IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

JOSE BALAM-CHUC, REBEKAH BALAM-CHUC, MAYA BALAM-CHUC, and ERIC BALAM-CHUC,	)	No. 67337-8-I
Appellants,	)	DIVISION ONE
v.	)	
GABRIEL BANFI,	)	UNPUBLISHED OPINION
Respondent.	)	FILED: September 17, 2012

Spearman, A.C.J. — This appeal arises from a legal malpractice action brought by Jose and Rebekah Balam-Chuc[1] and their two children against Jose and Rebekah's former attorney, Gabriel Banfi. The action is based on Banfi's alleged failure to timely file Jose's immigration petition with the United States Immigration and Naturalization Service. The Balam-Chucs alleged damages for fees they spent on a new attorney to appeal the untimely filing and loss of consortium damages for Rebekah and the children. The issue presented in this appeal is whether the Balam-Chucs' claims are barred by the statute of limitations, which depends on when they accrued. The Balam-Chucs argue their claims accrued when Jose was required to leave the country in November 2009,

[1] For clarity, first names will be used to refer to Jose and Rebekah in their individual capacities. "Balam-Chucs," will be used to refer to all four members of the family. No disrespect is intended.

after his appeals failed. Banfi argues they accrued in July 2002 when Jose learned of the untimely filed petition. We agree with Banfi that the malpractice claim accrued in July 2002. But loss of consortium claims are separate claims that accrue when the deprived person begins to experience the injury. Therefore, the statute of limitations did not bar those claims, which accrued when Rebekah and the children began to experience that injury in November 2009. Their lawsuit against Banfi was filed within one year. The children's claims, however, were properly dismissed because they were not Banfi's clients and do not show he owed a duty to them. Accordingly, we reverse the dismissal of Rebekah's loss of consortium claim, otherwise affirm, and remand for further proceedings.

FACTS

Jose Balam-Chuc entered the United States from Mexico without inspection on or around August 1997. On May 8, 2000, he married Rebekah Hinman (now Balam-Chuc), a U.S. citizen. The couple has two children, Eric (born December 4, 2001) and Maya (born August 9, 2005). In early 2001, prior to the birth of their children, Jose and Rebekah retained the DeDamm Law Firm to file a family visa petition and application for adjustment of status for Jose under the Legal Immigration Family Equity Act (LIFE Act), enacted by Congress in 2000. Immigration and Naturalization Act (INA) § 245 (1999) (codified at 8 U.S.C. § 1255 (1999)).

Banfi, an associate at the DeDamm firm, assisted with LIFE Act petitions.

Raquel Inchauste, an immigration paralegal, was tasked with completing the necessary paperwork for I-130 petitions and mailing the forms to Immigration and Naturalization Service (INS). Banfi reviewed the files and forms to ensure that there were no disqualifying criminal history entries or other incidents that might bar relief and that nothing in the submittal could result in deportation or otherwise prejudice the applicant. He reviewed the forms in Jose's case and filed a notice of appearance as the attorney of record. Banfi signed off on the petition on March 30, 2001. According to Inchauste, the petition was mailed to the INS before the statutory deadline of April 30, 2001 under the LIFE Act.

INS did not, however, receive the petition until June 13, 2001. In July 2002, Jose appeared for his adjustment interview and learned that his I-130 petition had not been filed by the deadline. Jose and Rebekah contacted the DeDamm firm, but no one could provide proof that the petition had been submitted prior to the deadline. On or around August 6, 2002, the couple contacted Banfi, who had by then left the firm. This was when Banfi first became aware that the petition had not been filed in a timely manner. Banfi referred Jose and Rebekah to other Seattle-area immigration attorneys.

On February 3, 2003, Jose was issued a notice of intent to deny his application for permanent residency because he had failed to submit proof that his petition was filed before the April 30, 2001 deadline. On May 10, 2004, the Department of Homeland Security (DHS), the successor agency to INS, notified

Jose by letter that his application for lawful permanent resident status was denied and any permission to work terminated. The letter stated there was no appeal from DHS's decision and enclosed a notice to appear before an immigration judge. The notice to appear commenced removal proceedings against Jose.

Jose and Rebekah hired a new attorney, Carol Edward, sometime in 2004. Jose appeared with Edward before an immigration judge on August 18, 2004. He admitted to DHS's allegations and conceded removability. He argued, nevertheless, that he was eligible for adjustment of status under the LIFE Act because he had filed the petition on time; alternatively, he argued that the deadline should be tolled due to ineffective assistance of counsel. On January 20, 2005, the immigration judge decided Jose was ineligible for adjustment of status and sustained the charge of removability.

Jose appealed to the Board of Immigration Appeals, which affirmed, and then petitioned for review from the Court of Appeals for the Ninth Circuit. The Ninth Circuit denied the petition, determining that the deadline for filing a LIFE Act petition was not subject to equitable tolling. It nonetheless urged DHS to "look past any technical flaws in Balam-Chuc's application and follow Congress's guidance to exercise its discretion in an equitable manner." Balam-Chuc v. Mukasey, 547 F.3d 1044, 1051 (9th Cir. 2008).

The Ninth Circuit granted Jose's request to stay issuance of its mandate

so he could attempt to negotiate an equitable resolution with DHS. Jose then requested DHS to grant him a "parole in place," which would have permitted him to remain in the United States. In May 2009 the request was denied. Following issuance of the Ninth Circuit's mandate,Jose left for Mexico on November 22, 2009.

On March 26, 2010, the Balam-Chucs filed a legal malpractice action against Banfi. The complaint sought loss of consortium damages for Rebekah, Eric, and Maya, as well as damages in the form of fees they paid to Edward to rectify Banfi's alleged error. After further efforts by Edward, Jose was granted the right to return to the United States around September 2010 and returned November 27, 2010.

Banfi filed a motion for summary judgment dismissal of the Balam-Chucs' lawsuit on April 22, 2011, arguing it was barred by the statute of limitations. The Balam-Chucs filed a motion for summary judgment regarding liability, arguing Banfi committed negligence as a matter of law. The trial court denied the Balam-Chucs' motion, stating that Banfi's negligence was a question of fact. It granted Banfi's motion and dismissed the lawsuit on the ground that it was not filed within the statute of limitations. The court later clarified that the statute of limitations also barred any loss of consortium claims. The Balam-Chucs timely appeal.

DISCUSSION

We review an order granting summary judgment de novo. Troxell v. Rainier Pub. Sch. Dist. No. 307, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). We must view all facts, and draw reasonable inferences from them, in the light most favorable to the nonmoving party. Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 119, 118 P.3d 322 (2005).

The Balam-Chucs argue the trial court's dismissal of their claims should be reversed because (1) none of their claims were barred by the statute of limitations, (2) even if their malpractice claim is barred, their loss of consortium claims accrued when Jose left the country and are not barred, and (3) Banfi was negligent per se. Banfi argues that summary judgment should be affirmed because (1) as a matter of law, Inchauste's failure to timely file the I-130 petition cannot constitute negligence as to Banfi, (2) all of the claims accrued when Jose learned the petition was not timely filed and are therefore barred by the statute of limitations, (3) Banfi had no duty to the Balam-Chuc children, and (4) Rebekah and the children do not have a viable claim for loss of consortium where the underlying tort is prohibited. We hold the malpractice claim was properly dismissed because it accrued in July 2002 when Jose learned that his petition had not been timely filed, and the Balam-Chucs' lawsuit was not brought

within three years. However, the loss of consortium claims did not accrue until Rebekah and the children began to suffer from loss of consortium, and those claims were not barred by the statute of limitations. Finally, though the children's loss of consortium claims were not barred by the statute of limitations, they were properly dismissed because the children were not Banfi's clients and do not otherwise show that he owed them a duty.

Accrual Date of Malpractice Claim

We first address the issue of when the malpractice claim accrued and whether it was barred by the statute of limitations. The Balam-Chucs contend the claim did not accrue until November 2009, when Jose left the country. Banfi, on the other hand, contends it accrued when Jose discovered that the petition had not been timely filed–at the latest, in July 2002. Attorney malpractice claims are subject to a three-year statute of limitations. RCW 4.16.080(3); Huff v. Roach, 125 Wn. App. 724, 729, 106 P.3d 268 (2005). The Balam-Chucs filed suit in March 2010. If they are correct as to the accrual date, their lawsuit was filed within the statute of limitations; if Banfi is correct, it was not.

To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) the existence of an attorney-client relationship giving rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage

incurred. Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). The statute of limitations in a legal malpractice action commences when the client discovers or, in the exercise of reasonable diligence, should have discovered the facts giving rise to the cause of action. Huff, 125 Wn. App. at 729-30. This court, addressing when the element of damage takes place, has further explained:

> Frequently, recitations of the negligence elements inaptly refer to "damages" as an element of negligence rather than damage or injury. Although "injury" and "damages" are often used interchangeably, an important difference exists in meaning. In the legal malpractice context, injury is the invasion of another's legal interest, while damages are the monetary value of those injuries. [The plaintiffs] were injured by [defendant attorney] when [defendant attorney] missed the statute of limitations, effectively invading their legal interests.

Id. at 729-30. The accrual of a statute of limitations is not postponed because substantial damages occur later or until the occurrence of the specific damages for which a plaintiff seeks recovery. Hudson v. Condon, 101 Wn. App. 866, 875, 6 P.3d 615 (2000) (citing Green v. A.P.C. (American Pharm. Co.), 136 Wn.2d 87, 96-97, 960 P.2d 912 (1998)). Instead, a cause of action accrues when the plaintiff has "knowledge of some actual, appreciable damage." Hudson, 101 Wn. App. at 875. Additionally, accrual is not tolled pending the exhaustion of appeals. Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C., 109 Wn. App. 655, 660-61, 37 P.3d 309 (2001). Usually the determination of when a party suffered actual and appreciable injury is a question of fact.

Haslund v. City of Seattle, 86 Wn.2d 607, 620, 547 P.2d 1221 (1976). In some cases, however, a court may be able to conclude as a matter of law that no triable issue of fact exists as to when the injury occurred. Id. at 621.

This issue turns on when the Balam-Chucs experienced injury or damage. They contend there was no actual and appreciable harm until the appeals and requests for equitable relief were exhausted and Jose left the country on November 25, 2009. Until then, they argue, his deportation was speculative. We disagree.

The facts here are similar to those in Huff and Janicki. In Huff, we held that the plaintiffs' legal malpractice claim accrued, and the three-year limitations period began to run when their former attorney missed filing their underlying personal injury action within the statute of limitations, "effectively invading their legal interests"–not when the underlying action was dismissed seven years later. Huff, 125 Wn. App. at 730. In Janicki, Janicki Logging sued its former law firm because it missed a deadline for filing in the court of claims. Janicki, 109 Wn. App. at 658. The trial court ruled Janicki's lawsuit was barred by the statute of limitations. Id. at 659. Janicki appealed, arguing that the statute of limitations did not begin to run until all appeals on the underlying matter had been exhausted. Id. at 660. Janicki argued it could not have known it was damaged before that time, because any damage was only speculative up to that point. The court declined to adopt Janicki's proposed rule that an appeal in a civil matter delays

discovery for statute of limitations purposes. Id. It explained:

> Here, as in [Richardson v. Denend, 59 Wn. App. 92, 795 P.2d 1192 (1990)], the facts as pleaded are susceptible of but one conclusion: Janicki knew or should have known when its claim was dismissed as untimely that its lawyers missed a deadline, leaving in place a judgment that denied Janicki the relief it had sought. [See id. at 95]. The denial of that relief was in itself an adverse consequence.

Janicki, 109 Wn. App. at 660-61.

The Balam-Chucs cite Murphey v. Grass, 164 Wn. App. 584, 267 P.3d 376 (2011) rev. denied, 173 Wn.2d 1022, 272 P.3d 850 (2012) and Haslund, in support, but those cases are distinguishable on their facts. Murphey involved a malpractice claim against an accountant alleging negligent preparation of tax returns. Murphey, 164 Wn. App. at 586. The parties agreed that the malpractice claim accrued at the latest when the revenue department issued its "final assessments." They only disagreed as to when that event occurred. Id. at 590. The court concluded that where the relevant statute made an assessment final at the time an individual is sent an initial tax assessment only if the taxpayer elects not to file a timely petition for correction of the assessment, and where Murphey had filed such a petition, the assessment did not become final until the administrative appeal process concluded. Id. at 591.

Haslund involved harm stemming from the issuance of an invalid building permit. There, the plaintiffs sued the city for damages eventually resulting from the issuance of a permit in 1969. Haslund, 86 Wn.2d at 609. Construction on the

apartment building began in March 1971. The permit was adjudicated invalid in July 1973. Id. at 610. The plaintiffs' efforts to obtain a new building permit were unsuccessful, and they were unable to complete the construction of the building and the land lost most of its value. Haslund sued the city in February 1974, more than three years after the permit had issued. The city moved to dismiss, arguing that the cause of action accrued on the day the permit was issued in 1969. Id. at 619. The court held, as a matter of law, that the plaintiffs suffered actual and appreciable harm as of July 1973 when the permit was declared invalid and construction halted. Id. at 621.

Here, the Balam-Chucs should have been aware that their legal interest was invaded in July 2002, when Jose was informed at his adjustment interview that his petition had not been filed before the April 2001 deadline. At that time, Jose became aware that he may have lost the opportunity to process his adjustment of status application under the LIFE Act and was "put on notice, that his…attorney may have committed malpractice in connection with the representation." Janicki, 109 Wn. App. at 660 (quoting Richardson, 59 Wn. App. at 98). As was made clear throughout his appeals and attempts to seek equitable relief, the LIFE Act provision stated a firm deadline that was not subject to tolling. That the Balam-Chucs suffered injury from Banfi's alleged error well before Jose left the country in 2009 is evident from the fact that they were forced to retain Edward in 2004 to rectify the error.[2] Their position that they

suffered no injury until 2009 is untenable given that they seek to recover damages spent on Edward's services. Though the full extent of their damages (i.e., whether Jose would be forced to leave the country) was not known until later, their claims were actionable and accrued when they became aware of the untimely filed petition.

Accrual Date of Loss of Consortium Claims

The next issue is whether the loss of consortium claims are subject to a different accrual date. The Balam-Chucs contend that loss of consortium claims are independent, not derivative, and that theirs did not accrue until November 2009, when Jose left the country. They cite, among other cases, Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 733 P.2d 530 (1987) in support. Banfi responds that loss of consortium claims are not viable where the underlying tort is prohibited, citing Conradt v. Four Star Promotions, Inc., 45 Wn. App. 847, 728 P.2d 617 (1986).

This issue is squarely addressed by Reichelt. Edward Reichelt sustained various injuries after being exposed to asbestos for years at his job. Reichelt, 107 Wn.2d at 763. He and his wife sued asbestos manufacturers and distributors, asserting claims based on products liability, negligence, misrepresentation, and loss of consortium. Id. at 765. The trial court dismissed all of the claims as barred by the statute of limitations. The court of appeals

[2] Even if the injury in their malpractice claim against Banfi was not deemed to accrue until 2004, when they hired Edward, the malpractice claim was still not filed within the statute of limitations.

affirmed the dismissal of the products liability and loss of consortium claims, and dismissed the negligence and misrepresentation claims on the ground that they were inadequately pleaded. Id. The Reichelts sought review of the court of appeals' disposition of their negligence and loss of consortium claims only.

The Washington Supreme Court held that where the husband knew or should have known of the facts necessary to establish the essential elements of his negligence claim prior to October 20, 1977, his negligence cause of action filed on October 20, 1980 was barred by the three-year statute of limitations. Id. at 768-69. In addressing the wife's loss of consortium claim, however, the court held that loss of consortium "is a separate claim that does not necessarily accrue when the impaired spouse's claim accrues." Id. at 773. It explained:

> One commentator describes a loss of consortium claim as derivative, but derivative in a special sense. A derivative action is generally one that owes its existence to a preceding cause of action and is often, as in a shareholder's derivative suit, no more than a separate right to enforce the preceding claim. While a loss of consortium action is dependent on the occurrence of an injury to another, the claimant suffers an original injury that is the subject of the action. Thus, the injury rather than the claim is derivative. For this reason, as this commentator posits, the rights of the deprived spouse should not be restricted by or contingent on the rights of the impaired spouse.

Id. at 773-75 (footnotes omitted). The court held that because the wife's claim is a separate cause of action, "it logically follows that the statute of limitations governing her claim should begin to run when she experienced her injury, not when her husband knew of his injury." Id. at 776. The court concluded that "a

deprived spouse's loss of consortium claim is not necessarily determined by the timeliness of the impaired spouse's claim" and remanded for a determination of when the wife in that case began to experience loss of consortium. Id. at 776-77.

Here, as in Reichelt, there is one underlying claim at issue (legal malpractice here, negligence in Reichelt) and a claim for loss of consortium. The legal malpractice claim here is barred under the statute of limitations, like the negligence claim in Reichelt. In Reichelt, the loss of consortium claim could proceed as an independent claim, depending on when the spouse first experienced loss. Here, the claims for loss of consortium accrued when Rebekah and the children began to experience loss of consortium, and Banfi does not dispute that such an event began when Jose left the country in November 2009. Where the Balam-Chucs' lawsuit was filed within one year, the loss of consortium claims were not barred by the statute of limitations.[3]

Conradt does not apply here.[4] There, the court held the wife's claims for

[3] It is unclear what statute of limitations applies to an independently proceeding loss of consortium claim. We assume, without deciding, that it is the statute of limitations that applies to the underlying claim (here, three years). The parties do not brief this issue on appeal and may raise it below should they disagree as to the applicable limitations period.

[4] Specifically, Banfi relies on the following language:

> No claim for loss of consortium will arise if no tort is committed against the impaired spouse. . . . Even though loss of consortium has been held a separate, independent, nonderivative action of the deprived spouse and not affected by the negligence of the impaired spouse, Christie v. Maxwell, 40 Wn. App. 40, 44, 696 P.2d 1256 (1985), nevertheless, an element of this cause of action is the "tort committed against the 'impaired' spouse." Lund, 100 Wn.2d at 744, 675 P.2d 226. Moreover, a consortium claim by a lone spouse will not be recognized where the underlying tort has been prohibited or abolished. Lund, at 747.

Conradt, 45 Wn. App. at 852-53.

loss of consortium were barred because the husband signed an assumption of risk release, abandoning his right to complain if an accident occurred. Id. at 853. Because of the release, "no cause of action arose from which a court could conclude a tort had been committed upon Mr. Conradt. Therefore, an element of the consortium claim was lacking and summary judgment dismissal was proper." Id. at 853. In other words, where there has been no actionable underlying tort against the injured spouse, the loss of consortium claimant would not be able to prevail because he or she could not prove liability based on the underlying tort claim. But a dismissal of the underlying claim based on statute of limitations–rather than substantive–grounds is a different matter, as shown by Reichelt. Here, because there has been no determination of Banfi's negligence, the legal malpractice claim is not barred on substantive grounds. Thus, Conradt is inapposite.

Children's Loss of Consortium Claims

The remaining issue is whether the children's loss of consortium claims were properly dismissed because, as Banfi argues, he owed them no legal duty. He contends they were not his clients and do not otherwise show that they meet the "third-party beneficiary test." The Balam-Chucs make no response to this argument. We agree with Banfi.

In the absence of privity of contract between an attorney and a putative client, there must be some other basis to establish a duty for the attorney to be

held liable in a legal malpractice action. Stangland v. Brock, 109 Wn.2d 675, 680, 747 P.2d 464 (1987). The Washington Supreme Court developed the following multifactor balancing test to determine whether an attorney owes a duty of care to a non-client:

> (1) the extent to which the transaction was intended to benefit the plaintiff;
> (2) the foreseeability of harm to the plaintiff;
> (3) the degree of certainty that the plaintiff suffered injury;
> (4) the closeness of the connection between the defendant's conduct and the injury;
> (5) the policy of preventing future harm; and
> (6) the extent to which the profession would be unduly burdened by a finding of liability.

Trask v. Butler, 123 Wn.2d 835, 843, 872 P.2d 1080 (1994). The first factor is the threshold inquiry; if the representation is not intended to benefit the non-client, he or she has no standing to sue for malpractice. Id. at 842-43; Leipham v. Adams, 77 Wn. App. 827, 832, 894 P.2d 576 (1995). No "further inquiry need be made unless such an intent exists." Trask, 123 Wn.2d at 843.

Here, there is no evidence Banfi's representation of Jose and Rebekah was intended to benefit the children. Jose and Rebekah retained the DeDamm firm prior to the birth of the children. There is also no evidence that Jose or Rebekah's words or actions led Banfi to believe that the couple's unborn children would benefit from his services. Banfi contends he never discussed with the Balam-Chucs their plans for children. The Balam-Chucs provide no evidence or argument to rebut this, and they cite no authority establishing that an

attorney's duty to non-clients can extend to this situation. Accordingly, we affirm the dismissal of the children's loss of consortium claims, reinstating only Rebekah's loss of consortium claim (regarding Jose's absence from November 2009 to November 2010).

We reverse the trial court's dismissal of Rebekah's loss of consortium claim and remand for further proceedings. We otherwise affirm.[5]

Spearman, A.C.J.

WE CONCUR

Grosse, J

[5] The parties advance other arguments regarding negligence per se and how Inchauste's acts or omissions should factor into Banfi's liability. The Balam-Chucs would have us hold that Banfi committed negligence per se and remand to determine damages. Banfi would have us hold that he was not negligent as a matter of law and affirm the dismissal of all of the Balam-Chucs' claims on that basis. We decline the parties' invitation to decide the appeal based on these arguments, which were not, in any event, reached by the trial court. Whether Banfi was negligent involves disputed issues of material fact.