

NO. 398028

**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' BRIEF

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR

The trial court erred by denying defendants' CR 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court commit reversible error by refusing to dismiss a legal malpractice action brought more than four years after plaintiff discovered the facts which gave rise to his cause of action?

2. Did the trial court commit reversible error by failing to decide the purely legal question of whether plaintiff would have received a more favorable outcome in the underlying action but for defendants' alleged malpractice?

II. STATEMENT OF THE CASE

After repeatedly being found by this and other courts to have shown "bad faith" in his refusal to comply with court orders and to have engaged in "frivolous" litigation in his dissolution action, CP 58-60, 63, plaintiff Robert Hipple was ordered incarcerated by Pierce County Superior Court Commissioner Meagan Foley for "intentionally failing to comply with the child support order" until "such time as he 'bring[s] his child support arrearage current and remain[s] in compliance with existing orders.'" *See* CP 3 ¶ 3.3. Though the Commissioner's finding of contempt

expressly noted he was presently able to pay the arrearage, CP 88, for more than a year thereafter Hipple continued to disobey the order. *See* CP 72. As a result, his complaint alleges that on "April 15, 2005, Plaintiff was placed into custody of the Pierce County Jail" and that the Department of Assigned Counsel (hereinafter "DAC") supposedly through an unidentified agent verbally promised him on April 25, 2005, that "appointed counsel would contact him before the next hearing." CP 3 ¶s 3.4-3.6. At the May 5, 2005, show cause hearing, the still pro se Hipple was ordered by Commissioner Mark Gelman to remain "confined to the Pierce County Jail" until his arrearage was paid as earlier ordered. CP 3 ¶ 3.7.

The Complaint further alleges that four days later on May 9, 2005, Hipple received a letter informing him that DAC attorney Carolyn Elsey would be representing him "regarding the contempt matter," but that on May 10, 2005, a different DAC attorney -- Deborah McFadden -- filed a special notice of appearance "in connection with the contempt show cause hearing only" that already had been held on May 5, 2005. CP 4 ¶s 3.8-3.10. DAC attorney Elsey a few days later then contacted plaintiff by telephone and a month later in June 2005 meet with him allegedly without any "discussion regarding Plaintiff's conditions of release" and thereafter he alleges no "action regarding readdressing Plaintiff's conditions of release" was taken despite his attempts "[b]etween May 10, 2005 and June 21,

2006 . . . to contact Defendants numerous times, in writing and by telephone, regarding the contempt matter." *Id.* ¶ 3.13-CP 5 ¶ 3.17. The record however reveals that, though plaintiff remained in custody because he continued not to purge his contempt, within a month -- by June 28, 2005 -- he had been placed on "electronic home monitoring" and had been released from jail. CP 28 ¶s 3.16-3.17. Though this allowed plaintiff to leave home and work during the day, he still did not pay his arrearages and therefore was not fully released until September 2006 when a motion to revise the conditions of release was filed by new counsel who had entered a notice of appearance on June 21, 2006. CP 5 ¶s 3.19-3.21; CP 72.

Several years later, on June 18, 2009, plaintiff filed the instant malpractice action against McFadden, Elsey, and Pierce County which he some weeks later served on July 9, 2009. CP 1, 36. Within a week, on July 16, 2009, defendants moved to dismiss with prejudice pursuant to CR 12(b)(6) because the face of the complaint and the Court's record¹ confirmed that the three-year statute of limitations had long since expired and that proximate cause was absent as a matter of law since plaintiff could

¹ As part of a CR 12(b)(6) analysis the "court may take judicial notice of matters of public record." *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977). *See, also, e.g., Iacoponi v. New Amsterdam Casualty Co.*, 379 F.2d 311, 312 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968) (in deciding a motion to dismiss the court can take judicial notice of other court proceedings); ER 201(f) ("[j]udicial notice may be taken at any stage of the proceeding").

not show he would have received a more favorable outcome from the Commissioner in the contempt matter but for defendants' alleged negligence. CP 9. However, on July 31, 2009, Superior Court Judge Rosanne Buckner denied defendants' motion by ruling as to the statute of limitations that the June 2006 appearance of plaintiff's new counsel was a "reasonable point in time under the continuous representation rule for this action to accrue" and making no mention of the alternative ground for dismissal of proximate cause. CP 86, 106-07. On August 10, 2009, defendants filed timely motions for reconsideration or alternatively for certification under RAP 2.3(b)(4). CP 75. On August 21, 2009, the trial court denied reconsideration but certified "that both its instant and July 31, 2009, orders 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 109-10. On September 21, 2009, defendants timely filed their notice of discretionary review, CP 104, and on December 7, 2009, Commissioner Ernetta Skerlec granted review. *See* 12/7/09 Ruling Granting Review.

III. ARGUMENT

Under CR 12(b)(6), "where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *See Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). Hence, "Rule

12(b)(6) is designed to raise legal challenges to a claim, typically based on the inclusion within a Complaint of facts that are damning to the claim...." *Freeport Transit, Inc., v. McNulty*, 239 F.Supp.2d 102, 108 (D. Me, 2002). *See, also, Bennett v. Schmidt*, 153 F.3d 516, 519 (7th Cir., 1998) ("Litigants may plead themselves out of court by alleging facts that establish defendants' entitlement to prevail"). Dismissal for failure to state a claim does not require "the appearance, beyond a doubt, that plaintiff can prove no set of facts in support of claim that would entitle him to relief" but examines whether the complaint's allegations "raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 561-23, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In so deciding, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and the rule "that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

In opposing such a motion, a plaintiff only may allege a "set of facts" that are "consistent with the complaint." *Stangland v. Brock*, 109 Wn.2d 675, 676, 747 P.2d 464 (1987). *See, also, Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985); *Quinn Construction Co. v.*

King County Fire Prot. Dist., 111 Wn.App. 19, 30, 44 P.3d 865 (2002);
Schneider v. Amazon.com, 108 Wn.App. 454, 459, 31 P.3d 37 (2001).

Hence, factual allegations that are contrary to the complaint are unavailing because "the court will not accept . . . allegations [that] are contradicted by the description" in the complaint. *See* 5A C. Wright & A. Miller, Federal Practice § 1357 at p. 320 (2d ed. 1990). Similarly, "the Court also need not accept as true allegations that contradict facts judicially noticed by the Court." *Ileto v. Glock, Inc.*, 194 F.Supp. 2d 1040, 1045 (C.D. Cal., 2002), *rev'd in part on other grounds*, 349 F.3d 1191 (2003). Further, even a complaint's own conclusory factual allegations will not be accepted where they "do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself." *See id.* Finally, any fact alleged in support of a complaint cannot be imagined from thin air but must be made "without violating CR 11," *Havsy v. Flynn*, 88 Wn.App. 514, 520, 945 P.2d 221 (1997) -- which expressly requires that "every pleading" be "well grounded in fact." CR 11(a) (emphasis added).

Here, the facts as alleged on the face of the complaint and as found in the official Court record are damning to plaintiff's malpractice claim.

A. EXPIRATION OF STATUTE OF LIMITATIONS REQUIRED DISMISSAL FOR FAILURE TO STATE A CLAIM

In denying dismissal under the statute of limitations, the trial court

held that the date new counsel appeared on plaintiff's behalf was a "reasonable point in time under the continuous representation rule for this action to accrue." CP 86. This is in direct conflict with binding precedent.

First, this Court expressly holds that any claim "that the statute of limitations is tolled until such time as a dissatisfied client obtains other legal counsel . . . is not the law of Washington." *Richardson v. Denend*, 59 Wn.App. 92, 98, 795 P.2d 1192 (1990) (emphasis added). *See, also, Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988) (Supreme Court holds it "is not the law" that the Court can "do away with the limitation of actions until an injured person saw his/her attorney"). Rather, in legal malpractice actions the limitations period begins to run when "the client discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action." *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976). As this Court has explained, in "professional malpractice cases, the pivotal factor which tolls the running of the statute of limitations is the absence of knowledge of injury." *Richardson*, 59 Wn.App. at 96 (emphasis added). Once the facts of alleged legal malpractice are known, the statute of limitations begins to run regardless of whether plaintiff understands their legal effect because "knowledge of the 'facts' comprising a cause of action for attorney malpractice is to be distinguished from knowledge that such con-

duct constitutes malpractice" since "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." *Id.* at 97 n. 6 (citing *Gevaart*, 111 Wn.2d at 502).

Here, the face of his complaint establishes Hipple knew of his alleged "injury" and the "facts of alleged malpractice" by: 1) being ordered at his May 5, 2005, hearing to remain in custody in the obvious absence of a supposedly promised DAC attorney; 2) never having any contact with attorney McFadden who had only specially appeared on May 10, 2005, "in connection with the contempt show cause hearing only" that already had been held; and 3) thereafter meeting with attorney Elsey in May and June of 2005 without ever discussing conditions of his release -- much less that she would represent him thereon. CP 3-4. Indeed, the complaint's affirmative allegation that he actively and repeatedly attempted to contact defendants beginning on "May 10, 2005," but was ignored, not only establishes that by that time he had "notice" of "the facts of malpractice" but actually had drawn the conclusion that his freedom was being restrained and he needed but was not receiving legal representation. CP 5 ¶s 3.17-3.18. For this reason plaintiff has never disputed that by early May 2005 he knew or should have known of his claim yet sat on his alleged legal rights for over four years -- until June 18, 2009 -- well past the time the

statute of limitations had expired. *See* CP 1. Hence the face of the complaint required dismissal as a matter of law because, as this Division again notes: "In 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 because the pertinent facts are susceptible of but one conclusion." *Richardson*, 59 Wn. App. at 95.

Second, as to the trial court's reliance on the "continuous representation rule," the face of the complaint also affirmatively precludes its application here as a matter of law. The cited doctrine did not replace the "discovery rule" but is a narrow exception to it which can toll the limitations period beyond discovery but strictly requires that "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). Hence, the exception is not automatic and to oppose a motion to dismiss "a simple allegation of continuous representation standing alone does not suffice" because "it must appear that the continuous representation relates to that original act" and the "complaint at issue did not allege continuous representation." *State ex rel. Long v. Petree Stockton, L.L.P.*, 499 S.E.2d 790, 797 (N.C. App., 1998). *See, also, Riemers v. Omdahl*, 687 N.W.2d 445, 451 (N.D. 2004) (rejecting

claim statute was tolled where defendant attorney "failed to follow the procedure for termination of representation" and "from time to time" consulted with plaintiff because 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 and mere allegations of continued representation "lack sufficient specificity").

Indeed, as a matter of law, exceptions to statutes of limitations "are strictly construed, and cannot be enlarged from considerations of apparent hardship or inconvenience." *Rushlight v. McLain*, 28 Wn.2d 189, 199, 182 P.2d 62 (1947) (quoting 34 Am.Jur. § 189). Therefore courts cannot "read into statutes of limitation an exception which has not been embodied therein, however reasonable such exception may seem, even though the exception would be an equitable one." *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 73-74, 947 P.2d 1252 (1997) (quoting *Rushlight*, 28 Wn.2d at 199-200 & 34 Am.Jur. § 186). Accordingly, our courts hold the application of the "continuing representation rule" also must "be based on whether any of the policy considerations is furthered" and will deny its application if it is not. *Burns*, 135 Wn.App. at 636 ("The trial court's decision to toll the statute of limitations based on the continuous representation rule must be reversed").

Here, plaintiff's complaint not only fails to allege facts that would support a "continuous representation" but on its face expressly precludes such representation because plaintiff affirmatively asserts his suit is "based upon inaction" from the inception of the relationship. *See* CP 44. Specifically, the complaint expressly alleges McFadden's only act in the case was to file a May 10, 2005, special notice of appearance for a "contempt show cause hearing only" that already had been held. CP 4 ¶ 3.10 (emphasis added). Hence, even if such an after-the-fact notice of appearance is deemed "representation," by its express terms it applied "only" to the "show cause hearing" that was held beforehand on May 10, 2005 -- not all later contempt matters. As to Elsey, the complaint does not even allege she represented him in "the specific matter directly in dispute" concerning contempt but instead affirmatively states she only spoke with him twice in May and June of 2005 about matters other than the "conditions of his release." CP 4 ¶s 3.13-3.14. Thereafter, the complaint concedes that neither attorney ever did anything on his behalf. *See* CP 5 ¶ 3.16. Hence, from the face of the complaint, the "continuous representation doctrine" cannot apply to allow the filing of suit over four years later because the complaint expressly alleges facts showing there never was representation for "the specific matter directly in dispute" -- much less representation that was "continuous" as required. *See, e.g., Schoenrock v. Tappe*, 419 N.W.2d

197, 201 (S.D., 1988) (representation could not be "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, "an ongoing, continuous, developing, and dependent relationship did not exist."); *Muller v. Sturman*, 79 A.D.2d 482, 485, 437 N.Y.S. 2d 205 (1981) (the rule requires "a relationship which is not sporadic but developing and involves a continuity of the professional services from which the alleged malpractice stems," and therefore was not present where plaintiff after a certain date "had no conversation with any member of the law firm until she inquired" and where "the record is silent as to further contact between plaintiff and appellants until her file was returned"). For this reason an application of the rule here also would do nothing to further its purpose of "avoiding disrupting the attorney-client relationship," avoiding clients having "to sue their attorneys though the relationship continues" and "giving attorneys the chance to remedy mistakes before being sued." *Burns*, 135 Wn.App. at 294; *Janicki Logging & Const. Co., Inc. v. Schwabe*, 109 Wn.App. 655, 662, 37 P.3d 309 (2001).

Third, even in cases where a representation is "continuous" so that the rule applies, it does not toll plaintiff's suit until new counsel is substituted as the trial court here also erroneously held. As a matter of law, our

appellate courts have been clear 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 663-64. *See, also, Burns*, 135 Wn. App. at 296 (same). Hence, in *Cawdrey v. Hanon Baker Ludlow Drumheller, P.S.*, 129 Wn.App. 810, 819, 120 P.3d 605 (2005), the Court affirmed that "under 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," and therefore held the attorney's "representation in the transactions at issue here ended in 1999" with her last act on the issue -- without concern as to whether she ever withdrew as counsel. (Emphasis added.) *See, also, Burns, supra.* at 298 ("in *Cawdrey* the court concluded that an attorney malpractice complaint was untimely even though filed less than three years after the termination of the relationship" because though "the lawyer had continuously represented her client in a variety of matters, including estate planning, her representation in the specific transaction at issue -- structuring a partnership buyout -- had ended long before"); *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) (continuous representation exception did not apply because a motion to withdraw "need not be made

in order to 'mark' the end of an attorney's representation of a client" and the 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) (rejecting claim accrual began only with "actual date that his attorney-client relationship . . . ended" because rule "has no application . . . where the client actually knows that he suffered appreciable harm as a result of his attorney's conduct" because "there is no 'innocent reliance which the continued representation doctrine seeks to protect'"); *Hiltz*, 910 P.2d at 571 (no tolling because "attorney-client relationship does not continue indefinitely just because it has not been formally terminated"); *Schoenrock*, 419 N.W.2d at 202 (statute not tolled because "the relationship does not continue indefinitely simply because there is no formal termination").²

Because the complaint states McFadden's only "act" was her after-the-fact May 2005 filing of a notice of special appearance "only" for a hearing he knew had already been held, while Elsey is claimed to have never appeared nor acted "on the particular matter in which the alleged malpractice occurred" but simply met with him twice in May and June of

² In contrast, under plaintiff's novel interpretation of the continuous representation exception, the statute of limitations might never run in some malpractice cases -- indeed, he has asserted here "an argument could be made that defendants *still* represent Plaintiff Hipple." CP 96.

2005 to discuss other matters, plaintiff's late filing of his June 2009 complaint four years later cannot now be resurrected under the "continuous representation rule." *See, e.g., also, Tool v. Boutelle*, 91 Misc. 2d 464, 398 N.Y.S.2d 128 (N.Y. Supp. 1977) ("If there is a three-year gap between the services performed by a professional, even though such services are related to the original condition or initial acts upon which the malpractice is predicated, then the Statute of Limitations will have run").

As our state's Supreme Court explains:

In Washington, the goals of our limitation statutes are to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969). Our 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. *Ruth v. Dight*, 75 Wn.2d 660, 664, 453 P.2d 631 (1969). A statute of limitation, in effect, deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim.

Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 714, 709 P. 2d 793 (1985) ("courts apply limitation statutes to compel the exercise of a right of action within a reasonable time so opposing parties have fair opportunity to defend," and "are in their nature arbitrary" because they "rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens"). *See, also, Crisman v. Crisman*, 85 Wn.App. 15, 931 P.2d 163, *rev. denied*, 132 Wn.2d 1008 (1997) ("When

plaintiffs sleep on their rights, evidence may be lost and witnesses' memories may fade"). Hence, though it "is easy to argue, relative to any statute of limitations as applied to a particular case, that it works injustice . . . it must be remembered that these are statutes of repose, and, as said in *Thomas v. Richter* [88 Wash. 451, 456, 153 P. 333 (1915)], 'It is believed that it is better for the public that some rights be lost than that stale litigation be permitted.'" *O'Neil*, 89 Wn.App. at 73 (quoting *Golden Eagle Mining Co. v. Emperor-Quilp Co.*, 93 Wash. 692, 696, 161 P. 848 (1916)).

Hence, the statute of limitations "is not an unconscionable defense, but a declaration of legislative policy to be respected by the courts." *O'Neil, supra.* (quoting *Davis v. Rogers*, 128 Wash. 231, 235, 222 P. 499 (1924)). Here, the trial court's refusal to respect the policy therefore was reversible error.

B. TRIAL COURT COULD NOT ABDICATE MAKING A PROXIMATE CAUSE ANALYSIS

Though the trial court did not address the issue, CP 86, the question of proximate cause was before it and "presents an issue of law for the trial court to resolve." *Geer v. Tonnon*, 137 Wn.App. 838, 844-45, 155 P. 3d 163 (2007) (legal malpractice claim dismissed because causation was absent as a matter of law). *See, also, Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P. 2d 600 (1985) (the issue of whether a court would have "ren-

dered a judgment more favorable to the client" has been consistently recognized to be "within the exclusive province of the court, not the jury, to decide"). 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), the failure here to dismiss or reconsider on the ground of proximate cause also was grounds for reversal. See, also, *Bowman v. Two*, 104 Wn.2d 181, 186, 704 P.2d 140 (1985) (noting in dismissing legal malpractice under CR 12(b)(6), "the breach of duty must also be a proximate cause of the resulting injury"); *Powell v. Associated Counsel for the Accused*, 146 Wn.App. 242, 249, 191 P.3d 896 (2008) (legal malpractice claim dismissed 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'" and he failed to do so).

First, at his May 5, 2005, hearing plaintiff had no defense to detention because the complaint on its face admits that long before any request for DAC counsel was made, Commissioner Foley on January 2004 expressly found plaintiff's failure to pay was done "intentionally," CP 3 ¶ 3.3, while the court record confirms her order made an express finding of his present ability to pay. CP 88. Once such a finding is 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). Indeed, even when plaintiff's new counsel on the issue appeared over a year later in June 2006 and still later sought revision of his detention, he submitted no evidence to meet this burden. CP 65. Rather, the only evidence of record on that issue was the declaration of his opponent that instead 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. In opposing dismissal and reconsideration in the instant action, Hipple likewise again offered nothing from the complaint or the record to show that at the May 5, 2005, show cause hearing -- or at any other time before June 2006 -- any counsel would have been able to meet that burden on his behalf. In fact, plaintiff's superior court briefs nowhere alleged that -- at the May 2005 hearing or before June 2006 -- he ever actually had become unable to pay the amount or make arrangements to do so. CP 38-39; CP 99-100. The only reason for this glaring omission would be that he could not so claim. *See, e.g., Havsy*, 88 Wn.App. at 520 (to defeat CR 12(b)(6) motion, allegation must be made "without violating CR 11"); CR 11(a) (pleading must be "well grounded in fact").

Second, the fact that over a year later in September of 2006 a commissioner concluded that further coercion was not going to overcome plaintiff's steadfast determination not to comply with an order and therefore fully released him, does not state a basis in law for concluding plaintiff somehow had the "right" to such a ruling based on his intransigence -- much less back in May of 2005 when plaintiff claims he was being represented by defendants. *See International Union v. Bagwell*, 512 U.S. 821, 827 & 831 (1994) ("those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard"); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911) ("If a defendant should refuse to pay alimony . . . he could be committed until he complied with the order" because "he carries the keys of his prison in his own pocket" since "[h]e can end the sentence and discharge himself at any moment by doing what he had previously refused to do."); *Armstrong v. Guccione*, 470 F.3d 89, 151 (2d Cir. 2006) (though plaintiff was confined for seven years for civil contempt, court's authority to detain him 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

confinement); *In re King*, 110 Wn.2d at 803 (father jailed for failure to comply with court order had no right to be released because "the Court of Appeals conclusion that Mr. King's confinement of 11 months had become punitive as a matter of law is contrary to general authority"). Nevertheless, plaintiff argued in this action that his complaint asserted at least a defense to continued detention because he now argues he could have been released if inability to pay only had been raised by counsel -- as supposedly shown by the complaint's claim a commissioner in September 2006 allegedly ruled the May 2005 order that he remain confined was "at least void or voidable at a minimum." CP 5 ¶ 3.21; CP 37-41. This argument is demonstrably baseless and unavailing.

As a matter of law, a complaint's allegations are properly disregarded where they conflict with documents upon which it refers or relies. *See 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 pleadings 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"); *Ileto*, 194 F.Supp. 2d at 1045 (complaint dismissed because "Court may disregard allegations . . . if they are contradicted by facts es-

established by reference to any documents . . . upon which it necessarily relies; the Court also need not accept as true allegations that contradict facts judicially noticed by the Court"). Here, the court record is undisputed that: 1) by June 2005 plaintiff was on home detention and capable of paying arrearages, CP 28, 71-74; 2) in 2006, his pro se status back in May 2005 was never raised to the Commissioner, CP 65-68; and 3) the September 2006 order of release nowhere states the May 2005 order was "void or voidable." CP 69.

Because under CR 12(b)(6) a complaint must "raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 545, and "where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper," *Berge v. Gorton*, 88 Wn.2d at 759, dismissal was proper here because neither the complaint nor any court record showed alleged legal malpractice actually caused plaintiff's detention or its duration. Indeed, the complaint fails to allege any fact showing that some alleged legal failure by DAC, McFadden or Elsey -- rather than his own unwavering "intentional[] fail[ure] to comply with the child support order" -- ever actually caused him harm.

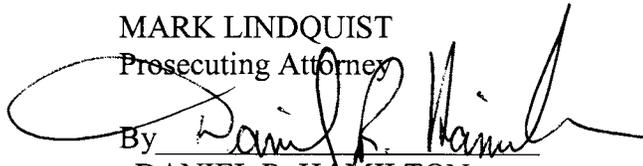
IV. CONCLUSION

By choosing to disregard both plaintiff's four-year delay in bringing suit and his failure to plead the necessary element of proximate cause

"above the speculative level," the trial court committed reversible error. Accordingly defendants respectfully request the orders denying dismissal and reconsideration be reversed and plaintiff's complaint be dismissed with prejudice.

DATED: 2/17/10

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLANTS'** **BRIEF** was delivered this 17th day of February, 2010, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to counsel for Plaintiff as follows:

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