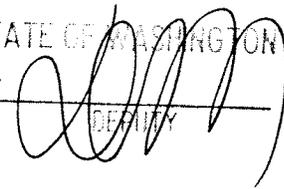


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DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

**CASE NO. 39802-8-II**  
(Pierce County Superior Court Cause No. 09-2-10222-3)

In the Court of Appeals, Division II, for the State of Washington

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ROBERT B. HIPPLE, JR., Respondent

v.

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

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**RESPONDENT'S BRIEF**

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**ORIGINAL**

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## I. STATEMENT OF THE CASE

In April 2005, Respondent Robert B. Hipple, Jr. (hereinafter "Mr. Hipple") "contacted Pierce County Department of Assigned Counsel, requesting appointed counsel." CP 3. Mr. Hipple was at the time being held in "the custody of the Pierce County Jail" because, more than a year earlier, Mr. Hipple had been found "in contempt of court for intentionally failing to comply with [a] child support order." *Id.* In response to Mr. Hipple's request for appointed counsel, "an employee of Pierce County Department of Assigned Counsel" contacted Mr. Hipple "in the Pierce County Jail and determined [Mr. Hipple] was eligible for appointed counsel." *Id.*

On May 5, 2005 Mr. Hipple appeared *pro se* at a hearing "to review terms of release." CP 3. At that hearing, "Commissioner Gelman ordered that [Mr. Hipple] continue to be confined to the Pierce County Jail, and that [Mr. Hipple] be immediately released upon payment of \$20,022.75." CP 3-4.

"On May 9, 2005, [Mr. Hipple] received a letter indicating Pierce County Department of Assigned Counsel had appointed [Petitioner] Caroline Elsey (hereinafter "Ms. Elsey") to represent [Mr. Hipple] regarding the contempt matter." CP 4. Subsequent to May 9, 2005, Ms.

Elsy contacted Mr. Hipple only twice, and "failed to take any action regarding readdressing [Mr. Hipple's] conditions of release." CP 5.

"On May 10, 2005, Pierce County Department of Assigned Counsel and its employee [Petitioner] Deborah Grace McFadden (hereinafter "Ms. McFadden") filed a Special Notice of Appearance on Contempt on behalf of Plaintiff 'in connection with the contempt show cause hearing only.' " CP 4. Subsequent to May 10, 2005, Ms. McFadden "failed to make any contact with" Mr. Hipple and "failed to take any action regarding readdressing [Mr. Hipple's] conditions of release." CP 5.

"Between May 10, 2005 through June 21, 2006, [Mr. Hipple] attempted to contact [Ms. Elsey, Ms. McFadden, and the Pierce County Department of Assigned Counsel (hereinafter "the DAC attorneys")] numerous times, in writing and by telephone, regarding the contempt matter." CP 5. During that time, Mr. Hipple "had been in custody continuously." *Id.* During that time, Mr. Hipple received no response from either Ms. McFadden or Ms. Elsey. *Id.* However, on June 21, 2006, Mr. Hipple finally received some kind of response from Pierce County Department of Assigned Counsel in the form of another attorney, Robert Way, filing a "Special Notice of Appearance on Contempt." *Id.* And in response to Mr. Way's "Motion for Order Re: Revision of Terms of Release," the order detaining Mr. Hipple in custody was "changed" to

"eliminate...any ongoing detention or electronic home monitoring immediately." *Id.*

On June 18, 2009, Mr. Hipple filed a legal malpractice Complaint in Pierce County Superior Court under Cause No. 09-2-10222-3. CP 1-7. On July 16, 2009, the DAC attorneys filed a Rule 12(b) Motion to Dismiss, arguing the statute of limitations barred the action, and alternatively that Mr. Hipple will be unable to prove the causation element of the cause of action as a matter of law. CP 8-18. On July 31, 2009, the Court denied the DAC attorneys' Motion to Dismiss. CP 106-107. On August 10, 2009, the DAC attorneys filed a Motion to Reconsider Denial of CR 12(B)(6) Motion to Dismiss or in the Alternative for Certification Pursuant to RAP 2.3(b)(4). CP 75-84. On August 21, 2009, the Court denied the reconsideration motion, yet certified the denial of the motions to dismiss and reconsideration of that motion to dismiss "involve controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of those orders may materially advance the ultimate termination of the litigation." CP 109-110.

## II. ARGUMENT

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle plaintiff to

relief. *Bravo v. Dolson Cos.*, 125 Wn.2d 745, 750 (1995). In ruling on a CR 12(b)(6) motion, a court presumes that plaintiff's allegations are true and may consider hypothetical facts consistent with the complaint not in the record. *Tenore v. AT&T Wireless Svcs.*, 136 Wn.2d 322, 330 (1998). CR 12(b)(6) motions should be granted sparingly and with care, and only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is an insuperable bar to relief. *Id.* "Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Bravo*, 125 Wn.2d at 750. "Under CR 12(b)(6), dismissal is only appropriate if it appears *beyond doubt* that the plaintiff cannot prove any set of facts which would justify recovery." *Burton v. Lehman*, 153 Wn.2d 416 (2005) (internal quotations omitted) (emphasis added).

Although the U.S. Supreme Court recently "adopted [a] standard for dismissal...in resolving motions brought pursuant to Federal Rule of Civil Procedure 12(b)(6)" that "requires that allegations be 'plausible' in order to survive a motion for dismissal," Washington courts have adopted no such heightened pleading standard. *McCurry v. Chevy Chase Bank, FSB*, 144 Wn. App. 900 (2008), *review granted*, 165 Wn.2d 1020 (2010). Indeed, when the Court of Appeals, Division I considered the issue in *McCurry*, the Court specifically found itself "without authority to adopt a

standard for claim dismissal different from the one previously announced by our Supreme Court." *Id.*

A. The Superior Court Did Not Commit Reversible Error in Denying the DAC Attorneys' 12(b)(6) Motion on the Basis of the Statute of Limitations.

a. Discovery Rule.

The statute of limitations for attorney malpractice is three years. RCW 4.16.080(2); *see also Janicki Logging v. Schwabe, Williamson*, 109 Wn. App. 655, 659 (2001). The statute of limitations on an action does not begin to run until the cause of action accrues. *Id.* Under the "discovery rule," the statute of limitations does not start to run on an attorney malpractice claim until the client "discovers," or in the exercise of reasonable diligence should have discovered, facts which give rise to his cause of action. *Peters v. Simmons*, 87 Wn.2d 400, 406 (1976). The rule requires a client have knowledge of facts supporting each of the essential elements of the cause of action: duty, breach, causation, and damages in a malpractice action. *Janicki Logging*, 109 Wn. App. at 659-660.

Generally, a question of fact is properly left to the jury. *Peterson v. State*, 100 Wn.2d 421, 436 (1983). However, "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Hartley v. State*, 103 Wn.2d 768, 775 (1985).

Although "[w]hether the statute of limitations bars a suit is a legal question," "the jury must decide the underlying factual questions." *Goodman v. Goodman*, 128 Wn.2d 366, 373 (1995). That is, "the application of the discovery rule generally presents questions of fact." *Richardson v. Denend*, 59 Wn. App. 92, 95 (1990). Although the *Richardson* court carved out an exception, holding "[i]n the context of actions for attorney malpractice premised upon errors or omissions allegedly occurring during the course of litigation...the application of the discovery rule presents a question of law," the court premised that exception upon broadly finding "pertinent facts [regarding attorney malpractice in litigation] are susceptible of but one conclusion." Implicit in the Court's framing is the limited availability of the exception. That is, *when* the pertinent facts regarding the application of the discovery rule in the attorney malpractice context are susceptible of *more than one* conclusion, the application of the discovery rule should not be treated as a question of law, but as a question of fact. *See Matson v. Weidenkopf*, 101 Wn. App. 472, 482 (2000).

"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.'" *Id.* at 483. "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 Wn.2d at 405. Although "is not the law of Washington" that "the statute of limitations is tolled until such time as a dissatisfied client obtains other legal counsel or engages in independent legal research to determine the propriety of the actions of his or her former counsel" *Richardson*, 59 Wn. App. at 98, the statute of limitations does not begin to run on an attorney malpractice claim until the client knows, or in the exercise of reasonable diligence should have known, facts supporting each of the essential elements of the cause of action—including causation. *Peters*, 87 Wn.2d at 406. Therefore the question as to when a client knew or should have known he was "injured by his lawyer's inaction" *may* be answered by reference to when the client "contacted a new attorney," although it is not necessarily so. *Matson*, 101 Wn. App. at 482-483.

Here, the face of the complaint establishes Mr. Hipple knew he was held in custody from April 15, 2005 through September 18, 2006. CP 5. However, the face of the complaint does not establish Mr. Hipple knew or should have known he was being held in custody but for the inaction of the DAC attorneys. To the contrary, Mr. Hipple was ordered to remain in the Pierce County Jail until he was able to pay \$20,022.75 at a hearing at which he appeared *pro se*. CP 3. Mr. Hipple may well have assumed that

his detention was legitimate, at least initially. Mr. Hipple 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. Moreover, Mr. Hipple "attempted to contact [the DAC attorneys] numerous times, in writing and by telephone" "[b]etween May 10, 2005 and June 21, 2006." CP 5. The numerous attempts at contact may suggest Mr. Hipple at some point concluded was being detained wrongfully. However, the numerous attempts at contact may also suggest Mr. Hipple's belief the DAC attorneys would assist him, and contraindicate a belief the DAC attorneys had acted negligently. That is, Mr. Hipple's hypothetical belief that the DAC attorneys would refuse to act for over a year is inconsistent with the face of the complaint and its reference to numerous attempts at contact.

*Richardson*, in holding "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" "upon the entry of the judgment," is distinguishable. 59 Wn. App. at 95-96. In *Richardson*, the client's malpractice complaint "arose out of Denend's representation of Richardson in a criminal case" which resulted in Richardson's conviction "of second degree assault." *Id.* at 93. The *Richardson* court found even if

Richardson did not know "Denend's conduct may have constituted malpractice until he conducted independent legal research after he was incarcerated for the assault" approximately two years after the trial, because he was "formerly advised of the judgment of the court," he thereby "receive[d] notification of any damage which result[ed] from [his] attorney's representation," and thus should have known all the facts which gave rise to the cause of action at the time of the judgment. *Id.* at 95-96.

Here, on the other hand, the only thing resembling a judgment is Commissioner Gelman's May 5, 2005 order. That order, needless to say, cannot serve as notice of the DAC attorneys' malpractice because it predated their representation of Mr. Hipple. Had Ms. Elsey or Ms. McFadden appeared on behalf of Mr. Hipple at the May 5, 2005 hearing, only to stand mute throughout the hearing, Mr. Hipple could legitimately be said to have notice of the facts that give rise to a malpractice action. However, on the facts as presented here, one cannot escape the conclusion that *Richardson's* special imputed notice rule does not apply.

Thus, the facts presented here, together with consistent hypothetical facts, the DAC attorneys cannot meet their burden of proving beyond doubt that Mr. Hipple cannot prove any set of facts which would justify recovery.

b. Continuous Representation Rule.

Even if the Court finds the pertinent facts underlying the application of the discovery rule here can reach but one conclusion—that the discovery date predates June 18, 2006—the denial of the DAC attorneys' 12(b)(6) motion on the basis of the statute of limitations was appropriate, given the application of the "continuous representation rule."

The continuous representation "rule tolls the statute of limitations until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred." *Janicki Logging*, 109 Wn. App. at 661. The *Janicki Logging* court adopted the continuous representation rule because it "avoids disruption of the attorney-client relationship and gives attorneys the chance to remedy mistakes before being sued." *Id.* at 662. "The rule also prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired." *Id.* The rule is "consistent with the purpose of the statute of limitations, which is to prevent stale claims and enable the defendant to preserve evidence." *Id.* "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." *Id.* at 663.

The continuous representation rule "is a limited one." *Id.* "[U]nder the continuous representation rule, the limitations period begins to accrue

when the attorney stops representing the client on the *particular matter in which the alleged malpractice occurred.*" *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810 (2005) (emphasis in original). Thus, the *Cawdrey* court found "[a]though [the attorney] Chicha last represented [the client] Elizabeth in May 2000, when she prepared a codicil to Elizabeth's will, her representation in the transactions at issue here"—a series of "business transactions" beginning in 1994 and ending in 1999—"ended in 1999," and therefore the continuous representation rule cannot make timely a "complaint, filed May 13, 2003." *Id.*

Here, the DAC attorneys began representing Mr. Hipple in May of 2005. CP 4. Specifically, the Pierce County Department of Assigned Counsel notified Mr. Hipple by letter that Ms. Elsey had been appointed, and Ms. "McFadden filed a Special Notice of Appearance on Contempt." *Id.* Also, Ms. Elsey met with Mr. Hipple on two occasions. *Id.*

"In proceedings civil in form but criminal in nature, due process rights to liberty, the Sixth Amendment, and Washington Constitution article 1, section 22, require that a party threatened with jail be represented by counsel." *In re Custody of Halls*, 126 Wn. App. 599, 610 (2005). "Accordingly, whenever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with [government]-paid counsel if she is unable to afford private

representation." *Id.* "[W]here fundamental constitutional rights are not threatened, no right to counsel exists at public expense." *King v. King*, 162 Wn.2d 378, 384 (2007) (holding indigent parent does not have right to "appointment of counsel at public expense in a dissolution proceeding").

The face of the complaint here specifically indicates Ms. Elsey was "appointed," and that Ms. McFadden was "at all times relevant an employee of Pierce County Department of Assigned Counsel, and was acting within the scope of her employment in representing" Mr. Hipple. CP 4. Thus, the DAC attorneys, as appointed counsel, could have only been representing Mr. Hipple with respect to only one matter: described in the complaint alternately as "the contempt matter" and the "contempt show cause hearing." *Id.* Mr. Hipple was not entitled to appointed counsel with respect to any other legal matters he may have wanted to address. Thus, in the context of the complaint as a whole, Ms. Elsey's conversation with Mr. Hipple regarding "a modification of a child support order" was clearly a conversation "regarding the contempt matter." CP 4.

Also, Ms. McFadden's notice of appearance was filed May 10, 2005, with a scope of representation expressly limited to "the contempt show cause hearing." CP 4. The complaint references three hearings related to the contempt, occurring on January 8, 2004, May 5, 2005, and September 18, 2006. CP 3-5. None of these dates occurred while Ms.

McFadden was representing Mr. Hipple. *See* CP 5. Thus, the "show cause hearing" referenced in the notice of appearance cannot possibly refer to any of these hearings.

Because the DAC attorneys represented Mr. Hipple with respect to only one matter, the date on which the DAC attorneys stopped representing Mr. Hipple with respect to the particular matter in which the alleged malpractice occurred is identical to the date on which the DAC attorneys stopped representing Mr. Hipple. And the DAC attorneys stopped representing Mr. Hipple on June 21, 2006, when Robert Way filed a Special Notice of Appearance on Contempt. CP 5. Thus, the continuous representation rule would toll the end of the statute of limitations until June 21, 2009.

In Washington, the application of the continuous representation "rule to specific facts should be based on whether any of the policy considerations is furthered." *Burns v. McClinton*, 135 Wn. App. 285, 294 (2006). "The purpose of the continuous representation rule is to avoid disrupting the attorney-client relationship unnecessarily." *Id.* Under the rule, the "attorney has the opportunity to remedy, avoid, or establish that there was no error or attempt to mitigate the damages." *Janicki Logging*, 109 Wn. App. at 663. The rule "combats the 'illogical requirement' that a

client sue his attorney while his attorney is attempting to remedy the wrong." *Id.*

The *Burns* court considered the continuous representation rule in the professional accounting services context. *Burns*, 135 Wn. App. at 293. In *Burns*, however, the dispute did not concern the accountant McClinton's "failing to provide adequate accounting services or letting him down in any particular matter." *Id.* at 299. Rather, "the claim by [the client] Burns arose out of McClinton's charging him more than they had agreed for accounting services." *Id.* "The wrong occurred during the general course of an ongoing professional relationship, not in continued representation with respect to a particular undertaking or specific transaction in which McClinton had committed professional error." *Id.* Thus, "Burns did not have to choose between engaging in speculative litigation and waiting to see if things might turn out all right after all in some specific matter." *Id.* Moreover, "[t]here was nothing McClinton could have done in an ongoing professional capacity, that is, as the representative of Burns in any particular matter, to make the situation turn out better for Burns." *Id.* Because the facts of *Burns* did "not resemble those cases in which the continuous representation rule has been held to apply," the court there declined to toll the statute of limitations.

Here, the policy reasons underlying the continuous representation rule require its application. In April 2005, "an employee of Pierce County Department of Assigned Counsel contacted [Mr. Hipple] in the Pierce County Jail and determined [Mr. Hipple] was eligible for appointed counsel." CP 3. The determination that Mr. Hipple was eligible for appointed counsel means (1) Mr. Hipple was facing a contempt adjudication that may result in incarceration, and (2) Mr. Hipple was unable to afford private representation. *See In re Custody of Halls*, 126 Wn. App. at 610. Thus, because Mr. Hipple could not afford private representation, Mr. Hipple was wholly reliant on the DAC attorneys for representation. To require Mr. Hipple to choose between continuing to rely on the skill, expertise, and diligence of the DAC attorneys on the one hand, and instigating a malpractice action against the DAC attorneys while continuing to remain in custody and *pro se* on the other is a false choice brought upon by the "illogical requirement" of a possible application of the discovery rule on these facts.

Moreover, Mr. Hipple was being held in custody continuously from April 15, 2005 through September 18, 2006, which includes the entire period during which the DAC attorneys represented Mr. Hipple. CP 5. Thus, throughout the entire representation, the DAC attorneys would have had ample and repeated opportunities to remedy, avoid, or establish

that there was no error, or attempt to mitigate the damages. The DAC attorneys could have at any time attempted to have Mr. Hipple released from custody by highlighting the constitutional violation that occurred with Mr. Hipple's appearing *pro se* at the May 5, 2005 hearing without having made a knowing, voluntary, and intelligent waiver of his right to counsel. The DAC attorneys could have at any time attempted to have Mr. Hipple released from custody by demonstrating to the court Mr. Hipple's inability to purge the contempt by paying \$20,022.75. The DAC attorneys could have at any time attempted to have Mr. Hipple released from custody by demonstrating to the court Mr. Hipple's unwillingness to purge the contempt. The DAC attorneys could have at any time attempted to have the purge condition modified, or sought less restrictive conditions of release. The DAC attorneys could have even researched the issues and informed Mr. Hipple that, in their professional judgment, Mr. Hipple had no right to be released, or otherwise established there was no error. Precisely because any of these avenues were open to the DAC attorneys, the policies underling the continuous representation rule mandate its application here, tolling the start of the statute of limitations until the end of representation on June 21, 2006.

The continuous representation "rule tolls the statute of limitations until the end of an attorney's representation of a client." *Janicki Logging,*

109 Wn. App. at 661. The DAC attorneys 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 and dependent relationship between the client and the attorney' and the relationship 'is marked with trust and confidence.'"—as having been adopted by all other courts that have considered it. *Gonzalez v. Kalu*, 140 Cal. App. 4th 21, 29, 43 Cal. Rptr. 3d 866 (Cal. Ct. App., 2nd Dist., Div. 3 2006). To the contrary, the *Gonzalez* court found one of the purposes of the rule—"to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired"—is "not served" by the New York rule, and thus declined to adopt it. *Id.* at 30.

A better rule finds "the representation continues for the purposes of the continuous representation doctrine until either the formal or de facto termination of the attorney-client relationship." *DeLeo v. Nusbaum*, 263 Conn. 588, 597, 821 A.2d 744 (Conn. 2003). "The formal termination of the relationship occurs when the attorney is discharged by the client, the matter for which the attorney was hired comes to a conclusion, or a court grants the attorney's motion to withdraw from the representation." *Id.* "A de facto termination occurs if the client takes a step that unequivocally indicates that he has ceased relying on his attorney's professional

judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney." *Id.* at 597-598. By not adopting a "requirement...that the client continue to trust his attorney in order for the attorney-client relationship to continue for purposes of the" continuous representation rule, the court need not engage in "determinations of how much disenchantment with a client's attorney is too much" and leaves "a client...free to change his or her mind and reestablish a relationship of trust even after actions or statements...that may indicate a lack of such trust in his attorney at the time made." *Id.* at 598.

Here, Mr. Hipple did not discharge the DAC attorneys until June 21, 2006, when Robert Way filed a Special Notice of Appearance on Contempt. CP 5. At no point prior to June 21, 2006 had the contempt matter for which the DAC attorneys were representing Mr. Hipple come to a conclusion. At no point did the DAC attorneys move to withdraw from the representation, nor was such a motion granted. At no point prior to June 21, 2006 did Mr. Hipple hire an attorney to consider a possible malpractice claim. At no point prior to June 21, 2006 did Mr. Hipple file a grievance against the DAC attorneys. In short, no formal or de facto termination occurred to terminate the DAC attorneys' representation of Mr. Hipple until June 21, 2006.

Another better rule finds "the representation ends when the client actual has or reasonably should have no expectation that the attorney will provide further legal services" "in the event of an attorney's unilateral withdrawal or abandonment of the client." *Gonzalez*, 140 Cal. App. 4th at 30. "That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Id.* at 30-31. "Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint." *Id.* at 31. "Whether the client actually and reasonably believed that the attorney would provide further legal services regarding a specific subject matter is predominantly a question of fact for the trier of fact, but can be decided as a question of law if the undisputed facts can support only one conclusion." *Id.*

The client in *Gonzalez* "hired [the attorney] Kalu on June 2, 2000 to represent her in connection with her allegations of sexual harassment." *Id.* The court found because "Kalu never informed [Gonzalez] that he was withdrawing from her representation and that she never told him not to proceed," although Gonzalez "did not contact Kalu because she was

waiting for him to contact her," and because there was "no evidence that Kalu" "provided any information concerning the timing of litigation," "reasonable minds could differ as to whether Gonzalez reasonably should have believed more than one year before filing suit that Kalu had withdrawn from representation or abandoned her," notwithstanding "an absence of communication for almost two years and six months." *Id.* at 32.

Here, the DAC attorneys did not expressly notify Mr. Hipple they will perform no further services. Moreover, because Mr. Hipple "attempted to contact [the DAC attorneys] numerous times, in writing and by telephone, regarding the contempt matter," the face of the complaint precludes the possibility Mr. Hipple actually believed the DAC attorneys would perform no further services. CP 5. Furthermore, because the DAC attorneys failed to provide Mr. Hipple with any information about the contempt matter—e.g. regarding the timeline for readdressing conditions of release, or likelihood of success—and because the DAC attorneys were appointed, as opposed to retained, makes it decidedly *unreasonable* for Mr. Hipple to have expected the DAC attorneys would provide no further legal services.

Even an appropriate application of the New York rule regarding fixing in time the end of representation does not change the result here. Under that rule, the "relationship between the parties...is marked with trust

and confidence," "is not sporadic but developing and involves a continuity of professional services from which the malpractice stems." *Muller v. Sturman*, 79 A.D.2d 482, 485-486, 437 N.Y.S.2d 205 (N.Y. Sup. Ct. App. Div. 4th 1981).

The *Muller* court found significant the "approximately two and one-half years" period after November 1973 during which the client "had no conversation with any member of the law firm," in contrast to the "relatively frequent contact with the firm" prior to that time. *Id.* at 486. Moreover, the client in *Muller* professed knowing the Statute of Limitations...expired May 24, 1974," but "never inquired whether the summons had been reserved or whether the action was pending." *Id.* Also, the attorneys in *Muller* "did nothing to foster the impression or to lull [the client] into believing that the action...was proceeding." *Id.* Thus, the *Muller* court found "no expectation of representation" and denied the applicability of the continuous representation rule. *Id.*

Here, by contrast, Mr. Hipple "attempted to contact [the DAC attorneys] numerous times, in writing and by telephone, regarding the contempt matter." CP 5. Moreover, Mr. Hipple was not aware of his rights regarding the contempt matter: contrast the result when Mr. Hipple represented himself at the May 5, 2005 hearing at which he was held in custody with a \$20,022.75 purge condition, with the result when Mr.

Hipple was represented by Robert Way at the September 18, 2006 hearing at which Mr. Hipple was released from custody. CP 3, 5. Although the attorney-client relationship between Mr. Hipple and the DAC attorneys tended to be one-sided in terms of effort, the relationship was "marked with" at least a degree of "trust and confidence," however wary. And because the errors committed at the May 5, 2005 hearing had not been addressed, let alone remedied, until after June 21, 2006, Mr. Hipple had every reasonable expectation his relationship with the DAC attorneys was developing and involved a continuity of professional services through June 21, 2006.

Thus, regardless of how one fixes the date of the end of the DAC attorneys' representation of Mr. Hipple, the face of the complaint requires the date be fixed at June 21, 2006. Because the complaint in this action was filed less than three years after that date, the trial court's denial of the DAC attorneys' 12(b)(6) motion on the basis of the statute of limitations was appropriate.

**B. The Superior Court Did Not Commit Reversible Error in Denying the DAC Attorneys' 12(b)(6) Motion on the Basis of Proximate Cause.**

The trial court denied the DAC attorneys' 12(b) Motion to Dismiss. CP 106-107. Before doing so, the trial court "reviewed the records and

files in this case," "heard oral argument," and was "otherwise fully advised in the premises." *Id.* Specifically, the trial court reviewed the DAC attorneys' Rule 12(b) Motion to Dismiss and the memorandum in support, as well as the written and oral arguments in response to that Motion. *See* CP 8, CP 9-34, CP 35, CP 36-44, CP 45-74. Therein, the DAC attorneys specifically argued "Complaint Fails to Demonstrate Proximate Causation" as a basis for the motion. CP 15-18. Therefore, contrary to the DAC attorneys' assertion "the trial court did not address the issue" of causation, the trial court, by denying the DAC attorneys' motion, resolved the issue, and resolved the issue against the DAC attorneys.

"In proceedings civil in form but criminal in nature, due process rights to liberty, the Sixth Amendment, and Washington Constitution article 1, section 22, require that a party threatened with jail be represented by counsel." *In re Custody of Halls*, 126 Wn. App. at 610. "Accordingly, whenever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with [government]-paid counsel if she is unable to afford private representation." *Id.* "A court must indulge every reasonable presumption against waiver of fundamental rights." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207 (1984). "In general, constitutional rights may only be waived by knowing, intelligent, and voluntary acts." *State v. Stegall*, 124 Wn.2d 719, 724 (1994). In the

absence of a showing of a valid waiver of the right to counsel, a court must appoint counsel to represent any person accused of contempt when incarceration may result. *In re Custody of Halls*, 126 Wn. App. at 610. If a court does not so appoint, the resulting contempt orders must be vacated. *Id.*

Here, Mr. Hipple "contacted Pierce County Department of Assigned Counsel, requesting appointed counsel" prior to the May 5, 2005 hearing. CP 3. Mr. Hipple faced the possibility of incarceration at that hearing. *Id.* Pierce County Department of Assigned Counsel "determined [Mr. Hipple] was eligible for appointed counsel," i.e. that Mr. Hipple was indigent. *Id.* Although Mr. Hipple appeared *pro se* at the May 5, 2005 hearing, that appearance does not constitute a knowing, intelligent, and voluntary waiver of his right to counsel. Because Commissioner Gelman did not appoint Mr. Hipple counsel at the May 5, 2005 hearing, the order that Mr. Hipple "continue to be confined to the Pierce County Jail" until he pays \$20,022.75 must be vacated.

A court may find a person who has failed or refused to perform an act within the person's power in contempt. RCW 7.21.030(2). A court may, for disobedience of a lawful order of the court, impose imprisonment as a remedial sanction. RCW 7.21.030(2)(a). However, the imprisonment may extend only so long as it serves a coercive purpose. *Id.* Imprisonment

no longer serves a coercive purpose when the contemnor cannot purge the contempt because he does not have the means to comply with the order. *Britannia Holdings Ltd. v. Greer*, 127, Wn. App. 926, 933 (2005). A threshold requirement to imposing remedial sanctions is a finding of current ability to perform an act previously ordered. *Id.* at 934. In *Britannia*, as part of a judgment collection, in 2004 the debtors were ordered to pay \$635,000 within four months or be incarcerated. *Id.* at 928. Although the trial court found in 2002 the debtors had possessed \$635,000, the trial court made no finding about the debtors' present ability to pay in 2004. *Id.* at 934. Therefore, the 2004 contempt order was not coercive, but impermissibly penal. *Id.*

"A contemnor 'will not be held in jail forever' for civil contempt." *In re King*, 110 Wn.2d 793, 803 (1988). "Once a court becomes convinced that a contemnor will steadfastly refuse to comply with the terms of the contempt citation, the court is 'obligated to release [him] since incarceration would no longer serve the purpose of the civil contempt order – coercing [compliance].'" *Id.* Moreover, "[i]ncarceration for civil contempt obviously loses its coercive effect if the contemnor no longer has the ability to comply with the particular court order he is charged with violating." *Id.* at 804. Although the "length of incarceration per se does not make further incarceration for contempt unlawful," length of incarceration

does provide some evidence as to whether the contempt power has ceased to have a coercive effect. *Id.* at 803-804. And although "[i]n the context of civil contempt, the law presumes that one is capable of performing those actions required by the court," that presumption is *rebuttable*. *Id.* at 804. "[I]nability to comply is an affirmative defense." *Id.*

Moreover, "[t]he incarcerated contemnor must be afforded the opportunity to purge himself of contempt *and*, at regular intervals, to present new evidence tending to show that the confinement has lost its coercive effect or that there is no reasonable possibility of compliance with the court order." *Id.* at 805 (emphasis added).

Here, on January 8, 2004, a Commissioner found Mr. Hipple had intentionally failed to comply with a child support order. CP 3. The January 8, 2004 order's purge clause included "bringing his child support arrearage current." *Id.* The May 5, 2005 order's purge clause included payment of \$20,022.75. CP 3-4. Even assuming the January 8, 2004 order rightly found Mr. Hipple had the means to bring his child support arrearage current as of January 8, 2004, the issue of whether Mr. Hipple had the means to pay \$20,022.75 was never even addressed, as required, at the May 5, 2005 hearing.

Additionally, on April 25, 2005, "an employee of Pierce County Department of Assigned Counsel...determined [Mr. Hipple] was eligible

for appointed counsel;" i.e. that Mr. Hipple was indigent. CP 3. Mr. Hipple's indigency is inconsistent with a finding he was presently able to pay \$20,022.75. Also, Mr. Hipple was held "in custody continuously from April 15, 2005 through September 18, 2006. CP 5. The face of the complaint strongly suggests, although does not affirmatively state, Mr. Hipple was never able to pay \$20,022.75 until sometime after the DAC attorneys representation of Mr. Hipple ceased on June 21, 2006.

Nevertheless, the conclusion that the trial court rightly denied the DAC attorneys' motion to dismiss is unavoidable. The DAC attorneys, in order to prevail, must show *beyond doubt* that Mr. Hipple cannot prove any set of facts consistent with the complaint that would justify recovery. *Tenore*, 136 Wn.2d at 330. The question is not whether the complaint unambiguously indicates Mr. Hipple was unable to pay \$20,022.75 from April 2005 through September 2006. The question is whether the face of the complaint *precludes the possibility* that Mr. Hipple was unable to pay \$20,022.75, which it unambiguously doesn't. That Mr. Hipple may have at some point after May 10, 2005 been released from the Pierce County Jail to "electronic home monitoring," "allowed to leave his house during the day to work," and in fact did work "as a substitute janitor" by no means *requires* a finding that Mr. Hipple was able to pay \$20,022.75 at some point prior to June 21, 2006. Rather, Mr. Hipple's ability to purge the

contempt was *at least possibly* not alleviated by whatever employment Mr. Hipple could have or was able to procure. The question is not whether Mr. Hipple was able to work, in fact did work, or in fact did work and began making sufficient monies to be capable of starting to chip away at arrearages. The question is whether Mr. Hipple was able to pay \$20,022.75.

"Once a court becomes convinced that a contemnor will steadfastly refuse to comply with the terms of the contempt citation, the court is 'obligated to release [him] since incarceration would no longer serve the purpose of the civil contempt order – coercing [compliance].' " *In re King*, 110 Wn.2d at 803. That is, if a coercive-contemnor's refusal to comply is "steadfast," the contemnor has a right to be released.

Thus, the DAC attorneys are not only obligated to demonstrate beyond doubt that Mr. Hipple had \$20,022.75 he unwilling to pay, but also that his refusal to pay for over a year was *not* a "steadfast" refusal. That is, the DAC attorneys must prove beyond doubt (1) Mr. Hipple actually presently possessed \$20,022.75; (2) Mr. Hipple was refusing to pay that \$20,022.75; and (3) by continuing to hold Mr. Hipple in custody, Mr. Hipple would eventually pay. The DAC attorneys quasi-concede their inability to meet this burden by referencing Commissioner Marshall's September 2006 order, and describing it as finding it concludes "further

coercion was not going to overcome [Mr. Hipple's] steadfast determination not to comply with [the contempt] order." <sup>1</sup> The reference acts as a concession because (1) the DAC attorneys' assertion that Mr. Hipple did not have a "right" to such a ruling is contrary to law; and (2) the DAC attorneys' assertion that Mr. Hipple would not have had a right to such a ruling during the period of representation—May 2005 through June 2006—is unsupported by any factual distinction. *See In re King*, 110 Wn.2d at 803.

In conclusion, the DAC attorneys, to prevail on their 12(b)(6) motion with respect to causation, would have to show beyond doubt that (1) there was no constitutional error in having Mr. Hipple represent himself at the May 5, 2005, given his earlier request for a lawyer, or that a remedy other than vacation of the May 5, 2005 order is appropriate; (2) Mr. Hipple was presently able to pay \$20,022.75 from May 9, 2005 through June 21, 2006, inclusive; *and* (3) although Mr. Hipple had \$20,022.75 he was presently able to pay, his refusal to pay for over a year was not a "steadfast" refusal. The DAC attorneys simply cannot show beyond doubt any of these things. Therefore, but for the DAC attorneys

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<sup>1</sup> Although Commissioner Marshall found the May 5, 2005 order "at least void or voidable at a minimum" in orally ruling on Mr. Way's Motion for Order Re: Revision of Terms of Release, that language did not make it into his written Order Re: Conditions of Release. CP 69. However, that does not mean somehow Commissioner Marshall's order releasing Mr. Hipple from custody was somehow in error, or that the reasoning underlying the order should be ignored.

failure to act, but for their failure to raise these issues with the court, Mr. Hipple would have been released from custody at an earlier date.

### III. CONCLUSION

The trial court, in denying the Petitioners' CR 12(b)(6) motion to dismiss, as well as their CR 59 motion for reconsideration, did not commit reversible error with respect to either the statute of limitation or proximate cause issues raised in those motions. Respondent therefore requests the trial court's decisions be affirmed, with this matter be remanded for further proceedings.

DATED this 16<sup>th</sup> day of March, 2010.



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Christopher Taylor, WSBA # 38413  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing RESPONDENT'S BREIF was delivered this 16<sup>th</sup> day of March, 2010, to ABC Legal Services, Inc., with appropriate instructions to forward the same to counsel for the Petitioners as follows:

Daniel R. Hamilton  
Deputy Prosecuting Attorney  
Pierce County Prosecuting Attorney's Office  
955 Tacoma Ave S Ste 301  
Tacoma, WA 98402



\_\_\_\_\_  
Christopher Taylor

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