligence after May 2005 should have determined "he was being held in custody but for the inaction of the DAC attorneys." Indeed, by hypothecating he somehow might believe his "detention was legitimate, at least initially," RB 8, plaintiff concedes even he cannot hypothecate a more than year long subjective belief that "attorneys were actively attempting to remedy Commissioner Gelman's error, but that remedying such an error was a complicated and lengthy procedure" that he somehow could think had no end and about which he somehow would never get notice.

The statute of limitations "begins to accrue when the plaintiff has a right to seek legal relief," and here long before he had endured more than a year of home detention for contempt while knowing DAC attorneys were ignoring him, plaintiff "knew enough facts to file suit" under his theories of recovery. *Cawdrey*, 129 Wn.App. at 818. See also *Huff v. Roach*, 125 Wn.App. 724, 729 & 732, 106 P.3d 268 (2005) ("statute of limitations accrues when the plaintiff has a right to seek relief in the courts" so discov-

ery rule did not toll statute because plaintiffs "knew the facts underlying their malpractice claim ... well within the three-year statute of limitations" but failed to bring suit). Under plaintiff's theories of liability he had just as much "right" to sue in May or June of 2005 based on the knowledge he had at that time as he did more than four years later when he actually got around to doing so. Hipple's inertia for over four years -- during which time "evidence may be lost and witnesses' memories may fade" -- falls squarely within the statute of limitations' intended consequence for such plaintiffs who "sleep on their rights." See *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 163, rev. denied, 132 Wn.2d 1008 (1997).

2. Complaint Precludes "Continuous Representation Rule"

The "continuous representation rule" is a narrow exception that can toll the limitations period but requires that a "plaintiff must show continuous representation ... with respect to 'the specific matter directly in dispute ...'" *Burns v. McClinton*, 135 Wn.App. 285, 297, 143 P.3d 630 (2006) (emphasis added). Under the complaint here, the "specific matter in dispute" for DAC was plaintiff's "next hearing" on May 5, 2005, at which it did not appear to represent him. CP 3 ¶s 3.6-3.7. For McFadden the "matter in dispute" was "the contempt show cause hearing only" for which she did not represent him because it already had been held on May 5, 2005. CP 4 ¶ 3.10 (emphasis added). For Elsey the "matter in dispute" was "modification of his child support order" because "a discussion regarding

plaintiff's conditions of release did not take place." CP 4 ¶s 3.13, 3.14 (emphasis added). Hence the complaint characterizes its malpractice claim as defendants having "failed to take any action regarding readdressing Plaintiff's conditions of release." CP 5 ¶ 3.16 (emphasis added).

Accordingly, under these express allegations of the complaint, the "continuous representation rule" as a matter of law cannot apply because the acts it alleges as "representation" neither were "continuous" nor concerned the "specific matter directly in dispute" here; i.e., modifying plaintiff's "conditions of release" that had been set at his May 5, 2005, show cause hearing. See also 12/7/10 Order at 4 (Div. II Commissioner noting "the lawyers involved here were not making any continuing efforts on Hipple's behalf" and that it "is precisely this lack of representation that is the basis of his complaint"). Unable to rebut this fundamental inability to meet the rule's required elements, plaintiff instead argues the rule's "policy" supposedly supports its application or that this Court should adopt a "better rule." RB 13-22. Policy, precedent, and logic dictate otherwise.

As to "policy," plaintiff quotes the statement in *Burns*, 135 Wn. App. at 294, that the purpose of the "continuous representation rule" is to combat "the 'illogical requirement' that a client sue while his attorney is attempting to remedy the wrong." RB 13-14 (emphasis added). Besides ignoring that the rule's required elements actually are absent, such reliance instead on its underlying policy also ignores that here the very basis for his

suit is the claim "Defendants failed to take any action regarding readdressing Plaintiff's conditions of release." CP 5 ¶ 3.16 (emphasis added). In short, the complaint's whole point is that there never was any "attempt to remedy the wrong" that could be awkwardly interrupted by a suit. Like *Burns*, the statute is not tolled under the rule because plaintiff's suit does "not resemble those cases in which the continuous representation rule has been held to apply." 135 Wn.App. at 299. Though plaintiff surmises he "could not afford private representation" to sue defendants during his detention so he supposedly could not act within the limitations period, CP 15, such is a false choice because not only was plaintiff working at the time in question but also free on home detention to contract with counsel for contingent civil representation or civilly represent himself pro se as he had previously. See RPC 1.5(c); CP 55-63, 71-72. In any case, the rule does not depend on when a plaintiff can purchase legal services, see *Gevaart*, 111 Wn.2d at 502 ("To so require would effectively do away with the limitation of actions until an injured person saw his/her attorney" but "[t]his is not the law."); *Richardson*, 59 Wn.App. at 98 (claim that "statute of limitations is tolled until such time as a dissatisfied client obtains other legal counsel ... is not the law of Washington"), but whether there is "continuous representation ... with respect to 'the specific matter directly in dispute.'" Further "[o]ur policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant

against stale claims." *Stenberg v. Pacific Power & Light Co., Inc.*, 104 Wn.2d 710, 714, 709 P. 2d 793 (1985). It "is easy to argue, relative to any statute of limitations as applied to a particular case, that it works injustice," but it is "a declaration of legislative policy to be respected by the courts." *O'Neil v. Estate of Murtha*, 89 Wn.App. 67, 73-74, 947 P.2d 1252 (1997) (quoting *Davis v. Rogers*, 128 Wash. 231, 235, 222 P. 499 (1924)).

Plaintiff next argues defendants somehow "misleadingly present the so-called New York rule -- which finds 'an attorney-client relationship exists only as long as 'there are clear indicia of an ongoing, continuous developing relationship between the client and the attorney' ... -- as having been adopted by all other courts that have considered it" because he cites a lower California appellate court that rejected it. RB 17 (citing *Gonzalez v. Kalu*, 140 Cal.App.4th 21, 43 Cal.Rptr.3d 866 (Cal.App. 2006)). First, the cited California case did not concern counsel who allegedly "failed to take any action" as plaintiff alleges here and, in any case, not only recognizes that other "California courts have endorsed the purported 'New York rule'" but also states its own contrary ruling was "because those requirements are not stated in Code of Civil Procedure section 340.6," id. at 871 -- a statute which Washington does not have. Second, in any case, plaintiff nowhere confronts that in Washington -- and elsewhere -- the "continuous representation rule" not surprisingly requires, among other things, that "plaintiff must show continuous representation"

Burns, 135 Wn. App. at 297 (emphasis added). See also *Cawdrey*, 129 Wn.App. at 819 ("under the continuous representation rule" the attorney's "representation in the transactions at issue here ended in 1999" with her last act on the issue); *Schoenrock v. Tappe*, 419 N.W.2d 197, 201 (S.D. 1988) (representation not "continuous" where "three years and seven months had passed with no contact whatsoever between the parties"); *Hiltz v. Robert W. Horn, P.C.*, 910 P.2d 566, 571 (Wyo., 1996) ("Since the parties did not communicate with each other for" several years, a "continuous, developing, and dependent relationship did not exist").

Seeking to change this well established requirement of Washington law, plaintiff argues a "better rule" would be that "representation continues ... until either the formal or de facto termination of the attorney-client relationship." See RB 17-19 (citing *DeLeo v. Nusbaum*, 263 Conn. 588, 597, 821 A.2d 744 (Conn. 2003); *Gonzalez*, 140 Cal.App. 4th at 30). Under this unique approach, because there was neither a formal nor informal "withdrawal" by defendants nor "discharge" by plaintiff, even Hipple has acknowledged the logical conclusion would be that "an argument could be made that defendants still represent Plaintiff Hipple." CP 96. Even ignoring as does plaintiff that representation on "the specific matter directly in dispute" of his release after the May 2005 show cause order in fact never started, our state and others addressing the question instead hold the rule 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." *Janicki*, 109 Wn. App. at 663-4. See, also, *Burns*, 135 Wn.App. at 296 (same); *Cawdrey*, 129 Wn.App. 819 ("representation in the transactions at issue here ended" with attorney's last act on the issue without reference to giving formal or informal notice of withdrawal or discharge); *Frenchman v. Queller*, *Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc.3d 486, 884 N.Y.S. 2d 596, 609-10 (N.Y. Sup. 2009) (motion to withdraw "need not be made in order to 'mark' the end of an attorney's representation of a client" and relationship "had already come to an end for purposes of the toll even though the client had not yet retained a new attorney"); *Lyons v. Nutt*, 436 Mass. 244, 763 N.E. 2d 1065, 1070 (Mass. 2002) (accrual not begin with "date that his attorney-client relationship ... ended" since rule "has no application ... where the client actually knows that he suffered appreciable harm as a result of his attorney's conduct"); *Hiltz*, 910 P.2d at 571 (no tolling since "attorney-client relationship does not continue indefinitely just because it has not been formally terminated"); *Schoenrock*, 419 N.W.2d at 202 (no tolling since "relationship does not continue indefinitely simply because there is no formal termination").

Further, plaintiff's proposed rule "conflicts with Washington cases supporting a strict application of the statute of limitations" and our Courts "will not generally read an exception into statutes of limitation which has

not been embodied in the statute, however reasonable such exception may seem." *Huff*, 125 Wn.App. at 732 (citing *Bennett*, 120 Wn. App. at 85-86; *Janicki*, 109 Wn. App. at 662; *O'Neil*, 89 Wn.App. at 73-74).

Therefore, as another court has noted, the "issue in this case is not whether the defendants were subject to rules for formal withdrawal, but whether the defendants continued to represent" plaintiff on his conditions of release. *See Riemers v. Omdahl*, 687 N.W.2d 445, 451 (N.D. 2004) (rejecting claim limitations period tolled where attorney "failed to follow the procedure for termination of representation" but "from time to time" consulted with plaintiff). Here, as shown above, the complaint shows defendants never represented plaintiff "with respect to 'the specific matter directly in dispute'" of modifying the May 5, 2005, show cause order and confirms their last act on any issue at best occurred in early June 2005. Plaintiff's argument that somehow "DAC attorneys stopped representing Mr. Hipple on June 21, 2006, when Robert Way filed" an appearance, RB 13, conflicts with the face of the complaint, controlling precedent, and common sense. *See also Gevaart*, 111 Wn.2d at 502 (statute is not tolled by when plaintiff "saw his/her attorney"); *Richardson*, 59 Wn.App. at 98 (claim statute "tolled until such time as a dissatisfied client obtains other legal counsel ... is not the law of Washington") (emphasis added). Because the continuous representation rule has no application here, the complaint should have been dismissed. *See e.g. State ex rel. Long v. Petree*

Stockton, L.L.P., 499 S.E.2d 790, 797 (N.C. App., 1998) ("allegation of continuous representation standing alone does not suffice" since "it must appear that the continuous representation relates to that original act" and complaint "did not allege continuous representation"); *Riemers*, supra (alleged continuous representation in complaint "lack sufficient specificity").

C. PROXIMATE CAUSE IS STILL ABSENT FROM COMPLAINT

In legal malpractice actions the question of whether a court would have "rendered a judgment more favorable to the client" is "within the exclusive province of the court, not the jury, to decide." *Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P. 2d 600 (1985). See also *Geer v. Tonnon*, 137 Wn.App. 838, 844-45, 155 P. 3d 163 (2007) (claim dismissed because in legal malpractice proximate cause "presents an issue of law for the trial court to resolve"). Here, the trial court also erred in not dismissing for lack of proximate cause because dismissal is necessary where "the client had no defense ... as a matter of law." *Sherry v. Diercks*, 29 Wn.App. 433, 438, 628 P.2d 1336, rev. denied 96 Wn.2d 1003 (1981). See, also, *Powell v. Associated Counsel for the Accused*, 146 Wn.App. 242, 249, 191 P.3d 896 (2008) (dismissal because it is plaintiff's "burden below to show that 'the outcome ... would have been more favorable to [him] than the result actually obtained but for the defendant attorney's negligence'").

Plaintiff argues the May 5, 2005, show cause order detaining him until he paid his arrearages should have been vacated because no counsel

was present. RB 22-24. However he nowhere shows how vacating the order for lack of counsel would have ipso facto resulted in his automatic and immediate release. Indeed, the complaint confirms regardless of counsel's presence he still was "in contempt of court for intentionally failing to comply with [a] child support order" and nowhere claims this earlier finding also was made while unrepresented by counsel. CP 3. For this reason, even the criminal law attorney who ultimately obtained his release in 2006 likewise never claimed his May 2005 pro se status was a ground to modify the order, CP 65-68, nor was such a stated ground for granting his September 2005 release. CP 69. Any "right" to counsel at the May 5, 2005, hearing is not a ground for suit over his subsequent home detention - especially against the later appearing DAC attorneys -- because it was not the cause of his detention which instead was caused by his intentional contempt of court. Since plaintiff "had no defense ... as a matter of law" to detention on May 5, 2005, proximate cause is absent as to that order.

The only remaining issue then is whether Hipple's continued detention thereafter was proximately caused by defendants. As a matter of law the complaint and record preclude this theory as well. First, as noted above, plaintiff had no defense to detention on May 5, 2005, because his complaint admits he had "intentionally" refused to comply with a Court order, CP 3 ¶ 3.3, and the court record confirms the finding of contempt expressly found he had the ability to pay. CP 88. Once that earlier find-

ing had been made, "the law presumes that one is capable of performing those actions required by the court" so that "inability to comply is an affirmative defense" and a "contemnor has both the burden of production on ability to comply, as well as the burden of persuasion." *In re King*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988). Because his complaint makes no such assertion, plaintiff now hypothetically asserts that at some point prior to June 2006 DAC counsel might have been able to show an inability to purge the contempt. See RB 25-28. However, this conclusory hypothetical is refuted by the fact of record that even his subsequent counsel after June 2006 did not do so. On this issue too, plaintiff's new counsel after June 2006 submitted no evidence to meet his burden. CP 65. Indeed, the only evidence of record on the issue was the declaration of his opponent that showed Hipple was "on electronic home monitoring in the evening but is allowed to leave his house during the day to work" and had "worked as a substitute janitor for a local school district this past year." CP 71-72. Hence, the claim any competent counsel could have met plaintiff's burden of showing his inability to purge his contempt is both unsupported by the complaint and contrary to the actual record. See e.g. Stangland, 109 Wn. 2d at 676 ("set of facts" must be "consistent with the complaint"); *Steckman*, supra. ("we are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint").

Second, the only ground supported by the record for plaintiff's Sep-

tember 2006 release was that by that time his by then 16 month detention had "convinced" the Court he would "steadfastly refuse to comply" and therefore further home detention "would no longer serve the purpose of ... coercing [compliance]." *King*, 110 Wn.2d at 803 (brackets in original). However, neither the complaint nor the law provides any basis to conclude such a result would have been obtained also during the first 12 months of plaintiff's intransigence -- much less that he had a "right" to such a ruling as a matter of law. Instead, as a matter of law, Courts uphold far longer coercive detentions for those in contempt of Court. See e.g. *Armstrong v. Guccione*, 470 F.3d 89, 151 (2d Cir. 2006)(though plaintiff confined seven years for contempt, court's authority to detain had not expired because the "length of coercive incarceration, in and of itself, is not dispositive of its lawfulness" since "a court may jail a contemnor 'indefinitely until he complies'"); *Lambert v. Montana*, 545 F. 2d 87 (9th Cir. 1976) (upholding 16 month detention); *King*, 110 Wn.2d at 803 (where father jailed for civil contempt, any "conclusion that Mr. King's confinement of 11 months had become punitive as a matter of law is contrary to general authority").

Hence, dismissal also should have been granted because neither the complaint nor any court record showed alleged legal malpractice actually caused plaintiff's detention or its duration. Indeed, defendants have gone further and affirmatively shown: 1) Hipple's May 5, 2005, pro se appearance was not a ground for release; 2) the law presumes Hipple had the

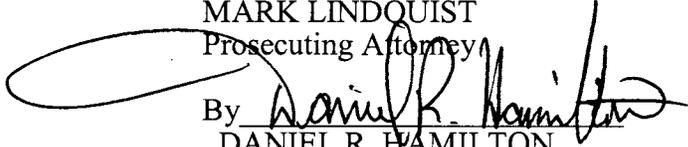
ability to purge his contempt, and the record shows different counsel also never was able to prove an inability to purge; and 3) his "steadfast refusal" did not as a matter of law entitle him to be released sometime before June 2006. Compare RB 29. In any case, the trial court should have dismissed for lack of causation simply because the complaint fails to allege any fact showing that some alleged legal failure by DAC, McFadden or Elsey -- rather than his own contempt of court by "intentionally failing to comply with the child support order" -- ever actually caused him harm.

IV. CONCLUSION

Here the trial court erred by disregarding Washington law on both the statute of limitations and on plaintiff's burden to identify facts showing the essential element of proximate cause. Because both issues required dismissal, defendants respectfully request this Court reverse the orders appealed and direct dismissal of the fatally untimely and deficient complaint.

DATED: April 16, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLANTS'**
REPLY BRIEF was hand delivered this 15th day of April, 2010, to counsel for Plaintiff as follows:

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