

No. 45949-3-II

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

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CHRISTOPHER T. DAVIS

Plaintiff/Appellant,

v.

THURSTON COUNTY, etal,

Defendants/Respondents.

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STATE OF WASHINGTON  
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Appeal from underlying cause of action filed in Thurston County Superior Court No. 12-2-01707-4. Visiting Judge: The Honorable Stephen M. Warning

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**BRIEF OF APPELLANT CHRISTOPHER T. DAVIS**

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HAROLD KARLSVIK  
Attorney at Law  
P.O. Box 292  
South Bend, Washington 98586  
hkarlsvik@comcast.net  
(360) 942-4612

Attorney for Plaintiff/Appellant: Christopher T. Davis

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## I. INTRODUCTION

Christopher T. Davis, plaintiff/appellant (hereinafter “Davis”), at all times related to this matter has resided in Thurston County, Washington. On January 19, 2009, Mr. Davis was charged with Rape 2<sup>nd</sup>, a serious felony in Thurston County Superior Court under cause number 09-1-00168-9. Mr. Davis, an adult male, unmarried, with dependent children was determined indigent by the underlying court. Mr. Davis was appointed defense Counsel from the Thurston County Office of Assigned Counsel, under former director, Sally Harrison, a licensed attorney in Washington state. Mr. Davis’ parents and friends pooled enough funds together and hired private defense counsel Mr. James Gazori to take over the criminal defense case. Mr. Davis’ indigent determination was unchanged and he was still entitled to public funds to assist his “private pay” attorney in defending his criminal charges. These public funds included, but were not limited to fees for investigators and expert witnesses.

Although, Mr. Gazori substituted in as the criminal attorney, and the former Director Sally Harrison, and the Thurston County Office of Assigned Counsel withdrew representing Mr. Davis in the traditional sense of a “criminal defense lawyer”, an attorney client relationship still

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existed with former Director Sally Harrison, and the Thurston County Office of Assigned Counsel with regards to the administration of public funds for indigent defendants in Thurston County, in a non-traditional sense of their legal duty and obligation to provide reasonable and necessary public funds for investigators and expert witnesses as requested by indigent Mr. Davis.

## **II. DECISION BELOW**

Visiting Cowlitz County Superior Court Judge Stephen M. Warning signed an Order Granting Defendant's Motion for Summary Judgment on January 29, 2014, which was later entered into the court record on February 3, 2014. (APPENDIX -A). Rule 10.4(c).

## **III. ASSIGNMENT OF ERROR**

The trial court erred in granting Defendant Thurston County's motion for summary judgment dismissing Mr. Davis' (1) legal malpractice claim; (2) fiduciary duty claim; (3) consumer protection claim; and (4) negligence claim.

## **ISSUES PRESENTED**

- A. Did the trial court err in ruling that the attorney/client relationship between appellant and Ms. Harrison terminated when private counsel, James Gazori, substituted as counsel for Mr. Davis in the criminal case?

- B. Did the trial court err in ruling that Mr. Davis was required to show a post-conviction finding of innocence?
- C. Did the trial court err in ruling that Consumer Protection Act does not apply to Mr. Davis claim against Thurston County?
- D. Did the trial court err in ruling that there was no proximate cause for Mr. Davis' negligence claim against Thurston County?

#### IV. STATEMENT OF THE CASE

On September 19<sup>th</sup>, 2008, Christopher Davis, the plaintiff herein, was at a party with friends when he was falsely accused of raping an intoxicated female as she lay passed out in a bedroom in the apartment where the party was being held. Mr. Davis was later charged in Thurston County Superior Court with Rape in the 2<sup>nd</sup> Degree, RCW 9A.44.050(1)(b). (*Harrison Declaration, Ex. 1*). Mr. Davis was arrested and held in custody at the Thurston County Jail. Mr. Davis was found by the Court to be indigent. (*Davis Declaration, Ex. A*). The court appointed the Thurston County Office of Assigned Counsel (OAC) to represent him. (*Id*). Sally Harrison, one of the defendants herein and the Director of OAC signed and filed a Notice of Appearance on Mr. Davis's behalf on March 5, 2009. (*Karlsvik Declaration, Ex. 2*).

While in custody, Mr. Davis received a visit from Mr. James Shackleton who identified himself as a court appointed attorney with OAC, assigned to represent him against the pending criminal charges. (*Karlsvik Declaration, Ex. 9, page 69*). Mr. Shackleton met and discussed the criminal charges with Mr. Davis at the Thurston County Jail. (*Id.*) Mr. Davis believed that Mr. Shackleton was his court appointed criminal lawyer. (*Id.*) This was confirmed by a formal notice dated March 4, 2009 on OAC letterhead indicating that Mr. James Shackleton was Mr. Davis' appointed attorney. (*Davis Declaration, Ex. B*). The letter advised Mr. Davis not talk to anyone about his case and "from now on" refer all/any contacts about his case (or any other possible criminal charges) to the OAC. (*Id.*) Defendant Sally Harrison was listed on the letterhead as the "Director" of the OAC. (*Id.*) Defendant Sally Harrison was James Shackleton's supervising attorney. (*Karlsvik Declaration, Ex. 8, page 27*). Both Mr. Shackleton and Ms. Harrison are licensed by the Washington State Bar Association to practice law in the State of Washington, and both were employed by Defendant Thurston County. (*Karlsvik Declaration, Ex. 8, page 6*).

Ms. Harrison's position as Director of OAC required that she must have graduated from an accredited and recognized school of law,

and was required to be a member of the Washington State Bar Association. (*Karlsvik Declaration, Ex. 1, page 3*). The OAC Director is responsible for the overall management and supervision of the system providing for public defense through the Office of Assigned Counsel. (*Id at page 1*).

Mr. Davis's parents gathered enough funds to hire a private lawyer and signed a fee agreement with Attorney James Gazori on behalf of Christopher Davis. (*Hurling Declaration, Ex. 1*). The fee agreement was for representation only and specifically excluded the costs for additional expenses, including, but not limited to, "expert witness fees, deposition fees, transcription fees, etc." (*Id*). On March 26, 2009, Mr. James Gazori substituted for Mr. James Shackleton. (*Karlsvik Declaration, Ex 3*). Mr. Davis understood from Mr. Gazori that although his parents hired private counsel, he (Mr. Davis) was still entitled to public funds because he was still considered indigent by the court. (*Davis Declaration, page 2*).

On May 11, 2009, after reviewing and discussing the case with Mr. Davis, Mr. Gazori motioned the court for public funds for \$3,000.00 to hire Robert Julien, M.D., Ph.D., to assist Mr. Davis in his defense. (*Karlsvik Declaration, Ex. 11*). The Honorable Judge Tabor heard the

motion and signed an order authorizing the public funds up to \$3,000.00. (*Karlsvik Declaration, Ex. 11*).

On May 14, 2009, Mr. Gazori received an email from Ms. Harrison indicating that he had failed to utilize the proper procedures and that she was going to ask Judge Tabor to revoke the order allowing public funds. (*Karlsvik Declaration, Ex 6, email attachment to Response to Motion to Compel*). Ms. Harrison did not express that the request for services was unnecessary or unreasonable. (*Karlsvik Declaration, Ex. 6*). Ms. Harrison's sole objection was that OAC's "budget was stretched extremely thin and I may, if your client is indigent, be asking you to seek an expert who is perhaps less expensive and/or more local and/or fewer hours are requested". (*Karlsvik Declaration, Ex 6, email attachment to Response to Motion to Compel*).

On or about June 1, 2009, Mr. Gazori filed a Professional Service Authorization Form with OAC requesting \$3,000.00 to hire Dr. Julien. (*Harrison Declaration, Ex. 4*). This request was denied by defendant Harrison and the previously authorized amount was arbitrarily reduced to \$900.00. (*Id*).

On June 12, 2009, Sally Harrison, as an attorney for the OAC, signed a Notice of Withdrawal of Counsel, indicating that James

Shackleton withdraws as attorney of record. (*Karlsvik Declaration, Ex. 5*). Mr. Gazori continued to attempt to obtain public funds for Mr. Davis. On July 29, 2009, Mr. Gazori filed a Motion and Declaration to Compel OAC to Authorize Funds Pursuant to CrR 3.1(f), LCrR 3.1(f)(2). (*Karlsvik Declaration, Ex.4*). In the Motion to Compel, Mr. Gazori explained “after discussion with Ms. Harrison, I received on July 17, 2009 an authorization for Ms. Batson’s services, but only on the condition that the indigent Mr. Davis contribute \$250.00 for the in-custody polygraph, and Dr. Julien receive no additional funding beyond the \$675.00 worth of time already invested. (*Karlsvik Declaration, Ex. 4 page 4, Ex. 7 page 1&2*). Mr. Gazori further explained that “my attempts to move this case expeditiously and with only minimal financial requests to do so have been thwarted and frustrated at every stage.” (*Karlsvik Declaration, Ex. 4 page 5*).

Mr. Gazori believed that Ms. Harrison was upset that Mr. Gazori filed the motion. Mr. Gazori stated in his deposition that “Sally Harrison was very upset with me for filing this motion to the extent she was hostile when I met her at court. That’s not common...And I said “this isn’t personal.” And her response is, “the hell it isn’t.”” (*Karlsvik Declaration, Ex. 10, page 64*).

On August 4, 2009, Ms. Harrison filed a Response to Motion to Compel. (*Karlsvik Declaration, Ex. 6*). In the Response, Ms. Harrison wrote that “I asked on July 8, 2009 if the \$1,150 was in lieu of the \$900 I had authorized for Dr. Julien and said if it was I could authorize \$800 for Sue Batson and \$100 toward the required polygraph. On being told it was an additional amount, counsel and I met on July 14, 2009 to discuss the matter. On July 15, 2009, counsel said that Mr. Davis’ family would contribute \$250 toward the polygraph. (*Karlsvik Declaration, Ex. 6 page 2*). Ms. Harrison further stated that “It appears that counsel is going forward with a number of theories and wants public funds in excess of \$5,600 to do this. This is not a “de minimus amount and would severely impact our limited professional services budget.” (*Karlsvik Declaration, Ex. 6 page 3*).

On September 10, 2009, Mr. Davis pleaded guilty to Assault in the Third Degree. The plea was an “Alford” plea. (*Karlsvik Declaration, Ex. 9, page 78*). Mr. Davis agreed to the plea deal because “I couldn’t get the funds to fight my case. So without an expert witness that I believed and Mr. Gazori believed that I wouldn’t be able to win at trial.” (*Id at page 84*).

Mr. Davis received a sentence of 22 months in prison. (*Harrison Declaration, Ex. 7 page 5*).

## V. ARGUMENT

The prevailing issue of Mr. Davis' plight for justice and to be heard at trial is based upon the fact that the criminal court determined he was indigent and entitled to funds at public expense to defend against the serious charges against him. Although it is disputed on the amount of funds he received, timeliness of those funds, and if the delay or denial of those funds contributed to his ultimate position of entering an Alford plea in the criminal matter and spending 16 months in prison. Clearly the record before this court shows there was a continuing dispute between Mr. Davis former attorney's office "The Thurston County Office of Assigned Counsel, and his "private pay" attorney, Mr. James Gazori.

The records submitted support the assertion that the Thurston County Office of Assigned Counsel and its director actively and aggressively utilized its legal position to make sure that Mr. Davis did receive the public funds requested by his private pay lawyer. Mr. Davis argues that not only did a "traditional" attorney client relationship between defendant Sally Harrison, former director of the Thurston County Office of Assigned Counsel and the public defense agency. He further argued

that even after the director and public defense agency withdrew as his traditional criminal defense attorney, a “non-traditional” attorney client relationship remained between defendant Sally Harrison, former director of the Thurston County Office of Assigned Counsel and the public defense agency for the civil administration of public funds for indigent criminal defendants. Mr. Davis met the indigent requirements and was entitled to such benefits.

**A. The trial court erred in ruling that the attorney/client relationship between appellant and Ms. Harrison terminated when private counsel, James Gazori substituted as criminal attorney for Mr. Davis.**

The underlying court, after reviewing the record and arguments of counsel, established that an attorney client relationship existed between Plaintiff Christopher T. Davis and Defendant Sally Harrison, former director of the Thurston County Office of Assigned Counsel.

The trial court ruled that the attorney/client relationship terminated when Mr. Gazori “substituted in” (RP 25). The trial court failed to address or consider the issue of whether Ms. Harrison and the Thurston County Office of Assigned Counsel continued to represent Mr. Davis in an administrative capacity while performing their delegated duties to provide public funding for Mr. Davis’ criminal defense.

The trial court relied on the erroneous position that all of the act that Mr. Davis complained of occurred during the time period prior to Mr. Gazori's substitution;

“The brief period in which Ms. Harrison's office did represent the Plaintiff might have some bearing on this if anything complained of occurred during that time period. But nothing did. Nothing that is complained about occurred until after the substitution of counsel. And nothing complained about relates in any way to any of the actions taken by Ms. Harrison or her office prior to that substitution.”

(RP 25-26).

In the case below, the trial correctly ruled that an attorney/client relationship was established between Mr. Davis and Ms. Harrison and the Thurston County Office of Assigned Counsel. However, the trial erred in concluding that the attorney/client relationship terminated upon Mr. Gazori' substitution. Thurston County Office of Assigned Counsel continued with its uninterrupted representation of Mr. Davis for administrative purposes.

Mr. Davis has always maintained that the actions or lack of actions rising to legal malpractice have been related to the civil aspect of the administration of public funds that he was entitled to as a matter of law.

The characterization of the role played by a director of a public defense organization was addressed in the Ninth Circuit Court of Appeals in the case Miranda v. Clark County, 319 F.3d 465 (9<sup>th</sup> Cir. 2003).

In that case, the administrative head of the county public defender's office, in managing the office's resources, instituted a policy that required defendants to undergo polygraph exams, with the defendants that performed poorly on the exam having fewer resources allocated to their defense. Id. at 468-69. There, the court determined that the defendant "was acting on behalf of Clark County in determining how the overall resources of the office were to be spent" and therefore he qualified as a state actor for purposes of § 1983. Id. at 469. The Ninth Circuit stated that the "nature and context" of the head public defender's function was "administrative":

"In allocating the county's funds, Harris was performing essentially an administrative role on behalf of Clark County. It was a function similar to that performed by the head of every government administrative office. See, e.g., Nev.Rev.Stat. chs. 180.080, 260.010, -.040, -.070, -.075 (requiring of state and county public defenders expenditure reports and providing for institution and regulation of public defender offices). It therefore materially differs from the relationship inherent in a public defender's representation of an individual client. Polk County, 454 U.S. at 322 n. 13, 324-25, 102 S.Ct. 445. The conduct alleged falls within the type of administrative action adumbrated by the Supreme Court in Polk County, when it recognized the possibility that a public defender's "administrative and possibly investigative functions "would constitute state action. Id. at 325, 102 S.Ct. 445; see also

McCollum, 505 U.S. at 54, 112 S.Ct. 2348 (reaffirming that the Public Defender may be a state actor with respect to administrative or investigatory functions). We thus conclude that Harris was acting on behalf of Clark County in determining how the overall resources of the office were to be spent, and he qualifies as a state actor for purposes of § 1983.”

Miranda v. Clark County, 319 F.3d at 469.

In Polk County v. Dodson, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), the U.S. Supreme Court held that a public defender does not act under color of state law when performing a lawyer's traditional functions such as entering not guilty pleas, moving to suppress state's evidence, objecting to evidence at trial, cross-examining state's witnesses, and making closing arguments. A public defender serves his traditional, and primary, role, by "advancing the undivided interests of his client," an "essentially private function, traditionally filled by retained counsel, for which state office and authority are needed." Id. at 318-19, 102 S.Ct. 445.

In this case, once Mr. Gazori substituted for Ms. Harrison and the Thurston County Office of Assigned Counsel was no longer functioning as Mr. Davis's criminal defense attorney, but she was certainly operating as his attorney in an administrative role.

Mr. Davis believed that Ms. Harrison was supposed to be working on his side until he observed her arguing in court against him. (*Davis*

*Declaration, page 3*). This belief was reasonably formed based on the attending circumstances.

Although it is Mr. Davis' contention that an attorney/client relationship existed between himself and Ms. Harrison as set forth above, liability for professional malpractice would still exist in this case even without such a relationship. Traditionally, a rule of strict privity limited an attorney's liability for malpractice. Bohn v. Cody, 119 Wn.2d 357, 364, 832 P.2d 71 (1992). Under this rule, a malpracticing attorney could be held liable only to the attorney's own clients. See Stangland v. Brock, 109 Wash.2d 675, 680, 747 P.2d 464 (1987).

Privity of contract, however, is no longer required in all cases. Under certain circumstances, an attorney may be held liable for malpractice to a party the attorney never represented. Bohn v. Cody, 119 Wn.2d at 365. Two theories provide the basis for this expanded liability. Stangland, at 680, 747 P.2d 464. First, an attorney may be held liable for negligence toward third party beneficiaries of an attorney/client relationship. Stangland, at 681, 747 P.2d 464; Bowman v. John Doe, 104 Wash.2d 181, 188, 704 P.2d 140 (1985). Second, an attorney may be held liable under a multi-factor balancing test developed in California. This test involves analysis of the following six factors:

“the extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury; the policy of preventing future harm; and the extent to which the profession would be unduly burdened by a finding of liability.”

Bohn v. Cody, 119 Wn.2d 357, 365, 832 P.2d 71 (1992).

The inquiry under this multi-factor test has generally focused on whether the attorney's services were intended to affect the plaintiff. Id at 365.

Under this multi-factor test, genuine issues of material fact exist as to whether Ms. Harrison owed a duty to Christopher Davis:

- a. Intent to affect Mr. Davis. A reasonable fact finder could infer that Ms. Harrison intended to affect the course of Mr. Davis' case when she engaged in her administrative role of denying funds that were necessary.
- b. Foreseeability of harm. A reasonable fact finder could certainly infer that the funding decisions made by Ms. Harrison could harm Mr. Davis by effecting the existence and quality of his defense. Had the funding been provided, Mr. Davis would have opted to go to trial (*Karlsvik Declaration Ex. 13, Davis Declaration, page 3*). Mr. Gozori has stated that “I believe

Chris would have opted for trial had the expert been approved.” (*Karlsvik Declaration Ex. 13*).

c. Certainty of harm. Mr. Davis was not able to obtain an adequate defense and served 16 months in prison after pleading to a charge that he did not commit (assault 3). If the purse strings of a defendant’s ability to go to trial are tied shut, there is a certainty that the right to trial is lost.

d. Proximity of harm. Mr. Davis’ harm was proximately caused by Ms. Harrison’s decision not to provide adequate expert funding as requested by his criminal defense attorney. Mr. Davis was essentially compelled to plead guilty to a charge that he did not commit because he did not have the funding to mount a defense of the original charge. (*Karlsvik Declaration, Exhibit 9, page 84*).

e. Policy of preventing harm. This factor is easily met since the existence of the funding rules are in place to ensure that indigent defendants are not harmed by an inadequate defense. Thurston County Local Criminal Rule 3.1(f)(2) states that the delegated authority shall provide necessary funding. However, OAC’s Expert Services Policy and Procedures violates that rule, stating instead that OAC may approve the funding. (*Harrison Declaration, Exhibit 2, page 1*).

f. Burden on the legal profession. “Balanced against the importance of providing a remedy to those harmed by attorneys is the recognition that imposing liability could place an undue burden on practicing attorneys. Attorneys have a duty of zealously representing their clients within the bounds of the law. When their clients have opposing interests with third parties, attorneys are supposed to represent their clients' interests over the interests of others.” Bohn v. Cody, 119 Wn.2d at 367. Ms. Harrison was representing the interests of Thurston County, not the interests of Mr. Davis.

A duty to Mr. Davis still exists under this analysis, thus summary judgment was improper on the question of whether an attorney/client relationship existed after Mr. Gazori substituted in for Ms. Harris and the Thurston County Office of Assigned Counsel.

**A. The trial court erred in ruling that Mr. Davis was required to show a post-conviction finding of innocence.**

The trial court ruled that the lack of post-conviction innocence was fatal to both the claim of legal malpractice and to the claim of violation of any fiduciary duty (RP 26).

A legal malpractice claim requires a showing of (1) the existence of an attorney-client relationship giving rise to a duty of care to the client, (2) an act or omission by the attorney in breach of the duty, (3) damages to

the client, and (4) proximate causation between the attorney's breach and the damages incurred. Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992).

In criminal malpractice cases, the majority of courts who have considered the issue have imposed two additional requirements--a successful post-conviction challenge and proof the plaintiff did not commit the underlying crime. Falkner v. Foshaug, 108 Wn.App. 113, 118, 29 P.3d 771 (2001).

The phrase "criminal malpractice" has been widely adopted to denote "legal malpractice in the course of defending a client accused of crime." Otto M. Kaus & Ronald E. Mallen, The Misguiding Hand of Counsel--Reflections on "Criminal Malpractice," 21 UCLA L.REV. 1191, 1191 n. 2 (1974). Ang v. Martin, 114 P.3d 637, fn 1, 154 Wn.2d 477 (Wash. 2005).

Mr. Davis was not required to prove post-conviction innocence. Ms. Harrison was not operating as Mr. Davis criminal defense attorney at the time the actions alleged herein. The acts of Ms. Harrison complained of in this matter did not occur in her capacity as criminal defense attorney. The acts of Ms. Harrison complained of in this matter occurred in her capacity as administrator of public funding for indigent defendants in

Thurston County, Washington. Thus, the two additional prongs required in Falkner v. Foshaug are not applicable in this case.

A claim for breach of fiduciary duty requires the claimant to prove: (1) the existence of a duty owed; (2) breach of that duty; (3) resulting injury; and (4) that the claimed breach caused the injury. Micro Enhancement Int'l. Inc. v. Coopers & Lybrand, LLP, 110 Wn.App. 412, 433-34, 40 P.3d 1206 (2002). In Eriks v. Denver, 118 Wash.2d 451, 824 P.2d 1207 (1992) the Washington Supreme Court affirmed a trial court decision that an attorney breached his fiduciary duty to clients by violating the Code of Professional Responsibility (CPR), the predecessor to the RPC. In that case, an attorney was hired to provide joint legal defense for all investors and promoters in a tax shelter scheme. The investors later sued the attorney, alleging that he violated the CPR by representing both investors and promoters in the tax shelter and therefore breached his fiduciary duty to his clients. They also claimed counsel violated the CPA. In Hizey v. Carpenter, 119 Wash.2d 251, 830 P.2d 646 (1992), the same court expressly preserved the propriety of using the CPRs or RPCs other than to impose malpractice liability. Hizey, 119 Wash.2d at 264. Rather, the Hizey court held that a violation of the CPRs or the RPCs may not be used as evidence of legal malpractice. Subsequent decisions adhere to the

view that the RPCs may be considered in cases other than legal malpractice. See, e.g., Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan, 97 Wash.App. 901, 909, 988 P.2d 467 (1999) ("In addition, attorney fee agreements that violate the Rules of Professional Conduct (RPC) are against public policy and are unenforceable by the courts."). In Cotton v. Kronenberg, 44 P.3d 878, 111 Wn.App. 258 (Wash.App. Div. 1 2002) the Court of Appeals held that the trial court properly considered the RPCs to determine whether Kronenberg breached his fiduciary duty to Cotton in this action to recover attorney fees.

In the present case, the facts show that Ms. Harrison violated the following sections of the Washington Rules of Professional Conduct:

RPC 1.9 Duties to Former Clients: The Office of Assigned Counsel was formerly Mr. Davis's criminal defense attorney. Ms. Harrison violated this section when filing pleadings on behalf of Thurston County contrary to the interests of OAC's former criminal defense client.

RPC 1.8 Conflict of Interest: Current Clients: Specific Rules: After Mr. Gazori took over the Davis case, Sally Harrison still owed a duty to Mr. Davis and continued as attorney in the role of administering funds. She violated RPC 1.8(b) which states that a lawyer shall not use information relating to representation of a client to the disadvantage of a

client unless the client gives informed consent. Her response to Mr. Davis's motion to compel OAC to authorize funds set forth the history of the funds requested in the case, allowing the prosecutor to learn Mr. Davis's theory and strategy of the case. Ms. Harrison also violated RPC 1.8(m) which prohibits a lawyer from making or participating in making an agreement with a governmental entity for the delivery of indigent defense services if the agreement obligates the lawyer or law firm to "bear the cost of providing investigation or expert services." Ms. Harrison placed the interest of Thurston County and her personal interest ahead of Mr. Davis interest.

RPC 1.7 Conflicts of Interest: Current Clients. Ms. Harrison violated RPC 1.7(a)(2) because her representation of Mr. Davis in her administrative capacity was materially limited by her responsibilities to Thurston County and OAC's budget and her personal interest obtaining favorable job performance reviews.

These violations of the Rules of Professional Conduct may be considered to determine whether Ms. Harrison breached her fiduciary duty to Mr. Davis.

The trial failed to consider that violations of the Rules of Professional Conduct may be used as evidence of a violation of fiduciary

duty when it ruled that lack of post-conviction innocence was fatal to Mr. Davis fiduciary claim. Post-conviction innocence is not an element for a claim of breach of fiduciary duty.

**C. The trial court erred in ruling that Consumer Protection Act does not apply to Mr. Davis claim against Thurston County.**

The provision of legal services does not generally fall within the definition of "trade or commerce", except as those services relate to the "entrepreneurial aspects" of the practice of law. Short v. Demopolis, 103 Wash.2d 52, 60-61, 691 P.2d 163 (1984); Demopolis v. Peoples Nat'l Bank of Wash., 59 Wash.App. 105, 796 P.2d 426 (1990). The entrepreneurial aspects of legal practice are those related to: how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients. Short, 103 Wash.2d at 61, 691 P.2d 163. Claims for malpractice and negligence are not subject to the CPA, since those claims go to the competence and strategy of lawyers, and not to the entrepreneurial aspects of practice. Short, 103 Wash.2d at 61-62, 691 P.2d 163. This is true even where other remedies available are inadequate. Short, 103 Wash.2d at 62, 691 P.2d 163. The CPA should be liberally construed. Salois v. Mut. of Omaha Ins. Co., 90 Wn.2d 355, 358, 581 P.2d 1349 (1978).

The role that Ms. Harrison played in this case was not entirely that of the traditional defense attorney. The acts and/or omissions that Mr. Davis complains of definitely relate to the entrepreneurial aspects of law: the OAC budget. In this case, Mr. Davis was ordered in his judgment and sentence to reimburse the Office of Assigned Counsel. (*Harrison Declaration, Exhibit 7, page 4*).

Furthermore, under Short v. Demopolis, it has long been settled in Washington that the "entrepreneurial aspects" of the practice of law falls within the definition of "trade or commerce." The defendants essentially argue that this well-settled ruling should not apply to a recipient of legal services who is indigent, even though that recipient will be required to reimburse the County for those services if he is convicted. That result would simply not be fair and there is no precedent for it.

The rape charge damaged Mr. Davis' reputation as well as his ability to find work. This might not be the case had he been allowed to defend that charge with the assistance of the requested expert. He was damaged financially in that he was ordered to reimburse the Office of Assigned Counsel even though it provided inadequate services due to Ms. Harrison's acts. And this is not merely obtaining fees through the judicial

process. Unpaid fees are typically sent to collections and can result in judgment liens being placed upon the defendant.

Furthermore, Ms. Harrison's act of concealing her duty and obligation to fund indigent client's for polygraph services that are necessary from indigent client's families forcing them to contribute additional funds is an unfair and deceptive act under the CPA. (*Karlsvik Declaration, Exhibit 8, page 37-38*).

The trial court erred in dismissing Mr. Davis' Consumer Protection Claim.

**D. The trial court erred in ruling that there was no proximate cause for Mr. Davis's negligence claim.**

The trial court ruled that there must be some duty of care owed, but that it was not necessary to define that duty because there was no proximate cause (RP 26).

Proximate cause is usually the province of the jury. Brust v. Newton, 70 Wash.App. 286, 291-93, 852 P.2d 1092 (1993). However, the court can determine proximate cause as a matter of law if "reasonable minds could not differ." Hertog v. City of Seattle, 138 Wash.2d 265, 275, 979 P.2d 400 (1999). Smith v. Preston Gates Ellis, L.L.P., 135 Wn.App. 859, 863-43.

In fact, Mr. Davis has asserted that “from my understanding, I couldn’t get the funds to fight my case. So without an expert witness that I believe and Mr. Gozori believed that I wouldn’t be able to win at trial.” (*Karlsvik Declaration, Ex. 9, page 84*).

Mr. Davis suffered damages because of Ms. Harrison’s breach of her duties, and those damages were caused by the claimed breach. Ms. Harrison failure to provide public funds for Mr. Davis’ case stripped him of his rights, and hindered Mr. Gazori’s ability to provide an adequate defense.

Mr. Davis served 16 months in prison after entering an Alford plea to the charge of Assault in the Third Degree. Mr. Davis has asserted the following damages: “pain and suffering, anguish, stress. My name was put in the paper for a crime I didn’t commit. I was locked up for a charge I got charged with Rape in the Second Degree. Then I got charged with a third degree assault which I didn’t do. I missed out on my kids and family and for lost wages. I wasn’t working at the time, but I’m pretty sure in sixteen months I would have been.” (*Karlsvik Declaration, Ex. 9 page 90-91*).

Mr. Davis would have been foolish to go to trial without the requested expert witness. He did not have the expert witness because

defendant Harrison denied the funding. Mr. Davis was therefore put into the position of having to accept an offer from the State or face almost certain conviction at trial. Contrary to the defendants' assertions, that Mr. Davis accepted the best plea deal he could get, the deal was only good in the context of a case where funds were denied and no other option existed.

“In a legal malpractice case the burden is on the plaintiff to show that the attorney's negligence was the proximate cause of the injury.

Hansen v. Wightman, 14 Wash.App. 78, 88, 538 P.2d 1238 (1975).

Proximate causation has two elements, cause in fact and legal causation.

City of Seattle v. Blume, 134 Wash.2d 243, 251, 947 P.2d 223 (1997).

"Cause in fact refers to the 'but for' consequences of an act, that is, the immediate connection between an act and an injury." Blume Wn.2d at 251-52. Legal causation is based on policy considerations determining how far the consequences of an act should extend. *Id.* Proximate cause is determined by the "but for" test. Griswold v. Kilpatrick, 107 Wash.App. 757, 760, 27 P.3d 246 (2001). The plaintiff must demonstrate that "but for" the attorney's negligence he would have obtained a better result.

Sherry v. Diercks, 29 Wash.App. 433, 438, 628 P.2d 1336 (1981).

The trial court erred in ruling that there was no proximate cause as it relates to Ms. Harrison's actions and Mr. Davis' damages.

## VI. CONCLUSION

The Court below erred when it failed to follow the established law, and its findings directly contradicted the record. The remedy for an error determined at the trial court is to remand the case back for further proceedings and/ or trial. For the reasons stated above, this court should vacate the Order dismissing Mr. Davis' (1) legal malpractice claim; (2) fiduciary duty claim; (3) consumer protection claim; and (4) negligence claim and remand this case back for further proceedings at the trial court.

**DATED** this 28<sup>th</sup> day of July 2012.



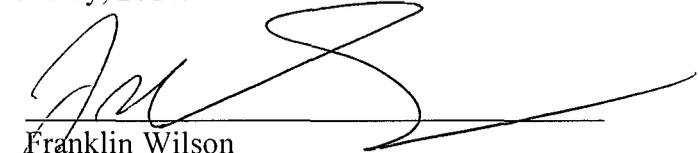
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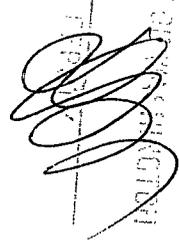
Harold Karlsvik, WSBA #  
Attorney for Plaintiff/Appellant  
P.O. Box 292  
South Bend, Washington 98586  
[hkarlsvik@comcast.net](mailto:hkarlsvik@comcast.net)  
(360) 942-4612

**CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 2014, I personally mailed a copy of the Brief of Appellant Christopher T. Davis, and caused a copy to be electronically emailed to John Justice, Attorney at Law. A hard copy was also sent regular mail to Mr. Justice, and the Thurston County Prosecuting Attorney's Civil Division. The Brief of Appellant Christopher T. Davis was filed with the Clerk of the Appeals Court, Division II, by regular mail.

**DATED** this 28<sup>th</sup> day of July, 2014.

  
Franklin Wilson  
Paralegal to Harold Karlsvik

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