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No. 67337-8-I  
King County Superior Court No. 10-2-11780-6 SEA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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JOSE BALAM-CHUC, et al.,  
Plaintiffs-Appellants,  
v.

GABRIEL BANFI, et al.,  
Defendants-Appellees.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

The Honorable Laura Inveen, Judge

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APPELLANTS' REPLY BRIEF

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIV. I

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A. REPLY STATEMENT OF FACTS

The Balam-Chucs stand by their statement of the issues and of the facts found at pages 2 to 8 of the Appellants' opening brief. To the extent that the appellants disagree with Banfi's statement of the facts, they will be discussed below.

B. REPLY ARGUMENTS

1. *This Court's recent decision in Murphey v. Grass, 2011 WL 5127622, - Wn. App. - , - P.3d - (Oct. 31, 2011), confirms the Balam-Chucs' argument that their claims accrued on the date Jose was forced to leave the United States.*

In their opening brief, the Balam-Chucs argued that under settled law and public policy considerations, the Balum-Chucs' causes of action did not accrue until they had suffered actual and appreciable harm. In this case, that occurred on the November 25, 2009, when Jose was forced to leave his family and return to Mexico. Because the complaint was filed less than one year later, this lawsuit was clearly timely.

Just after the Respondent's brief was filed this Court issued its decision in *Murphey v. Grass*, supra. In that case Murphey hired Grass, a certified public accountant to prepare certain tax returns. Grass was negligent in completing his duties and, in 2004, Murphey learned that he might owe as much as \$100,000 in back taxes. He fired Grass and told him he was assessing his damages, but that Grass should inform his malpractice carrier of Murphey's potential claim for damages. *Id.* at \*1.

State auditors then began determining the true amount of taxes, penalties and interest due. Murphey contested the auditor's assessments and appealed those assessments and penalties to the Board of Tax Appeals. *Id.* at \*2. In 2009, while the appeal was pending, Murphey sued Grass.

Grass moved for summary judgment alleging that the three-year statute of limitations began to run, at the latest, in 2006 when Murphey learned of Grass's negligence. The trial court agreed, granted Grass's motion and dismissed the case.

On appeal Murphey argued that his claims did not accrue until he suffered actual damages and that did not occur until the administrative tax appeal process concluded. Grass (just like Banfi)

relied on *Huff v. Roach*, 125 Wn. App. 724, 106 P.2d 268, *review denied*, 155 Wn.2d 1023, 126 P.3d 1279 (2005), and *Janicki Logging & Const. Co. v. Schwabe, Williamson & Wyatt P.C.* 109 Wn. App. 655, 37 P.3d 309 (2001), *review denied*, 146 Wn.2d 1019, 51 P.3d 88 (2002), to argue that Murphey's claims accrued the moment he knew of the malpractice. But this Court held that:

Grass's reliance on these cases is misplaced. *Huff* and *Janicki* are not inconsistent with *Feddersen* and, in any event, presented different issues. In all three cases, the claims accrued when the plaintiffs learned of injury *that was certain*.

*Id.* at \*4 (emphasis added). This Court said that potential liability is not the equivalent of actual harm. The Court concluded that Murphey's liability for the taxes was not certain until the "appeals division made the assessments final, binding and due for payment."

The *Murphey* decision precludes all of the arguments made by Respondent at pages 17-22. In June 2002, the Balam-Chucs learned that, due to Banfi's negligence, Jose might be removed from the United States. But, just as there was no actual harm to Murphey in June 2002 when he learned that Grass's negligence *might* cost him \$100,000, there was no "actual harm" to the family when Banfi failed to file the

petition.<sup>1</sup> Like Murphey's continued challenges to the tax assessments, the Balam-Chucs contested the rejection of the untimely LIFE petition for seven years in the federal immigration and appellate courts. Just as the amount of tax Murphey actually owed was speculative until the administrative appeals concluded, Jose's actual deportation was speculative until the final order of removal was implemented on November 25, 2009.<sup>2</sup> Until that time, no one, not even the Ninth Circuit, believed that Jose would actually be deported. The result of accepting the Respondent's argument would be a flood of negligence lawsuits filed within three years of any negligent act by an attorney, such as failing to appear for a hearing or to file a timely pretrial motion to meet a pretrial deadline, even if no damages resulted from the negligence.

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<sup>1</sup> The Respondent argues that the fact that the Balam-Chucs filed a bar complaint demonstrates that all of the elements of the legal malpractice claim accrued. Brief of Respondent at 19. But a breach of one's ethical duty does not necessarily require proof of malpractice. *See Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) (Violation of the RPCs may not be used as evidence of legal malpractice). Similarly, in *Murphey*, this Court found that counsel's letter telling Grass to notify his insurance company did not mean that the action had accrued.

<sup>2</sup> The Respondent states that the "injury" in this case was Jose's lost "opportunity to process his adjustment of status under the LIFE Act." Brief of Respondent at 19. But that is not true. Had Jose lost his opportunity under the LIFE Act, but been permitted to adjust his status in some other way, then there would have been a negligent act but no injury. The injury was his removal from the country.

The reasoning in *Murphey* confirms the Balam-Chucs' analysis set forth in their opening brief at pages 9-16. Knowledge of the "occurrence" of the malpractice is not necessarily the date upon which the claim accrues. Law and public policy support the conclusion that under the facts of this case, the Balam-Chucs' claim did not accrue until Jose was forced to leave the country.

2. *This Court should reject Banfi's claim that the failure to meet a statutory deadline is not negligence as a matter of law.*

Banfi asks this Court to dispose of the Balam-Chucs' claim that his failure to meet the statutory deadline was negligence as a matter of law in a remarkable manner. He argues that an attorney can only be negligent as a matter of law if he or she fails to correctly determine the applicable statute of limitations. He argues that because the "Balam-Chucs do not claim that the failure to file the petition was due to Mr. Banfi's ignorance of the filing deadline," there was no negligence on his part. Brief of Respondent at 16. Under his theory, as long as counsel knows of the deadline, all of his further actions are insulated from a claim of negligence even if the attorney does nothing to meet the deadline or to insure that steps have been taken by his staff to meet the deadline. This Court should reject this argument expeditiously.

Instead, to comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction. *Id.* at 261. The Balam-Chucs provided the declaration of Carol Edwards, an experienced immigration attorney. She stated that there were no gray areas regarding the statutory deadline and that the standard of practice in the immigration community was to insure that the Petition was timely filed. CP 138-140. Banfi failed to meet that standard of care.

Jose came into Balam's office with the certainty of being granted legal status. Banfi had a duty to file the Balam-Chucs' petition by April 30, 2001. But because he failed to do so, Jose was forced to leave the country. The filing of legal documents in a timely manner is a basic function of any attorney's duty to their client. Many times there are a range of choices available to counsel that would discharge counsel's duty to a client. When it comes to meeting statutory deadlines, however, there are no alternatives to meeting the required deadline. This Court should find that Banfi committed negligence and violated the standard of care that attorneys owe to their client.

3. *The question of whether Banfi was responsible for supervising his paralegal cannot be resolved on summary judgment because the facts regarding that claim are disputed.*

In addition, Banfi attempts to avoid liability in this case by blaming his paralegal. He spends considerable time attempting to have this Court make factual findings that he had no hand in preparing or filing the petition or supervising the paralegal who assisted him. But this is a question of hotly disputed fact in this case.

Ms. Edwards stated that by signing the G-28 Notice of Appearance in the federal immigration proceedings he became responsible as attorney of record for the family's LIFE petition. CP 138-140. The record before the trial court establishes that the Balam-Chucs retained Banfi to file a family visa petition and application of adjustment of status for Jose. They specifically wanted to hire a bilingual attorney and they learned that Banfi was bilingual. CP 23. The Balam-Chucs completed and signed the forms and gave Mr. Banfi a check for the filing fee. He wrote to the Balam-Chucs. CP 134-135. Mr. Banfi signed the forms on March 30, 2001. CP 137. By signing, he swore that he had prepared the document at the request of Jose and that it was based upon "all information of which I have any

knowledge.” Not only that, Mr. Banfi gave written directions to Ms. Inchauste about her duties in the case. CP 133, 136. Ms. Inchauste has a note in the file from Mr. Banfi that states: “Reviewed and signed! Let’s talk about files.” The note is dated 4/15/01. Ms. Inchauste notes underneath, “OK to proceed per GIB.” CP 136.

In short, although Banfi now claims that he had no responsibility to supervise the duties of the paralegal assigned to the case he had been retained to handle, the facts are clearly in dispute. Thus, there is a question of fact that must be submitted to the jury.<sup>3</sup> Even if this Court could theoretically affirm the trial court’s decision on

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<sup>3</sup> Moreover, the Respondent’s argument relies on the assertion that Banfi’s duty of care as to his paralegal is defined solely by the Washington Rules of Professional [RPC] conduct. But, the Washington State Supreme Court has expressly stated that violations of the ethical rules cannot be used as evidence of malpractice. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). The RPCs serve to establish the “minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” *Hizey*, 119 Wn.2d at 262 (quoting RPC Preliminary Statement). But a legal malpractice action is based on what a “reasonable” lawyer would do in a particular situation. Both of these standards should “continue to operate in their relative, separate spheres” and the RPCs should not extend into the malpractice area, considering that there are adequate common law bases for malpractice. *Id.* Because the RPCs govern the relationship between an attorney and the court system and a malpractice claim focuses on the relationship between an attorney and client, basing a malpractice claim on the RPCs improperly elevates the RPCs that focus on the attorney-client relationship. *Hizey*, 119 Wn.2d at 263 (quoting Faure & Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 Mont. L.Rev. 363, 375 (1985-1986)). Conversely, adherence to the ethical rules does not provide complete insulation from a claim of negligence or provide irrefutable proof that the attorney met the standard of care for lawyers.

other grounds, it cannot affirm summary judgment on a ground that involves disputed issues of fact.

4. *Rebeka Balam-Chuc and the children have a loss of consortium claim that is not barred by the statute of limitations.*

Banfi argues without citation to any authority that because the claims for loss of consortium brought by Rebeka and the children did not accrue until after Jose's claims were barred by the statute of limitations, their claims are also barred. The flaw in Banfi's argument is that Washington recognizes loss of consortium as an independent, not derivative, claim. Thus, a child or spouse's cause of action for loss of consortium accrues when he or she first experiences injury due to loss of consortium, regardless of when the other spouse's injury claim accrues. *Green v. American Pharmaceutical Co.*, 136 Wn.2d 87, 101, 960 P.2d 912 (1998); *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). Banfi makes no effort to distinguish this clearly controlling precedent from the Washington Supreme Court. Thus, the order dismissing these claims is clearly erroneous and must be reversed.

Similarly, Banfi's argument that the "injury" occurred in 2001 before either child was born simply denies the facts. The "injury" in a

loss of consortium claim is the loss of love, care and relationship with the family member. In this case, that did not occur until November 2009, when Jose was forced to leave the country. Clearly, Rebeka and the children had a loving family relationship before Jose was forced to return to Mexico.

Moreover, this Court should reject Banfi's argument that the any loss of consortium in this case was "de minimus." First, the issue of damages is one for the jury, not this Court. Counsel cannot find a single Washington case that approves an order of summary judgment on the grounds that the potential damages were "de minimus."

Second the argument is without legal basis and is offensive. Essentially, Banfi argues that because Jose was not in a permanent vegetative state, the children did not "entirely lose the ability to communicate and engage with their parent." Even though Jose was forced to move thousands of miles away and barred by law from traveling to see his children in their home, at their school activities and from participating in normal family life, in Banfi's view the injury to his wife and children was negligible and temporary.<sup>4</sup> And, Banfi

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<sup>4</sup> In addition, there is simply no proof that the injury was "temporary."

apparently misses the irony of arguing that that damage was de minimus in this case. Banfi was hired to file a Petition under the LIFE Act. The purpose of that Act was to preserve families and to avoid “the undesirable alternative of forcing aliens to leave their families in the Unites States while they applied for a visa abroad.” *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1046 (9<sup>th</sup> Cir. 2008). Certainly Congress did not view forcible separations as “de minimus.”

It is safe to say that reasonable minds can differ about whether the traumatic, forcible separation of a father from his family for nine months has a “de minimus” effect on his wife and children. The defendants can certainly make their arguments to the jury. But many potential jurors might conclude that the forcible separation from a parent for even one week would be devastating to a child.

D. CONCLUSION

This Court should reverse all of the orders entered by the trial court and remand this case for trial.

Respectfully submitted this 14th day of November, 2011.

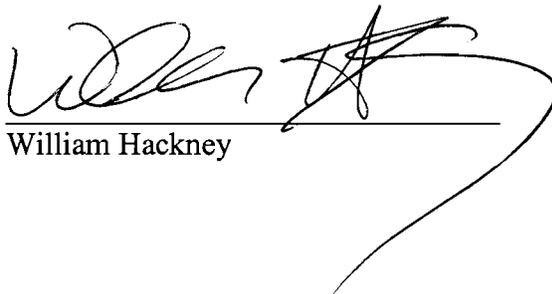
  
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**CERTIFICATE OF SERVICE**

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