

67337-8

67337-8

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

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

GABRIEL BANFI, et al.,
Defendants-Appellees.

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

The Honorable Laura Inveen, Judge

APPELLANTS' OPENING BRIEF

Suzanne Lee Elliott
Attorney for Plaintiffs
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 16 AM 10:29

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

1. Did the trial court err in concluding that the Balam-Chuc’s claim of attorney malpractice was barred by the statute of limitations when the Balam-Chuc’s filed their lawsuit within one year of the date the claim accrued?..... 1

2. Is the failure, by the attorney of record, to timely file a petition under the LIFE Act negligent as a matter of law? 1

3. Did the trial court err in concluding the loss of consortium claims were barred by the statute of limitations, when the wife and children filed their lawsuit within one year of the date the claim accrued? 1

B. STATEMENT OF THE CASE..... 2

C. ARGUMENT 8

1. Standards of Review 8

a. Statute of Limitations Issues..... 8

b. Summary Judgment Issues..... 8

2. Did the trial court err in granting summary judgment to Banfi when the Balam-Chucs’ cause of action for attorney malpractice arising from an immigration proceeding did not accrue until November 25, 2009, the date he was forced to leave the United States and where the Balam-Chucs filed their complaint on March 26, 2010, well within any applicable statute of limitations? 9

a. The statute did not begin to run on the date Banfi failed to timely file the petition. 9

b. The statute did not begin to run when the Balam-Chuc’s learned Banfi had failed to file the petition on time. 13

3. Did the trial court err in failing to find that Banfi’s failure to insure that the Balam-Chucs’ LIFE Act petition was timely filed was negligence as a matter of law? 16

4. Did the trial court err in dismissing the wife and children’s loss of consortium claims as untimely, when those claims were filed well with three year of Jose’s forced departure from the United States? 19

D. CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>Atchison v. Great W. Malting Co.</i> , 161 Wn.2d 372, 166 P.3d 662 (2007) .	8
<i>Balam-Chuc v. Mukasey</i> , 547 F.3d 1044 (9 th Cir. 2008)	3
<i>Bergin v. Grace</i> , 39 A.D.3d 1017, 833 N.Y.S.2d 729 (2007)	18
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005)	8
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wn.2d 215, 543 P.2d 338 (1975).....	11
<i>Go2Net, Inc. v. FreeYellow.com, Inc.</i> , 158 Wn.2d 247, 143 P.3d 590 (2006).....	8
<i>Green v. American Pharmaceutical Co.</i> , 136 Wn.2d 87, 960 P.2d 912 (1998).....	19, 20
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wn.2d 907, 32 P.3d 250 (2001)...	17
<i>Hashund v. Seattle</i> , 86 Wn.2d 607, 547 P.2d 1221 (1976).....	12
<i>Hickox v. Holleman</i> , 502 So.2d 626 (Miss. 1987), <i>superseded on other grounds by Mississippi Transp. Com'n v. McLemore</i> , 863 So.2d 31 (Miss. 2003)	18
<i>Hinton v. Carmody</i> , 182 Wn. 123, 45 P.2d 32 (1935)	19
<i>Hipple v. McFadden</i> , 161 Wn. App. 550, 255 P.3d 730 (2011)	10
<i>Huff v. Roach</i> , 125 Wn. App. 724, 106 P.3d 268, <i>review denied</i> , 155 Wn.2d 1023, 126 P.3d 1279 (2005).....	8
<i>Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt P.C.</i> , 109 Wn. App. 655, 37 P.3d 309 (2001), <i>review denied</i> , 146 Wn.2d 1019, 51 P.3d 88 (2002).....	14
<i>Lundgren v. Whitney's, Inc.</i> , 94 Wn.2d 91, 614 P.2d 1272 (1980).....	19
<i>Morse v. Antonellis</i> , 149 Wn.2d, 572, 70 P.3d 125 (2003).....	16

<i>Pudmaroff v. Allen</i> , 138 Wn.2d 55, 977 P.2d 574 (1999).....	16
<i>Reichelt v. Johns-Manville Corp.</i> , 107 Wn.2d 761, 733 P.2d 530 (1987)	20
<i>Richardson v. Denend</i> , 59 Wn. App. 92, 795 P.2d 1192 (1990), <i>review denied</i> , 116 Wn.2d 1005, 803 P.2d 1309 (1991)	13
<i>Shoemake ex rel. Guardian v. Ferrer</i> , 168 Wn.2d 193, 225 P.3d 990 (2010).....	10
<i>Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan</i> . 97 Wn. App. 901, 988 P.2d 467 (1999), <i>amended on denial of reconsideration</i> , 33 P.3d 742, <i>review granted</i> , 141 Wn.2d 1001, 10 P.3d 404 (2000).....	10
<i>Sing v. John L. Scott, Inc.</i> , 134 Wn.2d 24, 948 P.2d 816 (1997).....	17
<i>Steele v. Organon, Inc.</i> , 43 Wn. App. 230, 716 P.2d 920, <i>review denied</i> , 106 Wn.2d 1008, 1986 WL 420902 (1986).....	11
<i>Stevens v. Brink's Home Sec., Inc.</i> , 162 Wn.2d 42, 169 P.3d 473 (2007)...	8
<i>Troxell v. Rainier Pub. Sch. Dist. No. 307</i> , 154 Wn.2d 345, 111 P.3d 1173 (2005).....	8
<i>Ueland v. Pengo Hydra-Pull Corp.</i> , 103 Wn.2d 131, 691 P.2d 190 (1984)	19

Statutes

8 U.S.C. § 1182.....	4
8 U.S.C. § 1255.....	2, 3
I.N.A. § 245	3
RCW 4.16.080	8

Other Authorities

Legal Immigration Family Equity Act “LIFE Act”	passim
--	--------

Mallen & Smith, *Legal Malpractice*, § 2310 at page 382 (2011 Ed.)

..... 10, 11, 15

A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that the Balam-Chuc's claim of attorney malpractice was barred by the statute of limitations.
2. The trial court erred in failing to find that Banfi, the attorney of record, was negligent per se in failing to file Balam-Chuc's petition under the Legal Immigration Family Equity Act ("LIFE Act") in a timely manner.
3. The trial court erred in concluding that Rebekah, Eric and Maya Balam-Chuc's claims for loss of consortium were barred by the statute of limitations.

Issues Pertaining to the Assignments of Error

1. Did the trial court err in concluding that the Balam-Chuc's claim of attorney malpractice was barred by the statute of limitations when the Balam-Chuc's filed their lawsuit within one year of the date the claim accrued?
2. Is the failure, by the attorney of record, to timely file a petition under the LIFE Act negligence as a matter of law?
3. Did the trial court err in concluding the loss of consortium claims were barred by the statute of limitations, when the wife and

children filed their lawsuit within one year of the date the claim accrued?

B. STATEMENT OF THE CASE

On May 8, 2000, Jose Balam-Chuc married Rebekah Balam-Chuc, a U.S. citizen. Jose had entered the United States without inspection on or around August 1997. The couple has two children, Eric Alberto Balam-Chuc, born on December 4, 2001, CP 84, and Maya Diana Balam-Chuc born on August 9, 2005. CP 86. Mr. and Mrs. Balam-Chuc diligently worked to regularize Mr. Balam-Chuc's immigration status and create stability and security for their family.

In early 2001, they retained the services of attorney Gabriel Banfi of the DeDamm Law Firm to file a family visa petition and application of adjustment of status for Mr. Balam-Chuc. They specifically wanted a bilingual attorney and they had learned that Banfi was bilingual. CP 23.

Because Jose had initially entered the country without a visa, the family sought to take advantage of the LIFE Act. The Ninth Circuit described the Act as follows:

The Legal Immigration Family Equity Act ("LIFE Act"), INA § 245 (1999) (codified at 8 U.S.C. § 1255 (1999)), was enacted, in part, to provide a mechanism whereby the spouses and minor children of lawful permanent residents could apply more quickly for immigrant visas. *See* 146 Cong. Rec. S11851 (Dec. 15, 2000) (statement of Sen.

Kennedy). Congress established a system of temporary visas in order to provide “a speedy mechanism for the spouses and minor children of U.S. citizens to obtain their immigrant visas in the U.S., rather than wait for long periods of time outside the U.S.” *Id.* The LIFE Act also provided a method whereby an alien that had entered the United States without inspection or parole, but who was otherwise eligible for an immigrant visa, could apply to the Attorney General for an adjustment of status. 8 U.S.C. § 1255(i) (1999). This adjustment of status-to that of alien lawfully admitted for permanent residence-would allow the alien to remain in the United States, thus avoiding the undesirable alternative of forcing aliens to leave their families in the United States while they applied for a visa abroad.

CP 20, *Balam-Chuc v. Mukasey*, 547 F.3d 1044 (9th Cir. 2008).

To qualify for this status adjustment, the alien had to file a petition for classification under 8 U.S.C. § 1154 on or before January 14, 1998, and pay a \$1,000 fee. In 2000, Congress amended the LIFE Act to expand the class of beneficiaries who could apply for adjustment of status under I.N.A. § 245(i). Among other things, Congress moved the deadline for filing a visa petition from January 14, 1998, to April 30, 2001, for all aliens present in the United States as of the statute's date of enactment. *See* 8 U.S.C. § 1255(i). CP 26-29.

Thus, all Mr. Banfi had to do was file the petition with the immigration service on or before April 30, 2001. CP 21. Once that was done, Jose was guaranteed a visa and the adjustment of his status to that of a legal resident of the United States.

The Balam-Chucs completed and signed the forms and gave Mr. Banfi a check for the filing fee. 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.” *Id.* The Immigration and Naturalization Service [hereinafter INS], however, did not receive the petition until June 13, 2001, almost a month and a half after the statutory deadline. The Balam-Chucs did not learn of any issues with the filing until June 2002. CP 117.

Two years later, on May 10, 2004, the Department of Homeland Security [hereinafter DHS] served Balam-Chuc with a Notice to Appear, charging that he was subject to removal under 8 U.S.C. § 1182(a)(6)(A)(i) as an alien who was present without having been admitted or paroled. The family hired a new lawyer, Carol Edwards. CP 20, 30. Ms. Edwards, a member of the bar for 27 years, is an exceedingly experienced immigration lawyer. CP 19-20. Ms. Edwards began an intensive legal battle pursuing several means of remedying Banfi’s mistake. CP 20, 24,

First, Edwards argued that Banfi’s negligence justified extending the filing deadline. At the hearing before an administrative law judge, Balam-Chuc admitted to the allegations lodged by the Department of Homeland Security and conceded removability. He argued, however, that he should still be eligible for an adjustment of status under the LIFE Act

amendment because he had in fact filed the petition on time, and in the alternative, the statute of limitations should have been tolled due to the ineffective assistance of his prior counsel. *See* CP 29-30. The administrative law judge denied his petition. CP 30, 139.

Balam-Chuc appealed the hearing officer's decision to the Board of Immigration Appeals [hereinafter BIA], arguing that the hearing officer incorrectly classified the deadline as a statute of repose instead of a statute of limitations and that the statute should be tolled due to ineffective assistance of counsel. He further argued that the BIA should adjudicate the application *nunc pro tunc*. The BIA affirmed. CP 30.

Undeterred, the family appealed to the Ninth Circuit. That Court determined that the deadlines for filing a LIFE Act petition were not subject to equitable tolling. CP 25-37. In addition, that Court held that there was only a limited "due process" right to the effective assistance of counsel in immigration proceedings. *Id.* Thus, even though Banfi had failed to file the petition within the statutory deadline, the Fifth Amendment right to due process was not violated. That Court concluded by stating, however, that:

We recognize that this is a tragic result for Balam-Chuc and his family. . . . as a result of the statute and relevant precedent in this case, Balam-Chuc will be forced to leave his wife and two young children to return to Mexico, where he must start the process of applying for a visa through the

Mexican consulate, all because his attorney failed to take appropriate action in filing his application with the INA. It seems especially counterintuitive that DHS would insist on bringing charges against Balam-Chuc when Congress's specific directive in passing the statute was to encourage agencies to allow these very families to stay together. We hope that DHS will look past any technical flaws in Balam-Chuc's application and follow Congress's guidance to exercise its discretion in an equitable manner. However, it is not within our prerogative to ignore our prior precedent, unilaterally amend a statute duly passed by the legislative branch, or interfere with the legitimate exercise of executive discretionary power, even to provide Balam-Chuc with an avenue for remaining with his family.

Despite the apparent equities weighing to the contrary, the petition for review must be DENIED.

CP 36-37.

Based on this statement, Ms. Edwards asked the Ninth Circuit to stay issuance of the mandate so that she could negotiate an equitable resolution of the issues. CP 139. The Court granted the stay and Ms. Edwards then attempted to get the INS to grant Jose what is called a “parole in place.” This would have permitted Jose to remain in the United States. CP 140. Despite the strongly worded decision by the Ninth Circuit, Jose’s request was denied. In May 2009, the federal government “made a final decision denying the humanitarian and extraordinary relief” that the family was seeking. CP 140.

The Ninth Circuit's mandate issued in November 2009. Jose was forced to return to Mexico in late November 2009. CP 113. Jose was permitted to return to the United States in November 2010. CP 24.

On March 26, 2010, while Jose was in Mexico, the family filed this action for legal malpractice. CP 1-4. They moved for partial summary judgment and argued that Banfi had committed malpractice by failing to file the petition in a timely manner. Their motion was supported by the declarations of Carol Edwards. CP 11-18. The Balam-Chucs argued that failure to file the petition in a timely manner was negligence as a matter of law.

Banfi filed a "motion for summary judgment of dismissal" and argued that statute of limitations barred the action. CP 38-57.

The trial judge denied the Balam-Chucs' motion for summary judgment stating that Banfi's negligence was a "question of fact." CP 183. She then granted the order dismissing the Balam-Chucs' complaint because "they failed to file the action within the requisite statute of limitations." CP 181. The Court later clarified that the statute of limitations also barred any loss of consortium claims. CP 195.

This timely appeal followed. CP 198.

C. ARGUMENT

1. *Standards of Review*

a. Statute of Limitations Issues

A defendant may ask a trial court to dismiss a claim brought after the statute of limitations has expired. *See, e.g., Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 374, 166 P.3d 662 (2007). But in considering such a motion, a plaintiff's allegations are presumed to be true. *Burton v. Lehman*, 153 Wn.2d 416, 103 P.3d 1230 (2005). The statute of limitations for attorney malpractice action is three years. RCW 4.16.080(3); *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268, *review denied*, 155 Wn.2d 1023, 126 P.3d 1279 (2005).

b. Summary Judgment Issues

An order granting summary judgment is reviewed de novo. *Go2Net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 252, 143 P.3d 590 (2006) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005)). This court views the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007).

2. *Did the trial court err in granting summary judgment to Banfi when the Balam-Chucs' cause of action for attorney malpractice arising from an immigration proceeding did not accrue until November 2009, the date he was forced to leave the United States and where the Balam-Chucs filed their complaint on March 26, 2010, well within any applicable statute of limitations?*

The question of when the statute of limitations begins to run for malpractice committed in an immigration case appears to be a question of first impression in Washington. The trial judge did not give any explanation for her one-line conclusion that this action was barred by the statute of limitations. Although his arguments in the trial court were somewhat confusing it, appears that Banfi argued two theories. First, he argued that the limitation period began running the day he failed to comply with the filing deadline in late April 2001. In the alternative, he argued that the claim accrued in this case and that the limitations period began on the date in June 2002 when the Balam-Chucs had some reason to believe he had not timely filed the petition.

a. The statute did not begin to run on the date Banfi failed to timely file the petition.

Liability for legal malpractice requires proof of four elements: (1) the existence of an attorney-client relationship giving rise to a duty of care on the part of the lawyer; (2) an act or omission breaching that duty; (3) damage to the client; and (4) the breach of duty must have been a

proximate cause of the damages to the client. *Hipple v. McFadden*, 161 Wn. App. 550, 255 P.3d 730 (2011).

The “occurrence” of the malpractice is not necessarily the date upon which the limitations period begins to run. The leading commentators on legal malpractice point out that there are two potential dates of accrual: 1) the date the malpractice was committed or 2) the date of the actionable injury or damage. Mallen & Smith, *Legal Malpractice*, § 2310 at page 382 (2011 Ed.).¹ They note that using the date the negligence “occurs” may make sense in other types of torts. For example, many torts produce bodily injury or property damage that is immediately ascertainable. *Hamilton v. Arriola Bros. Custom Farming*. 85 Wn. App. 207, 931 P.2d 925 (1997) (Plaintiff’s action for injurious exposure to pesticide accrued on or about the day of exposure because immediately thereafter he was seen by a doctor and diagnosed with chemical hepatitis told he would no longer have full lung capacity.)

¹ Mallen and Smith have frequently been cited with approval by the appellate courts of this state. See, e.g., *Hipple* supra; *Shoemaker ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 200, 225 P.3d 990 (2010); *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*. 97 Wn. App. 901, 988 P.2d 467 (1999), *amended on denial of reconsideration*, 33 P.3d 742, *review granted*, 141 Wn.2d 1001, 10 P.3d 404 (2000).

But, when it comes to legal malpractice, the lawyer's error might not be discovered for years and, similarly, the "damages" may not occur for years. *Id.* Thus, Mallen & Smith note:

These and other problems with the occurrence rule account for its abandonment or modification in almost all jurisdictions as the exclusive doctrine for accrual.

Id. at page 383.

As the Balam-Chucs argued in the trial court, the Washington Courts have concluded that negligence actions generally only accrue when all four elements of the malpractice have occurred – most importantly the damage. A plaintiff must suffer actual and appreciable harm, as distinguished from nominal damages, before the statute of limitation commences. *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975).

For example, in *Steele v. Organon, Inc.*, 43 Wn. App. 230, 716 P.2d 920, *review denied*, 106 Wn.2d 1008, 1986 WL 420902 (1986), the Court cited the following passage from the California Courts with approval:

"It is clear that mere possibility, or even probability, that an event causing damage will result from a wrongful act does not render the act actionable.... Of course, it is uncertainty as to the fact of damage, rather than its amount, which negatives the existence of a cause of action...." (Italics ours.) *Davies v. Krasna*, 14 Cal.3d 502, 535 P.2d 1161, 121 Cal.Rptr. 705, 713, 79 A.L.R.3d 807 (1975) (quoting

Walker v. Pacific Indem. Co., 183 Cal.App.2d 513, 6 Cal.Rptr. 924 (1960)).

And, in *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976), the plaintiffs sued the City for damages resulting from the issuance of an invalid building permit. The permit was issued in 1969. It was not adjudicated invalid until June 19, 1973. After that the plaintiffs were unable to complete the construction of a planned apartment building and the land lost most of its value. Haslund sued the City on February 6, 1974, more than three years after the permit had issued. The City moved to dismiss arguing that the Haslund's cause of action accrued on the day the permit was issued in 1969.

The Washington State Court held that the determination of the date at which a plaintiff suffered actual and appreciable harm was generally a question of fact. *Id.* at 620. But in the *Haslund* case, the Court concluded that from the evidence, there was no actual and appreciable harm until the permit was declared invalid and construction halted.

Similarly, in this case, while the negligence occurred when the petition was not timely filed, there was no actual and appreciable harm to the Balam-Chuc family at that time. Jose remained living and working in the United States. It was not until the Government conclusively denied him the right to stay in the United States and forced him to leave the

country in November 2009 that he was damaged. In fact, had the Balam-Chucs sued Banfi before Jose was forced to leave the United States, Banfi would have argued that they had no damages and that Jose could pursue other avenues, such as those Ms. Edwards was actually pursuing, to stay in the United States.

- b. The statute did not begin to run when the Balam-Chuc's learned Banfi had failed to file the petition on time.

Banfi also argued that the statute began to run in July 2002 because, at that time, the Balam-Chucs had at least some knowledge of Banfi's failure. Banfi relied on the decision in *Richardson v. Denend*, 59 Wn. App. 92, 96, 795 P.2d 1192 (1990), *review denied*, 116 Wn.2d 1005, 803 P.2d 1309 (1991). But that case has little or no application to this one.

Richardson filed a malpractice claim against his criminal defense lawyer more than three years after he had been convicted and sentenced for second-degree assault. He appeared to concede that the action accrued on the date he was sentenced. He argued, however, that the statute was tolled under the "discovery rule" because he did not learn that his lawyer's conduct may have constituted malpractice until he conducted independent legal research after he was incarcerated for the assault.

The Court of Appeals acknowledged that the "discovery rule" applied to attorney malpractice actions and could toll the statute of

limitations until the plaintiff discovers, or should have discovered, his injury resulting from professional malpractice – that is, when the former client discovers or reasonably should have discovered that his lawyer’s negligence has injured him. *Id.* at 96. The Court held that in a litigated criminal case, as a matter of law, upon “the entry of an adverse judgment at trial” a client is charged with knowledge, or at least is put on notice, that his or her attorney may have committed malpractice in connection with the representation. And, the Court concluded that Richardson knew he was “injured” on the day he was ordered into custody.

Unlike Mr. Richardson, the Balam-Chucs do not agree that their claim accrued on the date Banfi failed to timely file the petition. They do not agree that it accrued on the day they “discovered” the petition had not been timely filed.

Richardson was imprisoned on the day he was sentenced and judgment was entered. But in this case, Jose remained in the United States and the family pursued other avenues and arguments to persuade the Government that Mr. Banfi’s error was not fatal to the family’s claims. As a result, it was not until the day that all of those other avenues were exhausted, in November 2009, and Jose was forced to leave the United States and the family was separated that damages occurred and the final element of the cause of action was complete. On that date, the action for

malpractice accrued. There is no question that the Balam-Chucs filed this lawsuit within one year of that date.

Similarly in *Janicki Logging & Const. Co., Inc. 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), this Court stated that the limitations period began to run as a matter of law on the date that a trial court entered an order dismissing the plaintiff's lawsuit. But, again, in this case there was no final order entered until Jose was forced to leave the country.

This Court should find that Jose's malpractice action did not accrue until he was forced to leave the country because that result is compelled not only under the reasoning of the cases discussed above, but also for sound policy reasons. Mallen and Smith point out that, absent this approach, clients in non-litigation situations cannot "gamble that the injury will manifest before the statute terminates the remedy." Mallen & Smith, *Legal Malpractice*, *supra* at page 382. Thus, any rule that requires the client to file a malpractice action before it is clear that the attorney's negligence has resulted in actual damage to the client "encourages speculative litigation that can involve the client, the attorneys and the courts in wasteful economic behavior." *Id.*

This is the course being urged by Banfi. Under his theory, the Balam-Chucs should have filed their complaint before Jose was forced to leave the United States. But, until that point there was reason to hope that no damage would ever ensue. Even as the Ninth Circuit rejected Balam-Chucs' claims, it urged the Government to grant Jose a visa. And, without a doubt, had the Balam-Chucs filed a lawsuit at that time, Banfi would have moved to dismiss on the ground that Jose had not been damaged by any failure on his part. It was not until the Government refused to heed this call and finally forced Jose to leave the United States that the Balam-Chucs' cause of action accrued.

Because the law and sound public policy support Balam-Chuc's claim that his cause of action did not accrue until November 2009, at the earliest, and the evidence clearly establishes that the Balam-Chucs filed their complaint within one year of that date, the trial court erred in dismissing their complaint.

3. *Did the trial court err in failing to find that Banfi's failure to insure that the Balam-Chucs' LIFE Act petition was timely filed was negligence as a matter of law?*

A judge can rule that a party has committed negligence as a matter of law. *Pudmaroff v. Allen*, 138 Wn.2d 55, 68, 977 P.2d 574 (1999). As the Court stated in *Morse v. Antonellis*, 149 Wn.2d, 572, 573, 70 P.3d 125

(2003): A party is entitled to a finding of negligence as a matter of law only when “viewing the evidence most favorably to the nonmoving party, ‘there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.’” *Id.* at 574 (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). Thus, the trial court could properly find Banfi negligent as a matter of law and direct a verdict for Balam-Chuc if no reasonable person could decide that Banfi exercised due care. *Id.* Substantial evidence is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

In this case, the trial court erred in failing to grant the Balam-Chucs’ summary judgment on the question of whether or not Banfi was negligent as a matter of law. There is no question that Banfi failed to file the petition in a timely manner. The Ninth Circuit said:

Gabriel Banfi, who supervised the preparation of the I-130, claims that a DeDamm paralegal submitted the application to the INS (now the Department of Homeland Security (“DHS”)) prior to April 30, 2001. However, he acknowledges that the application might have been returned because it was not accompanied by the appropriate filing fee, as required by 8 C.F.R. § 103.2(a)(1). Regardless of Banfi's claims, neither the Balam-Chucs nor anyone at the firm could provide proof that the petition had been submitted prior to the deadline, and on appeal, Balam-Chuc apparently concedes that he cannot provide evidence of a timely filing. Although the INS eventually approved the I-130 petition on October 14, 2002, it ultimately denied

Balam-Chuc's application for adjustment of status based on the untimely filing of the corresponding petition.

Balam-Chuc v. Mukasey, at 1047. There is also no question that had Banfi filed the petition on time, Jose would have been automatically granted status in the United States.

Thus, no reasonable person could find that Banfi exercised due care. He knew the deadline. He prepared the forms. The clients had given him the filing fee. Even if it was not his job to physically mail the forms or otherwise deliver them to the INS, it was his job to insure that the filing was done properly and on time.

Other courts have reached a similar conclusion – failing to meet obvious deadlines is malpractice as a matter of law. *See, e.g., Bergin v. Grace*, 39 A.D.3d 1017, 833 N.Y.S.2d 729 (2007) (Attorney was negligent as a matter of law in failing to timely commence underlying action against insurer based on his belief that six-year statute of limitations for contractual claims was applicable, where insurance policy indisputably set forth a shortened statute of limitations, and attorney learned of the two-year contractual limitations period only upon service of insurer's answer.); *Hickox v. Holleman*, 502 So.2d 626, 633 (Miss. 1987), *superseded on other grounds by Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31 (Miss. 2003) (An attorney's failure to file suit prior to the expiration of the

statute of limitations constituted negligence as a matter of law). This Court should reach the same conclusion in this case.

4. *Did the trial court err in dismissing the wife and children's loss of consortium claims as untimely, when those claims were filed well within three years of Jose's forced departure from the United States?*

The trial judge dismissed the loss of consortium claims on statute of limitations grounds. Although the trial judge did not give any detailed explanation of her ruling, it appears she determined that, because the statute of limitations had run on the attorney malpractice claims, it had also run on the loss of consortium claims. But Washington law is to the contrary.

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. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 691 P.2d 190 (1984).

In a loss of consortium claim, the jury considers such elements of damages as "loss of love, affection, care, services, companionship, society and consortium." *Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 94, 614 P.2d

1272 (1980), quoting *Hinton v. Carmody*, 182 Wn. 123, 130-31, 45 P.2d 32 (1935). Our state Supreme Court has clearly stated that: “The spouse's loss of consortium claim accrues when the spouse first suffers injury from loss of consortium, regardless of when the other spouse's injury claim accrues.” *Green v. American Pharmaceutical Co.*, 136 Wn.2d at 102, n.9, quoting *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 776, 733 P.2d 530 (1987).

In this case, Rebekah and the children did not experience any loss of Jose’s love, affection, care and services until the day he was deported to Mexico. As argued above, this occurred in November 2009. That was the date the loss of consortium claim “accrued.” This lawsuit was filed within one year of that date. Thus, the trial court erred in dismissing those claims.

D. CONCLUSION

This Court should reverse the orders dismissing Balam-Chuc’s action and remand to the trial court for trial on those claims. This Court should also find that the trial court erred in refusing to find that Banfi was negligent as a matter of law.

Respectfully submitted this 15th day of September, 2011.

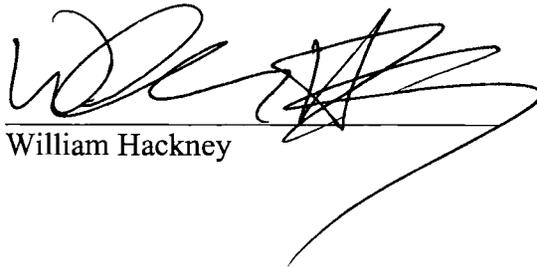
Suzanne Lee Elliott
Suzanne Lee Elliott, WSBA 12634

CERTIFICATE OF SERVICE

I certify that on September 15, 2011, had a copy of this pleading delivered by first class mail, postage prepaid, to:

Mr. Sam B. Franklin
Lee-Smart
1800 One Convention Place
701 Pike Street
Seattle WA 98101-3929

Mr. John Rothschild
Attorney at Law
Suite 1100
705 Second Ave.
Seattle WA 98104



William Hackney