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APPENDIX A

1-20-0724

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM CARLSON and WILLIS CAPITAL, LLC,
Plaintiff-Appellants,

v.

THOMAS CRONIN; AARON L. DAVIS; LELAND W. HUTCHINSON, JR.; DANIEL J. KELLEY; and CRONIN & COMPANY LTD.,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
No. 16 L 383
Honorable Daniel J. Kubasiak, Judge Presiding,

ORDER

This cause coming to be heard on Plaintiffs-Appellants WILLIAM CARLSON's and WILLIS CAPITAL, LLC's Petition for Rehearing, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

ORDER ENTERED

JUL 26 2022
APPELLATE COURT FIRST DISTRICT

/s/_____
PRESIDING JUSTICE

/s/_____
JUSTICE

/s/_____
JUSTICE

APPENDIX B

2022 IL App (1st) 200724-U
No. 1-20-0724
Order filed June 30, 2022

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM CARLSON and WILLIS CAPITAL, LLC,
Plaintiffs-Appellants,

v.

THOMAS CRONIN, AARON L. DAVIS, LELAND W. HUTCHINSON, JR., DANIEL J. KELLEY; and CRONIN & COMPANY LTD,
Defendants-Appellees.

JUSTICE MARTIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

Appeal from the Circuit Court of Cook County.

16 L 383
Honorable Daniel J. Kubasiak, Judge Presiding.

ORDER

¶1 *Held*: We affirm the circuit court's grant of summary judgment in favor of the Cronin defendants on count II of the amended complaint for legal malpractice brought by William Carlson.

¶2 William Carlson (Carlson) entered into a settlement agreement with his former business partners Thomas Hutchinson (Hutchinson) and Owen O'Neill (O'Neill). Under the terms of the agreement, Carlson agreed to sell them his ownership interest in Belvedere Trading LLC. Later, Carlson sought to reopen and set aside the agreement, arguing that it was procured by fraud and malfeasance on the part of his former business partners. Having been unsuccessful in his efforts to have the agreement set aside, Carlson filed a series of legal malpractice claims against various law firms and lawyers who advised him in connection with the agreement. See *Willis Capital LLC v. Belvedere Trading LLC*, 2015 IL App (1st) 132183; *Carlson v. Fish*, 2015 IL App (1st) 140526 (Carlson l); and *Carlson v. Michael Best & Friedrich LLP*, 2021 IL App (1st) 191961 (*Carlson II*). This is the latest appeal in that series.[1]

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July I, 2018), this appeal has been resolved without oral argument upon entry of a separate written order.

¶3 I. BACKGROUND

¶4 In 2002, Carlson founded Belvedere Trading LLC (Belvedere) for the purpose of trading S&P 500 equity index options, Carlson owned his interest in Belvedere through another limited liability company, Willis Capital LLC, of which he was the sole owner and member. Hutchinson and O'Neill eventually joined Belvedere as partners. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶5. "Carlson was the sole managing member and held about a 62% membership interest; O'Neill held about a 25% interest and Hutchinson held the remaining 13% interest." *Carlson I*, 2015 IL App (1st) 140526, ¶6. However, by 2004, O'Neill and Hutchinson were managing members and owned an equal 33.3% interest along with Carlson. *Id.*

¶5 In 2005, Carlson took a leave of absence from actively managing Belvedere due to health reasons. When Carlson returned to the company in 2006, "he had a falling out with O'Neill and Hutchinson over numerous issues, including profit distribution and management." *Id.* ¶7.

¶6 In March 2007, Carlson retained Attorneys Shawn M. Collins and David J, Fish of the Collins Law Firm, P.C. to represent him in his dispute with O'Neill and Hutchinson; Fish later formed the Fish Law Firm while continuing to represent Carlson; the two law firms are collectively referred to as "Collins." *Id.*

¶7 In May 2007, Collins filed a request for arbitration on behalf of Carlson with the Chicago

Board Options Exchange (CBOE), as provided for in Belvedere's operating agreement. *Carlson II*, 2021 IL App (1st) 191961, ¶6. In addition, Collins filed a complaint for injunctive relief in the circuit court seeking to dissolve Belvedere and compel a purchase of Carlson's interest in the company for fair value. *Id.* Hutchinson and O'Neill refused Carlson's request to obtain an appraisal of Belvedere and also denied his request for access to the company's books and records.

¶8 In February 2008, the parties agreed to mediate their dispute. Carlson failed to obtain an independent appraisal of his interest in Belvedere prior to the mediation, but in an e-mail to Collins, he estimated that by the end of 2009, the company could be sold for $100 million. *Id.* ¶7; *Carlson I*, 2015 IL App (1st) 140526, ¶8.

¶9 Unbeknownst to Carlson, and prior to the mediation, O'Neill and Hutchinson employed an accounting firm to conduct an appraisal of Belvedere to determine a market value of Carlson's one-third interest in the company. *Carlson II*, 2021 IL App (1st) 191961, ¶7; *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶8. The accounting firm developed statistical models to estimate this value and presented the models to O'Neill and Hutchinson. After receiving the statistical models, O'Neill and Hutchinson directed the accounting firm not to prepare a written report of its findings and to stop further work on the appraisal. None of this was disclosed to Carlson.

¶10 At the mediation, Carlson again asked for an

appraisal of Belvedere. In response, Hutchinson and O'Neill claimed that an appraisal was unnecessary as they were not interested in selling their interests in Belvedere. *Carlson II*, 2021 IL App (1st) 191961, ¶8; *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶9. The mediation resulted in Carlson agreeing to sell his interest in Belvedere for $17.5 million. The three owners signed a document delineating the terms of the sale, which were subsequently memorialized in a settlement agreement signed by them in March 2008. *Carlson II*, 2021 IL App (1st) 191961, ¶9; *Carlson I*, 2015 IL App (1st) 140526, ¶8.

¶11 The settlement agreement provided in part that it represented:

> "a complete compromise of the controversy between the parties involving disputed issues of law and fact, and that each party fully assumes the risk that the facts or law may be other than they believe"; the parties agree "that they are not fiduciaries to each other with respect to the negotiations, preparation and execution of' the agreement; and the parties were advised by their respective attorneys and advisors as to the merits of the agreement and that no party was relying on any promise, representation or disclosure of any other party.

¶12 In addition, the agreement contained a fee-

shifting provision providing that attorney fees and expenses could be awarded to a prevailing party in "an action brought by any party to enforce the terms" of the agreement.

¶13 In September 2008, approximately six months after the mediated settlement, Carlson exchanged e-mails with Shawn Collins expressing his belief that O'Neill and Hutchinson had fraudulently tricked him into selling his interest in Belvedere for less than its true value. *Carlson II*, 2021 IL App (1st) 191961, ¶11; *Carlson I*, 2015 IL App (1st) 140526, ¶9. Carlson and Shawn Collins discussed the possibilities of petitioning the circuit court to reopen and set aside the settlement agreement; and of filing a fraud action against O'Neill and Hutchinson.

¶14 In November 2008, Carlson contacted a college friend Chris Parker, who was an attorney with the law firm of Michael Best & Friedrich, LLP (Michael Best). Carlson asked Parker to review the settlement agreement and evaluate whether he had any viable claims against his former business partners. *Carlson II*, 2021 IL App (1st) 191961, ¶12. Carlson also began expressing dissatisfaction with the legal representation he received from Collins.

¶15 On November 19, 2008, Carlson met with attorneys from the law firm of Drinker, Biddle & Reath, LLP (Drinker), to review the settlement agreement and discuss possible fraud claims against his former business partners. *Id.* ¶13; *Carlson I*, 2015 IL App (1st) 140526, ¶16. Carlson claimed that during

these discussions, questions were raised concerning whether the legal services he received from Collins had been substandard. Carlson maintained that this was the first time he became aware of a possible legal malpractice claim against Collins.

¶16 From August 18, 2010, through September 16, 2010, Carlson officially retained the law firm of Michael Best for consultation regarding a potential legal malpractice action against Collins. Parker advised Carlson that a legal malpractice action against Collins "may be tough in the face of the statute of limitations." *Carlson II*, 2021 IL App (1st) 191961, ¶14. Parker informed Carlson that the applicable statute of limitations for a legal malpractice claim was two years from the date Carlson should have learned of the alleged malpractice. *Id.*

¶17 On November 11, 2010, Carlson retained the law firm of Cronin & Co., Ltd (Cronin). In the course of their research, Carlson and counsel from Cronin contacted the accounting firm which had conducted the pre-mediation appraisal of Belvedere. They discovered that unbeknownst to Carlson, O'Neill and Hutchinson had employed the accounting firm to conduct a pre-mediation appraisal of Belvedere to determine a market value of Carlson's interest in the company. *Id.* ¶15; *Willis Capital LLC*, 2015 IL App (1st) 132183, 112.

¶18 Cronin filed a legal malpractice complaint on behalf of Carlson against Collins on November 18, 2010. *Carlson II*, 2021 IL App (1st) 191961; ¶16;

Carlson I, 2015 IL App (1st) 140526, ¶17; *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶12. In the complaint, Carlson alleged that Collins failed to obtain an appraisal of Belvedere and "thereby permitted their clients to settle without any appropriate advice and counsel as to what was being surrendered." *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶12. Cronin subsequently filed an amended legal malpractice complaint against Collins on February 23, 2011. *Carlson II*, 2021 IL App (1st) 191961, ¶16. ln March 2011, Collins moved to dismiss the amended complaint on statute of limitations grounds.

¶19 On May 17, 2011, Cronin filed a request for arbitration on Carlson's behalf with the CBOE. *Id.* ¶17. Carlson alleged that his former business partners were fiduciaries and had committed fraud by withholding information regarding Belvedere's value. O'Neill and Hutchinson filed a motion to dismiss the arbitration.

¶20 On July 13, 2011, Carlson and Collins entered into a tolling agreement whereby Carlson voluntarily dismissed his amended legal malpractice complaint against Collins, without prejudice. *Id.* ¶18. The tolling agreement provided that if the arbitration action was "resolved on or after April 13, 2012, [Carlson] shall have a period of 90 days after resolution of the arbitration to refile this action. If the arbitration is resolved before April 13, 2012, the one-year refiling provision in 735 ILCS 5/2-1009 shall remain intact." *Id.* The tolling agreement further provided that it "shall not act to revive any cause(s) of action already

barred by the statute of limitations when the legal malpractice complaint was filed on November 18, 2010." The CBOE eventually dismissed the arbitration with prejudice on March 5, 2012. *Id.* ¶19; *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶12.

¶21 On March 26, 2012, pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), Carlson through Cronin filed a petition, and subsequent amended petition, in the circuit court, seeking to "reopen" the settlement agreement. *Carlson II*, 2021 IL App (1st) 191961, ¶19; *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶¶1, 13. The amended petition alleged the following: O'Neill and Hutchinson had fraudulently concealed information regarding the value of Belvedere prior to execution of the settlement agreement; the provision in the settlement agreement waiving fiduciary duties was unenforceable; and the CBOE's dismissal of the arbitration had no preclusive effect on the petition. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶1.

¶22 O'Neill and Hutchinson filed a motion to dismiss the amended petition pursuant to section 2-619.1 of Code (735 ILCS 5/2-619.1 (West 2012)). They argued that the amended petition was barred by the two-year statute of limitations applicable to section 2-1401 petitions. They further argued that the amended petition was barred by the CBOE's order dismissing the arbitration and by the release contained in the settlement agreement. They also contended that the amended petition was barred by Illinois Supreme Court Rule 201(b)(3) (eff. July 1, 2014), which protects

the identity of consultants, their opinions, and work product from discovery, except under "exceptional circumstances." *Carlson II*, 2021 IL App (1st) 191961, ¶19; *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶14.

¶23 On June 7, 2013, the circuit court dismissed the amended petition with prejudice. *Carlson II*, 2021 IL App (1st) 191961, ¶20; *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶15. The court determined that the amended petition failed to state a claim for rescission of the settlement agreement because it failed to allege sufficient facts showing that Carlson intended to return the $17.5 million. The court also determined that the amended petition failed to state a claim for fraudulent concealment in light of the nonreliance and mutual release clauses contained in the settlement agreement. The court further found that Carlson failed to exercise due diligence in the 2007 litigation where he never tried to obtain an appraisal of Belvedere prior to the mediation, even though he was able to produce an appraisal in the present litigation based on documents available at the time of the settlement. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶15. The court also determined that the amended petition was barred by the doctrine of res judicata and that Illinois Supreme Court Rule 201(b)(3) (201 Ill.2d R. 201(b)(3)) protected the accounting firm's appraisal from disclosure as consultant work product. *Id.*

¶24 O'Neill and Hutchinson subsequently filed a petition seeking attorney fees and costs pursuant to the fee-shifting provision in the settlement agreement.

Carlson filed a notice of appeal on July 5, 2013. On January 6, 2014, the circuit court awarded O'Neill and Hutchinson $172,391.75 in fees and costs. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶16. Carlson filed a second notice of appeal on January 31, 2014, challenging the court's fee award. This court consolidated the two appeals (*Willis Capital* appeal).

¶25 While the *Willis Capital* appeal was pending, Cronin refiled Carlson's legal malpractice complaint against Collins on July 5, 2013. *Carlson I*, 2015 IL App (1st) 140526, ¶17. The circuit court subsequently granted Collins's motion to dismiss the refiled complaint pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2012)), finding it was time-barred by the two-year statute of limitations applicable to legal malpractice actions (735 ILCS 5/13-214.3(b) (West 2012)). The court determined that the cause of action accrued at the true Carlson knew he had been injured, which the court found was no later than September 2008. The court found that by November 12 or 13 of 2008, Carlson had identified his former business partners as the wrongful cause of his injury, which put him on inquiry notice that a cause of action had accrued. *Id.* at 19. The court concluded that because Carlson's initial legal malpractice complaint was filed on November 18, 2010, which was more than two years after his cause of action accrued, the complaint was time-barred by the two-year statute of limitations applicable to legal malpractice actions. *Id.* Carlson appealed (*Carlson I* appeal).

¶26 Carlson retained the law firm of Michael Best

for a second time on February 27, 2014, to act as a consultant in connection with his appeals in Willis Capital and *Carlson I*.

¶27 On appeal in *Willis Capital*, this court affirmed in part and reversed in part. We affirmed the circuit court's dismissal of Carlson's amended petition to reopen the settlement agreement. We determined that even if Carlson's former business partners owed him a fiduciary duty and fraudulently concealed the results of the appraisal from him, this did not relieve Carlson of his duty to exercise due diligence in discovering the appraisal value of his interest in Belvedere prior to the mediation and settlement. *Id.* ¶¶20-23. We reversed the court's judgment with respect to the award of attorney fees and costs pursuant to the fee-shifting provision in the settlement agreement. We determined that the provision was intended to award attorney fees and costs to prevailing parties who sought to enforce the terms of the settlement agreement, as opposed to parties, such as O'Neill and Hutchinson, who sought to defend the terms of the agreement in response to a section 2-1401 petition to invalidate the agreement. *Id.* ¶¶24-25.

¶28 On appeal in *Carlson I*, we affirmed the circuit court's dismissal of Carlson's legal malpractice complaint against Collins. *Carlson I*, 2015 IL App (1st) 140526, ¶¶4, 48. We agreed with the circuit court that the complaint was time-barred by the two-year statute of limitations found in section 13-214.3(b) of the Code. We found that correspondence between Carlson and Collins, which began in September 2008 and continued

through November 2008, along with certain judicial admissions made by Carlson, showed that he was aware he was wrongfully injured by his former business partners no later than November 13, 2008, and probably as early as September 2008. *Id.* ¶¶28-33.

¶29 Carlson's second retention of Michael Best ended in May 2015, after Carlson decided not to file a petition for leave to appeal *Carlson I* to the Illinois Supreme Court. Carlson discharged Cronin in June 2015.

¶30 On January 13, 2016, Carlson filed a two-count complaint for legal malpractice in the circuit court against Michael Best, Cronin, and several attorneys associated with Cronin. *Carlson II*, 2021 IL App (1st) 191961, ¶28. Carlson filed an amended complaint on August 31, 2016. Count I of the amended complaint made allegations against Michael Best. Count II made allegations against Cronin and Cronin attorneys Aaron L. Davis, Leland W. Hutchinson, Jr., and Daniel J. Kelley (collectively, Cronin defendants).

¶31 The circuit court subsequently granted summary judgment in favor of Michael Best and we affirmed in *Carlson II*, 2021 IL App (1st) 191961, ¶109. In affirming the circuit court's decision we determined the following: Michael Best did not cause Carlson to lose any legal malpractice claims that he may have had against Collins because these claims were time-barred by the applicable statute of limitations prior to Carlson retaining Michael Best in August 2010; Michael Best did not cause Carlson to lose any

potential legal malpractice claims against Drinker because these claims were still viable when Carlson retained successor counsel in November 2010; and Carlson cannot sue Michael Best for failing to inform him of a claim against Michael Best as there is no duty for a law firm to inform a client that he or she has a claim against it. *Id.* ¶107.

¶32 We also determined that the circuit court did not abuse its discretion in denying Carlson leave to file a second amended legal malpractice complaint where the proposed amendment concerned allegations that were time-barred by the applicable period of repose and Carlson failed to establish the first factor set forth in *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992), showing that the allegations would cure defects in the prior pleadings. *Id.* ¶106. We further determined that the court did not abuse its discretion in denying Carlson's motion to conduct additional discovery where he failed to support the motion with a Rule 191 (b) affidavit. We finally concluded that the court did not abuse its discretion in declining to address arguments Carlson raised in his motion for reconsideration as they were not only waived, but without merit. *Id.* ¶108.

¶33 The present appeal concerns count II of Carlson's amended legal malpractice complaint against the Cronin defendants. In this count, Carlson alleged in the alternative, that if it was determined that his claims against Michael Best were time-barred by the applicable statute of limitations, then the Cronin defendants breached the applicable standard of care by

failing to advise him that he had potential legal malpractice claims against Michael Best, Drinker, and Collins. Carlson also alleged overbilling and failure to account for billed time. In response, the Cronin defendants filed a motion for summary judgment and attorneys Davis, Hutchinson, Jr., aud Kelley, filed their own motion for summary judgment.

¶34 The circuit court entered an opinion aud order on December 6, 2019, and a subsequent opinion and order on April 24, 2020, granting the motions for summary judgment on count II of Carlson's amended legal malpractice complaint. The court also denied Carlson's motions for leave to file second and third amended legal malpractice complaints. Carlson now appeals.

¶35 We address Carlson's claims starting with his contention that the circuit court erred in granting summary judgment in favor of the Cronin defendants. We provide additional facts in the analysis section where necessary to address specific issues.

¶36 II. ANALYSIS

¶37 A. Summary Judgment

¶38 "The purpose of summary judgment is to determine whether a genuine issue of material fact exists that would require a trial." *Hodges v. St. Clair County*, 263 Ill. App. 3d 490, 492 (1994). Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact aud that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005© (West 2012). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Our review of a summary judgment order is *de novo. Id.*

¶39 I. Drinker

¶40 Carlson first argues that the circuit court erred in granting summary judgment in favor of Cronin. Carlson contends that he established a *prima facie* case that Cronin violated the standard of care by failing to file a legal malpractice lawsuit against Drinker prior to expiration of the statute of limitations or by failing to obtain a tolling agreement.

¶41 Section 13-214.3 of the Code "sets forth two independent timing requirements for legal malpractice actions: the two-year statute of limitations in subsection (b) and the six-year statute of repose in subsection ©," *Sorenson v. Law Offices of Theodore Poehlmann*, 327 Ill. App. 3d 706, 708 (2002); 735 ILCS

5/13-214.3(b), © (West 2014). We focus our attention on subsection © which provides that an action for damages based on tort, contract, or otherwise against an attorney arising out of an act or omission in the performance of professional services may not be commenced more than six years after the date on which the act or omission occurred. 735 ILCS 5/13-214.3 © (West 2014).

¶42 "In contrast to a statute of limitations, which determines the time within which a lawsuit may be commenced after a cause of action bas accrued, a statute of repose extinguishes the action after a defined period of time, regardless of when the action accrued." *Evanston Insurance Co v. Riseborough*, 2014 IL 114271, ¶16. When the repose period expires, the cause of action is extinguished and the plaintiffs right to bring the action is terminated. Evanston Insurance, 2014 IL 114271, ¶16. Statutes of repose begin to run "on the last date on which the attorney performs the work involved in the alleged negligence." *Snyder v. Heidelberger*, 2011 IL 111052, ¶18.

¶43 In this case, the last act or omission which gave rise to Carlson's potential claims of legal malpractice against Drinker occurred in October 2009, when Drinker purportedly failed to advise Carlson of the two-year statute of limitations regarding his claims against Collins. Thus, the six-year statute of repose started running in October 2009 and ended October 2015. The record shows that Carlson discharged Cronin in June 2015 and obtained new legal representation. Therefore, Carlson's legal malpractice

claims against Drinker remained viable nearly four months after Cronin was discharged.

¶44 Our courts have recognized that when a plaintiff's cause of action remains viable at the time the attorney is discharged, it cannot be said that the action was lost due to the attorney's alleged negligence, since the action still existed at the time the attorney was discharged. See *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 755-56 (2008). Thus, as a matter of law, Cronin cannot be deemed a proximate cause of the loss of Carlson's legal malpractice claims against Drinker because these claims remained viable months after Cronin was discharged.

¶45 2. Individual Attorneys

¶46 Carlson next contends that he had viable legal malpractice claims against attorneys Aaron L. Davis, Leland W. Hutchinson, Jr., and Daniel J. Kelley, in their individual .and personal capacities for failing to advise him about legal malpractice claims he had against Drinker. In support of this contention Carlson cites to Illinois Supreme Court Rule 721(b) (eff. July 1, 2003). The rule provides in relevant pat that "[a]ny attorney who by act or omission causes the corporation, association, limited liability company, or registered limited liability partnership to act in a way which violates standards of professional conduct, including any provision of this rule, is personally responsible for such act or omission and is subject to discipline therefor." *Id.*

¶47 Our courts have determined that although the rules of professional conduct may be relevant to the standard of care in a legal malpractice claim, the rules, in and of themselves, do not establish liability in a legal malpractice case. *Vandenberg v. Brunswick Corporation*, 2017 IL App (1st) 170181, ¶¶33-34; *Nagy v. Beckley*, 218 Ill. App. 3d 875, 881 (1991).

¶48 In addition, we further note that it is well established that "[a] claim for legal malpractice requires (1) an attorney-client relationship, (2) a duty arising from that relationship, (3) a breach of that duty, and (4) actual damages or injury proximately caused by the breach." *Zweig v. Miller*, 2020 IL App (1st) 191409, ¶25. The record in this case shows that Carlson entered into an attorney-client relationship with Thomas Cronin and the Cronin law firm, but not the individual attorneys employed by the firm. This is evidenced by the November 19, 2010, engagement letter between Carlson and Cronin, which provided that although the law firm anticipated "using associate lawyers and perhaps other attorneys to prosecute this litigation," the firm would "remain primarily responsible for the prosecution of the litigation."

¶49 Moreover, not only was there not an attorney-client relationship between Carlson and any of the individual attorneys employed by the Cronin law firm–no allegations of negligent conduct were asserted against the attorneys in their individual capacities. Therefore, we find that the circuit court properly granted summary judgment to attorneys Davis, Hutchinson, Jr., and Kelley, in their individual

capacities.

¶50 3. Overbilling

¶51 Carlson next argues that Cronin breached the standard of care by overbilling him for its legal services. In his initial legal malpractice complaint, Carlson alleged that Cronin billed him in excess of $750,000, which he claimed was in breach of the attorney fee cap of $250,000 contained in the retainer agreement. In his amended complaint, Carlson alleged that Cronin billed him in excess of $750,000 and never provided him with an itemized bill or detailed statement of the work performed. Carlson claimed that this amount was "unreasonable, unnecessary, or otherwise unfair because under no circumstance would it cost in excess of $750,000 to work on two motions to dismiss, two appeals and initiate three legal proceedings."'

¶52 Carlson maintains that the circuit court erred in finding that his claim for overbilling was time-barred, as a matter of law, by the two-year statute of limitations set forth in subsection (b) of section 13-214.3 of the Code (735 ILCS 5/13-214.3(b) (West 2014)). Subsection (b) provides that an action for damages "against an attorney arising out of an act or omission in the performance of professional services *** must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2014). For purposes of a legal malpractice action, a plaintiff is

considered to be injured when he suffers a loss for which he may seek monetary damages. *Stevens v. McGuire Woods LLP*, 2015 IL 118652, ¶12.

¶53 The two-year statute of limitations applicable to legal malpractice actions incorporates the "discovery rule," which delays the commencement of the statutory period until the injured party knows or reasonably should know that he has been injured, and that the injury may have been wrongfully caused. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). The discovery rule was developed "to avoid mechanical application of a statute of limitations in situations where an individual would be barred from suit before he was aware that he was injured." *Hermitage Corp.*, 166 Ill. 2d at 77-78.

¶54 "The limitations period in a legal malpractice case begins to run from the time the injured party knows or reasonably should know that he has suffered an injury which was wrongfully caused." *Brummel v. Grossman*, 2018 IL App (1st) 162540, ¶26. "There is no requirement that a plaintiff must discover the full extent of his or her injuries before the statute of limitations begins to run." *Hoffman v. Orthopedic Systems, Inc.*, 327 Ill. App. 3d 1004, 1010 (2002). "A person knows or reasonably should know an injury is 'wrongfully caused' when he or she possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Carlson I*, 2015 IL App (1st) 140526, ¶23 (quoting *Hoffman*, 327 Ill. App. 3d at 1011). "At that point, the burden is upon plaintiff to

inquire further as to the existence of a cause of action." *Hoffman*, 327 Ill. App. 3d at 1011. The question as to when a plaintiff knew or reasonably should have known of his injury, so as to trigger the statute of limitations, is ordinarily a question of fact; however, the issue may be determined as a matter of law where the undisputed facts allow for only one conclusion. *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 922. (1998).

¶55 The central issue to be decided is when Carlson possessed sufficient information such that he knew or reasonably should have known that he was being overbilled. Carlson contends he was unaware of any claims of negligence related to overbilling until after he discharged Cronin in June 2015. Carlson asserts that the statute of limitations could not begin to run until sometime after June 2015, and thus, his initial legal malpractice complaint, which was filed in January 2016, was filed within the two-year statute of limitations.

¶56 Carlson argues that he is not seeking liability based on the fee cap being exceeded, but rather on fact that he was never provided with an itemized bill or detailed statement of work performed. We find Carlson's arguments unpersuasive.

¶57 The fee cap provides an appropriate baseline. Once the attorney fee cap of $250,000 was exceeded, Carlson knew or reasonably should have known that any additional work beyond the fee cap for which he was billed, was not contemplated in the retainer

agreement. The record contains evidence showing that by the end of 2011, and certainly no later than December 2013, Carlson possessed sufficient information such that he knew or reasonably should have known that not only had the fee cap been exceeded, but that he was not receiving itemized billing.

¶58 On January 18, 2012, Carlson sent Cronin an email and an attached spreadsheet showing that by the end of 2011, Carlson had paid Cronin $545,000 in fees.

¶59 On August 29, 2013, Carlson sent an email to Cronin stating in part: "I'm bringing [a] fees spreadsheet for where we currently are," "[w]e have to make more progress We need more eyes on this." On September 13, 2013, Carlson emailed Cronin stating in part: "One question is, what meaningful strides are we making? People we could be updating during these long breaks in the legal system. Pantle ruled in early June. It's been 100 days. *** We should have openly analyzed this already. Pantle ruled 100 days ago. That is a very long time."

¶60 On October 3, 2013, Carlson emailed Cronin stating: "This is a message to you ... And you are in charge of this case. Oh yeah, its hugely important. When do you want to meet? Enough bulls***." On November 29, 2013, Carlson emailed Cronin stating in part: "[S]ince nov 2010, we are now in the 750k range for fees (including consultants, experts)." Then on December 17, 2013, Carlson sent Cronin an email and

an attached spreadsheet showing that by August 2013, Carlson had paid Cronin $750,000 in fees, and stated that the "damage here is unmistakable."

¶61 This series of emails and spreadsheets, dating from January 2012 to December 2013, demonstrate that any injury from the alleged overbilling accrued possibly as early as the end of 2011, but no later than December 2013. By the latter date, Carlson clearly possessed sufficient information such that he knew or reasonably should have known that he was being overbilled by Cronin. By December 2013, Carlson possessed sufficient information of an injury from over billing and its possible wrongful cause to put a reasonable person on inquiry to determine whether actionable conduct was involved.

¶62 Carlson, however, did not file his action against Cronin until January 13, 2016, more than two years after December 2013. Therefore, we find the circuit court did not err in finding that Carlson's claim against Cronin for overbilling was time-barred, as a matter of law, by the two-year statute of limitations set forth in subsection (b) of section 13-214.3 of the Code (735 ILCS 5/13-214.3(b)(West 2014)).

¶63 4. Expert Affidavit

¶64 Carlson next argues that the circuit court erred in striking the expert affidavit of Attorney Richard Lehman. Carlson submitted the affidavit in opposition to the Cronin defendants' motions for summary judgment. Carlson maintains that the affidavit

provided admissible expert testimony.

¶65 There is a split of authority whether the standard of review for a circuit court's ruling on a motion to strike an affidavit in conjunction with a motion for summary judgment is *de novo* or abuse of discretion. See *Brettman v. Virgil Cook & Son, Inc.*, 2020 IL App (2d) 190955, ¶¶54-56 (discussing the split of authority): *De novo* consideration means that the reviewing court performs the same analysis that a circuit court would perform. *Bituminous Casualty Corp. v. Iles*, 2013 IL App (5th) 120485, ¶19. We believe that *de novo* review is the proper standard to apply here because we review the same documentary evidence, Lehman's affidavit, as did the circuit court. See *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941, 952 (2004) (circuit court's determination based solely on documentary evidence reviewed *de novo*). In any event, we need not attempt to resolve the issue here, as our finding would be the same under either standard of review.

¶66 "An affidavit submitted in the summary judgment context serves as a substitute for testimony at trial." *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶21. "The function of affidavits in summary judgment proceedings is to show whether the issues raised are genuine and whether each party has competent evidence to offer which tends to support his side of the issue." *Harris Bank Hinsdale, NA. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). With these principles in mind, we examine Lehman's affidavit to determine whether he raises sufficient genuine issues of material

fact necessary to survive the Cronin defendants' motions for summary judgment.

¶67 In his affidavit, Lehman opined than an error was made in determining when the six-year statute of repose began to run. Lehman opined that the statute began to run as soon as the event giving rise to the legal malpractice occurred. According to Lehman, this event occurred in November/December 2008, when Drinker failed to advise Carlson of the date by which he had to file his legal malpractice suit against Collins. Lehman stated that the "November/December 2008 Drinker Biddle representation started the running of the statute of repose, and the statute of repose ran on Carlson's claim of malpractice against Drinker Biddle in November 2014, while Cronin still was representing Carlson."

¶68 Contrary to Lehman's averments concerning when the six-year statute of repose begins to run, our supreme court has determined that "[t]he period of repose in a legal malpractice case begins to run *on the last date* on which the attorney performs the work involved in the alleged negligence." (Emphasis added.) *Snyder*, 2011 IL 111052, ¶18. As previously mentioned, the last act or omission which gave rise to Carlson's potential claims of legal malpractice against Drinker occurred in October 2009, when Drinker allegedly failed to advise Carlson of the two-year statute of limitations regarding his claims against Collins. Therefore, the six-year statute of repose started running in October 2009 and ended October 2015. As a result, Lehman's opinion on this issue does not

create an issue of material fact precluding summary judgment in favor of the Cronin defendants.

¶69 Lehman next opined that the attorney fees Cronin charged Carlson were suspect and unreasonable. Lehman averred that Cronin charged Carlson over $750,000 in attorney fees without providing him with an itemized billing statement specifying how the fees were calculated, and the amount of time spent on various tasks by lawyers and paralegals. Lehman averred that a portion of the fees Cronin charged was for work on an appeal spanning the time between the January 2014 trial court judgment and the March 2015 appellate court opinion. Lehman opined that Carlson's fee claim was not filed outside of the limitation period.

¶70 Lehman's opinions on the reasonableness of the attorney fees incurred by Carlson all relate to Carlson's claim of overbilling, a claim which we have determined is time-barred, as a matter of law, by the two-year statute of limitations set forth in subsection (b) of section 13-214.3 of the Code (735 ILCS 5/13-214.3(b) (West 2014)). Therefore, Lehman's opinions here do not create an issue of material fact precluding summary judgment in favor of the Cronin defendants. See, *e.g., Xeniotis v. Cynthia Satko, D.D.S., MS., P.C.*, 2014 IL App (1st) 131068, ¶74 (expert affidavit failed to raise question of fact with respect to motion for summary judgment). As a result, we find that the circuit court did not err in striking Lehman' s affidavit.

¶71 For the reasons set forth above, we find that the

circuit court did not err in granting summary judgment in favor of the Cronin defendants.

¶72 B. Leave to File Third Amended Complaint

¶73 Carlson next contends that the circuit court should have granted him leave to file a third amended legal malpractice complaint. Carlson argues that "[t]he amendment was timely because Cronin had time to conduct any discovery needed and this was the second time the claims were amended against Cronin so there was absolutely no reason [he] should be denied leave to amend."

¶74 Plaintiffs do not have an absolute right to amend a pleading, *Giles v. Parks*, 2018 IL App (1st) 163152, ¶24. The decision rests in the sound discretion of the circuit court. *Id; Abramson v. Marderosian*, 2018 IL App (1st) 180081, ¶30. A circuit court abuses its discretion in denying leave to amend a pleading if granting leave to amend would further the ends of justice. *Insurance. Benefit Group, Inc. v. Guarantee Trust Life Insurance Co.*, 2017 IL App (1st) 162808, ¶50.

¶75 Our supreme court has identified four factors reviewing courts should consider in determining whether a circuit court abused its discretion in denying leave to amend a pleading: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is

timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). "The party seeking leave to amend bears the burden of demonstrating that all four factors favor the relief requested." *United Conveyor Corp. v. Allstate Insurance Co.*, 2017 IL App (1st) 162314, ¶36.

¶76 We confine our analysis to the first Loyola factor because it is dispositive. If a party fails to establish this first factor, showing that the proposed amendment would cure the defective pleading, then the court need not proceed to consider the remaining three factors. *Hayes Mechanical, Inc, v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶77 Carlson's proposed third amended complaint merely rehashes the allegations against Cronin that were contained in count II of the amended complaint. The only differences between the two are found in paragraphs 154 and 155 of the proposed third amended complaint. Here, Carlson alleges additional duties that he claims the Cronin defendants allegedly breached. However, the allegations against the Cronin defendants remain the same and are not supported or substantiated by any additional facts. In essence, there was nothing in the pleadings that the proposed amendment would have cured. Therefore, we find that the circuit court did not abuse its discretion in denying Carlson leave to file a third amended legal malpractice complaint.

¶78 III. CONCLUSION

¶79 We find that the circuit court did not err in granting summary judgment in favor of the Cronin defendants. We also find that the circuit court did not abuse its discretion in denying Carlson leave to file a third amended legal malpractice complaint.

¶80 Affirmed.

APPENDIX C

No. 1-19-1961

2021 IL App (1st) 191961
No. 1-19-1961
Filed July 15, 2021

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM CARLSON and WILLIS CAPITAL, LLC,
Plaintiffs-Appellants,

v.

MICHAEL BEST & FRlEDRICH LLP,
THOMAS CRONIN, AARON L. DAVIS,
LELAND W. HUTCHINSON JR., DANIEL J.
KELLEY, and CRONIN & COMPANY LTD.,
Defendants,

(MICHAEL BEST & FRIEDRICH LLP,
Defendant-Appellee).

Appeal from the Circuit Court of Cook County.
16 L 00383
Honorable Daniel J. Kubasiak, Judge Presiding.

JUSTICE MARTIN delivered the judgment of the court, with opinion.

Presiding Justice Gordon and Justice Reyes concurred in the judgment and opinion.

OPINION

¶1 I. BACKGROUND

¶2 The following background facts and procedural history are taken from the common law record, the parties' briefs, and the related opinions of *Carlson v. Fish*, 2015 IL App (1st) 140526, No. 1-19-1961 and *Willis Capital LLC v. Belvedere Trading LLC*, 2015 IL App (1st) 132183.[1]

¶3 In 2002, William Carlson, the sole owner and member of Willis Capital, LLC (Willis), founded Belvedere Trading, LLC (Belvedere), with an initial investment of $405,000.[2] Belvedere was created to trade S&P 500 equity index options. Thomas Hutchinson and Owen O'Neill eventually joined Belvedere as partners, with Hutchinson investing $85,000 and O'Neill investing $160,000. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶5. "Carlson was the

[1] Carlson also sued the attorneys and law firms who represented him in these two cases. Those claims are not part of this appeal.

[2] For ease of reference, we will refer interchangeably to Willis Capital LLC as both Willis and Carlson.

sole managing member and held about a 62% membership interest; O'Neill held about a 25% interest and Hutchinson held the remaining 13% interest." *Carlson*, 2015 IL App (1st) 140526, ¶6. However, by 2004, O'Neill and Hutchinson were managing members and owned an equal 33.3% interest along with Carlson. *Id.*

¶4 In 2005, Carlson took a leave of absence from actively managing Belvedere due to health reasons. When Carlson returned to the company in 2006, "he had a falling out with O'Neill and Hutchinson over numerous issues, including profit distribution and management." *Id.* ¶7.

¶5 In March 2007, Carlson retained attorneys Shawn M. Collins and David J. Fish of the Collins Law Firm, P.C., to represent him in his dispute with O'Neill and Hutchinson. Fish later formed the Fish Law Firm while continuing to represent Carlson; the two law firms will collectively be referred to as "Collins." *Id.*

¶6 In May 2007, Collins filed a request for arbitration on Carlson's behalf with the Chicago Board of Options Exchange (CBOE), as provided for in Belvedere's operating agreement. *Id.*; *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶6. Collins also filed a complaint for injunctive relief in the circuit court of Cook County in October 2007, seeking to dissolve Belvedere and compel it to buy Carlson's interest in the company for fair value in accordance with section 35-60 of the Limited Liability Company Act (805 ILCS 180/35-60 (West 2006) (repealed by Pub. Act 99-637

(eff. July 1, 2017))). *Willis Capital LLC,* 2015 IL App (1st) 132183, ¶6; *Carlson*, 2015 IL App (1st) 140526, ¶7. During this time, Carlson asked O'Neill and Hutchinson to obtain an appraisal of Belvedere, but they refused. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶6. O'Neill and Hutchinson also denied Carlson's request for access to Belvedere's books and records. The circuit court subsequently entered an order compelling arbitration. *Id.*

¶7 In February 2008, the parties agreed to mediate their dispute. The parties "agreed that the mediation would be principals only, would be nonbinding, and would be supervised by mediator Douglas Gerrard." *Carlson*, 2015 IL App (1st) 140526, ¶8. Prior to the mediation, Carlson did not obtain an independent appraisal of his interest in Belvedere, but in an e-mail to Collins, he estimated that, by the end of 2009, the company could be sold for $100 million. *Id.* Unbeknownst to Carlson, prior to the mediation, O'Neill and Hutchinson employed the accounting firm of Horwich, Coleman, and Levin (HCL) tc conduct an appraisal of Belvedere and determine a market value of Carlson's one-third interest in the company. Willis Capital LLC, 2015 IL App (1st) 132183, ¶8. HCL developed statistical models to estimate this value and presented these models to O'Neill and Hutchinson. After receiving the statistical models, O'Neill and Hutchinson directed HCL not to prepare a written report and to stop further work on the appraisal. *Id.* None of this was disclosed to Carlson.

¶8 At the February mediation, Carlson again asked

for an appraisal of Belvedere, but O'Neill and Hutchinson responded that an appraisal was unnecessary because they did not want to sell their interests in the company. *Id.* ¶9. The mediation resulted in Carlson agreeing to sell his interest in Belvedere for $17.5 million.

¶9 After the mediation, but before he signed the proposed settlement agreement that would memorialize the terms of the sale, Carlson met with his accountant, John Flaherty, to discuss the tax consequences resulting from the settlement agreement. According to Carlson, Flaherty stated in jest that Carlson did not get enough money out of the settlement because of the large amount of taxes he would owe as a result of the settlement agreement. Nevertheless, Carlson ultimately signed the settlement agreement. Carlson and his two former partners signed a term sheet delineating the terms of the sale, which were memorialized in a settlement agreement signed by the parties on March 4 and 6, 2008. *Carlson*, 2015 IL App (1st) 140526, ¶8.

¶10 The settlement agreement provided in part that it represented "a complete compromise of the controversy between the parties involving disputed issues of law and fact, and that each party fully assumes the risk that the facts or law may be other than they believe." The agreement also provided that the parties agree "that they are not fiduciaries to each other with respect to the negotiations, preparation and execution of" the agreement. The agreement went on to provide that the parties were advised by their

respective attorneys and advisors as to the merits of the agreement and that no party was relying on any promise, representation or disclosure of any other party. In addition, the agreement contained a fee-shifting provision that provided that attorney fees and expenses could be awarded to a prevailing party in "an action brought by any party to enforce the terms" of the agreement.

¶11 Beginning in September 2008, and continuing through November 2008, Carlson exchanged e-mails with Shawn Collins concerning his belief that O'Neill and Hutchinson had fraudulently tricked him into selling his interest in Belvedere for less than the company's true value. *Id.* ¶¶9-15. Carlson and Shawn Collins discussed the possibility of having the circuit court set aside the settlement agreement and of Shawn Collins obtaining co-counsel in a possible fraud action against Carlson's former partners.

¶12 The record reveals that from November 2008 to the early part of December 2008, Carlson consulted with Chris Parker, a college friend and an attorney at the law firm of Michael Best & Friedrich, LLP (Michael Best). Carlson asked Parker to review the settlement agreement and evaluate whether Carlson may have any viable fraud claims against his former partners. Carlson also began to express dissatisfaction with the legal representation provided by Collins.

¶13 On November 19, 2008, Carlson met with attorneys from the law firm of Drinker, Biddle & Reath, LLP (Drinker), to review the settlement

agreement. According to Carlson, attorneys at Drinker raised questions about whether the legal services Collins rendered to him in connection with the settlement agreement had been substandard. *Id.* ¶16. Carlson claimed this was the first time he became aware of a possible legal malpractice claim against Collins. *Id.*

¶14 Carlson officially engaged Michael Best from August 18, 2010, through September 16, 2010, for consultation regarding a potential legal malpractice action against Collins. During this time, Parker advised Carlson that a legal malpractice action against Collins "may be tough in the face of the statute of limitations." Parker told Carlson that the applicable statute of limitations for a legal malpractice claim was two-years from the date he should have learned of the malpractice.

¶15 On November 11, 2010, Carlson engaged the law firm of Cronin & Co., Ltd (Cronin). Carlson and counsel from Cronin eventually contacted Horwich, Coleman, and Levin (HCL), the accounting firm which, unbeknownst to Carlson, had conducted the pre-settlement appraisal of Belvedere at the direction of O'Neill and Hutchinson. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶12.

¶16 Cronin filed a legal malpractice complaint against Collins on November 18, 2010. In the complaint, Carlson alleged that Collins failed to obtain an appraisal of Belvedere and "'thereby permitted their clients to settle without any appropriate advice

and counsel as to what was being surrendered.'" *Id.* Cronin subsequently filed an amended legal malpractice complaint against Collins on February 23, 2011. In March 2011, Collins moved to dismiss the amended complaint on statute of limitations grounds.

¶17 On May 17, 2011, Cronin filed a request for arbitration on Carlson's behalf with the CBOE against Belvedere, O'Neill, and Hutchinson. *Id.* Carlson alleged that O'Neill and Hutchinson were fiduciaries of Willis and had committed fraud by withholding information regarding Belvedere's value. O'Neill and Hutchinson filed a motion with the CBOE to dismiss the arbitration.

¶18 Carlson and Collins subsequently entered into a tolling agreement on July 13, 2011, under which Carlson voluntarily dismissed his amended legal malpractice complaint against Collins, without prejudice. The tolling agreement provided in part that if the arbitration action "is resolved on or after April 13, 2012, [Carlson] shall have a period of 90 days after resolution of the arbitration to refile this action. If the arbitration is resolved before April 13, 2012, the one-year refilling provision in 735 ILCS 5/2-1009 shall remain intact." The tolling agreement further provided in part that it "shall not act to revive any cause(s) of action already barred by the statute of limitations when the legal malpractice complaint was filed on November 18, 2010."

¶19 The CBOE arbitration panel granted O'Neill and Hutchinson's motion to dismiss the arbitration

with prejudice on March 5, 2012. *Id.* On March 26, 2012, in the circuit court, Cronin filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)), and an amended petition on December 20, 2012, against Belvedere and Carlson's former partners, seeking to '"reopen"' the settlement agreement. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶¶1, 13. O'Neill and Hutchinson filed a motion to dismiss the amended petition pursuant to section 2-619.1 of Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). They argued that the amended petition should be dismissed because it was barred by the following: (1) the CBOE arbitration panel's order of March 5, 2012, dismissing the arbitration; (2) the two-year statute of limitations applicable to section 2-1401 petitions; (3) the release contained in the settlement agreement; and (4) Illinois Supreme Court Rule 20l(b)(3) (eff. July 1, 2014), which protects the identity of consultants, their opinions, and work product from discovery) except under "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means." *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶4.

¶20 On June 7, 2013, the circuit court dismissed Carlson's amended section 2-1401 petition with prejudice. *Id.* ¶15. The circuit court determined that the amended petition to reopen the settlement agreement failed to state a claim for rescission of the agreement because the amended petition did not allege sufficient facts showing that Carlson intended to return the $17.5 million he received in the settlement.

Id. The court further determined that the amended petition failed to state a claim for fraudulent concealment due to the nonreliance clause in the settlement agreement and that the mutual release clause contained in the agreement barred the claims of fraud and breach of fiduciary duty. *Id.* The court also found that Carlson failed to exercise due diligence in the 2007 litigation because he did not try to obtain an appraisal of Belvedere prior to settling. The court further found that the amended petition to reopen the settlement agreement was barred by the doctrine of res judicata and that Rule 20l(b)(3) protected HCL's appraisal from disclosure as consultant work product. *Id.* On January 6, 2014, the circuit court awarded $172,391.75 in attorney fees and costs to Belvedere, O'Neill, and Hutchinson. *Id.* ¶16. Carlson appealed (*Willis Capital, LLC*, 2015 IL App (1st) 132183).

¶21 While the *Willis Capital, LLC*, appeal was pending, Cronin refiled the legal malpractice complaint against Collins on July 5, 2013. The complaint alleged that Collins breached its professional duties to Carlson by (1) failing to obtain an independent appraisal of Belvedere's value prior to the mediation, (2) permitting him to attend the meditation without an attorney, (3) advising him to sign the mediated settlement agreement without any changes, and (4) failing to protect him from the fraudulent conduct of his former partners. *Carlson*, 2015 IL App (1st) 140526, ¶7.

¶22 On August 28, 2013, Collins filed a motion to dismiss the legal malpractice complaint pursuant to

section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2012)). Collins asserted that Carlson's complaint was time-barred by the two-year statute of limitations governing claims for legal malpractice (*id.* § 13-214.3(b)). *Carlson*, 2015 IL App (1st) 140526, ¶18.

¶23 Following a hearing on January 15, 2014, the circuit court granted Collins's motion to dismiss the legal malpractice complaint with prejudice. The circuit court determined that the cause of action accrued at the time Carlson knew he had been injured, which the court found was no later than September 2008. The court found that by November 12 or 13 of 2008, Carlson had identified his former partners as the wrongful cause of his injury, which put him on inquiry notice that a cause of action had accrued. The court concluded that because Carlson's initial legal malpractice complaint was filed on November 18, 2010, more than two years after his cause of action accrued, the complaint was time-barred by the two-year statute of limitations set forth in section 13-214.3(b) of the Code. Carlson appealed (*Carlson*, 2015 IL App (1st) 140526).

¶24 On February 27, 2014, Carlson entered into a second engagement with Michael Best. Carlson engaged Michael Best to act as a consultant in connection with pending litigation, *i.e.*, the *Willis Capital, LLC*, appeal and the *Carlson* appeal.

¶25 On appeal in *Willis Capital, LLC*, this court affirmed in part and reversed in part. *Willis Capital LLC*, 2015 IL App (1st) 132183, ¶¶26-27. We affirmed

the circuit court's judgment with respect to its decision to dismiss Carlson's amended section 2-1401 petition to reopen the settlement agreement without holding an evidentiary hearing. We determined that even if O'Neill and Hutchinson owed Carlson a fiduciary duty and fraudulently concealed the results of the appraisal from him, this did not relieve Carlson. of his duty to exercise due diligence in discovering the appraisal value of his interest in Belvedere prior to the settlement. *Id.* ¶¶20-23. However, we reversed the circuit court's judgment with respect to the award of attorney fees and costs. We pointed out that fee-shifting provisions are strictly construed and, determined that the contractual language of the fee-shifting provision contained in the settlement agreement was intended to award attorney fees and costs to prevailing parties who sought to enforce the terms of the agreement, as opposed to parties, such as O'Neill and Hutchinson, who sought to defend the terms of the agreement in response to a section 2-1401 petition to invalidate the agreement. *Id.* ¶¶24-25.

¶26 On appeal in *Carlson*, this court affirmed the circuit court's decision granting Collins's section 2-619(a)(5) motion to dismiss Carlson's legal malpractice complaint as time-barred by the two-year statute of limitations set forth in section 13-214.3(b) of the Code. *Carlson*, 2015 IL App (1st) 140526, ¶¶23, 48-49. We found that e-mail correspondence between Carlson and Collins, which began in September 2008 and continued through November 2008, along with certain judicial admissions made by Carlson, showed that he was aware he had been wrongfully injured by his former

partners no later than November 13, 2008, and probably as early as September 2008. *Id.* ¶¶28-33.

¶27 Carlson's second engagement with Michael Best, which began on February 27, 2014, subsequently ended in May 2015, when he decided not to file a petition for leave to appeal the appellate court decision in Carlson to the Illinois Supreme Court.

¶28 On January 13, 2016, Carlson filed the legal malpractice complaint at issue here in the circuit court of Cook County against Michael Best, Cronin, and several of the law firms' respective attorneys.[3] An amended complaint was filed on August 31, 2016. In count I of the amended complaint, which is the only count directed at Michael Best, Carlson alleged that Michael Best breached the standard of care applicable to attorneys representing clients in legal malpractice matters by failing to advise him of the following: (1) when the statute of limitations would expire on his malpractice claims against Collins, (2) that he had a malpractice claim against Drinker, and (3) that he had a malpractice claim against Michael Best. Carlson alleged that, but for Michael Best's negligent advice, he would have filed timely legal malpractice claims against both Collins and Drinker.

¶29 Michael Best filed a motion for summary judgment on July 20, 2018. In the motion, Michael Best asserted that the following undisputed facts

[3] This appeal only concerns Michael Best and its attorneys.

required judgment in its favor as a matter of law: (1) "Carlson cannot prove that Michael Best caused him any damages because his claims against the Collins Law Firm were time-barred when he first engaged Michael Best in August 2010," (2) "Carlson cannot sue Michael Best for the loss of his malpractice claim against the Drinker Law Firm because those claims were viable when he engaged successor counsel, the Cronin Law Firm, in November 2010," and (3) "Carlson cannot sue Michael Best for failing to inform him of a claim against it. There is no duty for a law firm to inform a client that he has a claim against it."

¶30 Michael Best also filed a motion to stay further discovery pending a ruling on the motion for summary judgment. Carlson, in turn, filed a motion requesting the court to allow him to conduct further discovery before responding to the motion for summary judgment. The circuit court subsequently granted Michael Best's motion for the stay and denied Carlson's motion to conduct further discovery.

¶31 On October 30, 2018, Carlson filed a motion for leave to file a second amended complaint *instanter*, which the circuit court denied. On that same date, Carlson filed his response to Michael Best's motion for summary judgment along with a renewed motion for leave to file a second amended complaint.

¶32 On December 14, 2018, the circuit court entered an opinion and order partially granting and partially denying Michael Best's motion for summary judgment. The circuit court granted summary judgment in favor

of Michael Best, finding that there was no triable issue of fact as to whether Michael Best failed to advise Carlson as to any legal malpractice claims he may have had against Michael Best. However, the court determined that there were certain issues of fact which could not be resolved on summary judgment, namely: (1) whether Carlson's legal malpractice claims against Collins were already untimely at the time he first retained Michael Best on August 18, 2010, (2) whether Michael Best failed to timely advise Carlson that he may have a legal malpractice claim against Drinker, and (3) whether Carlson was aware of Collins's legal malpractice before the February 2008 settlement. In addition, the circuit court again denied Carlson leave to file a second amended complaint. The circuit court determined that the claims in the proposed second amended complaint concerned claims of legal malpractice against Michael Best that allegedly occurred in 2008, which extended beyond the six-year statute of repose for legal malpractice claims.

¶33 Michael Best filed a motion to reconsider the partial denial of its motion for summary judgment. On May 3, 2019, the circuit court reconsidered the matter and entered summary judgment on Carlson's remaining claims in favor of Michael Best. The circuit court analyzed section 13-214.3 of the Code, which contains a two year statute of limitations and six year statute of repose for malpractice actions against attorneys (735 ILCS 5/13-214.3(b), © (West 2014)), and determined that conversations between Carlson and his accountant John Flaherty in June 2008 indicated that, by the time Carlson first retained Michael Best

on August 18, 2010, he was already on inquiry notice of the facts underlying his legal malpractice claims against Collins and therefore those claims expired before Carlson engaged Michael Best. The circuit court further determined that Michael Best did not cause Carlson to lose any legal malpractice claims against Drinker because those claims were still viable after Michael Best's representation of Carlson ended and after he engaged new counsel.

¶34 On May 7, 2019, the circuit court entered an order pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), finding that there was no just reason to delay enforcement or appeal from its orders of December 13, 2018, and May 3, 2019.

¶35 On June 4, 2019, Carlson filed a motion to reconsider the orders granting summary judgment in favor of Michael Best. In the motion, Carlson asserted for the first time that statements attributable to him suggesting that his accountant Flaherty told him that he had a "real problem" with the settlement agreement because Carlson had "left $12 million on the table" was either inaccurate or constituted inadmissible hearsay. Carlson subsequently filed an amended motion to reconsider based on purported newly discovered evidence that he alleged demonstrated that his conversations with his accountant Flaherty occurred prior to the settlement agreement and that Flaherty denied telling him that he had a "real problem" with the settlement agreement or that he "left $12 million on the table"

¶36 On August 29, 2019, the circuit court entered an order denying Carlson's motion to reconsider and his amended motion to reconsider and allowed him 30 days from entry of the order to file an appeal. Carlson filed a notice of appeal on September 25, 2019.

¶37 We have jurisdiction to hear this appeal pursuant to Rule 304(a), which provides that "an appeal may be taken from a final judgment as to one or more but fewer than all of the parties *** if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." *Id.* We will provide additional facts in the analysis section where necessary to address specific issues raised on appeal.

¶38 **II. ANALYSIS**

¶39 A. Summary Judgment

¶40 Carlson appeals the circuit court's order granting summary judgment in favor of defendant Michael Best. "The purpose of summary judgment is to determine whether a genuine issue of material fact exists that would require a trial." *Hodges v. St. Clair County*, 263 Ill. App. 3d 490, 492 (1994). Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILC 5/2-1005© (West 2012). "In determining whether a genuine issue as to any material fact exists, a court

must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (l 993). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Our review of a summary judgment order is *de novo*. *Id.*

¶41 Carlson advances a number of arguments in support of his overall contention that the circuit court erred in granting summary judgment in favor of Michael Best. We address each in turn.

¶42 1. Leave to File Second Amended Complaint

¶43 Carlson first argues that the circuit court erred in denying his motion for leave to file a second amended complaint, arguing that the proposed second amended complaint added additional facts and expanded upon the theories of liability. Michael Best responds that the circuit court did not abuse its discretion because (1) the amendments in Carlson's proposed second amended complaint concern allegations of legal malpractice against Michael Best occurring in 2008, which are time-barred under the statute of repose governing claims of attorney malpractice and (2) Carlson fails to satisfy the four factors that courts consider in determining whether leave to amend pleadings should be granted as set

forth in *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶44 A circuit court has broad discretion in deciding whether to grant leave to amend a pleading prior to entry of a final judgment and its decision will not be disturbed absent an abuse of that discretion. *Abramson v. Marderosian*, 2018 IL App (1st) 180081, ¶30. A circuit court abuses its discretion in denying leave to amend a pleading if granting leave to amend would further the ends of justice. *Insurance Benefit Group, Inc. v. Guarantee Trust Life Insurance Co.*, 2017 IL App (1st) 162808, ¶50.

¶45 In this case, the circuit court denied Carlson's motion for leave to file a second amended complaint based upon its finding that the proposed amendments concerned allegations of legal malpractice against Michael Best occurring in 2008, which the court determined were time-barred under the statute of repose governing claims of attorney malpractice.

¶46 a. Statute of Repose

¶47 Section 13-214.3 of the Code (735 ILCS 5/13-214.3(b), © (West2014)) "sets forth two independent timing requirements for legal malpractice actions: the two-year statute of limitations in subsection (b) and the six-year statute of repose in subsection ©." *Sorenson v. Law Offices of Theodore Poehlmann*, 327 Ill. App. 3d 706, 708 (2002). Subsection © of the statute provides that an action for damages based on tort, contract, or otherwise against an attorney arising

out of an act or omission in the performance of professional services may not be commenced more than six years after the date on which the act or omission occurred. 735 ILCS 5/13-2 14.3© (West 2014).

¶48 "This court's primary goal in construing a statute is to ascertain and give effect to the intent of the legislature." *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶15. The most reliable indicator of that intent is the statutory language itself, which must be given its plain and ordinary meaning. *Id.* If the statutory language is clear and unambiguous, we will apply it as written, without resorting to extrinsic aids of statutory construction, and will not depart from the plain meaning of the statute by reading into it exceptions, limitations, or conditions that conflict with the express intent. State *Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶56.

¶49 "In contrast to a statute of limitations, which determines the time within which a lawsuit may be commenced after a cause of action has accrued, a statute of repose extinguishes the action after a defined period of time, regardless of when the action accrued." Evanston Insurance, 2014 IL 114271, ¶16. The purpose of repose statutes is "to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiffs lack of knowledge of his or her cause of action." *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001); see also *Sorenson*, 327 Ill. App. 3d at 708 (statute of repose is designed to place an outer limit on the time for commencing an action).

Statutes of repose "'effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time.'" *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 U.S. _, _, 137 S. Ct. 2042, 2049 (2017) (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014).

¶50 When the repose period expires, the cause of action is extinguished and the plaintiff's right to bring the action is terminated. Evanston Insurance, 2014 IL 114271, ¶16. "[S]tatutes of repose begin to run on the date of the last culpable act or omission of the defendant." (Internal quotation marks omitted.) *California Public Employees' Retirement System*, 582 U.S. at ___, 137 S. Ct. at 2049; see also *Snyder v. Heidelberger*, 2011 IL 111052, ¶18 ("period of repose in a legal malpractice case begins to run on the last date on which the attorney performs the work involved in the alleged negligence"); *Sorenson*, 327 Ill. App. 3d at 710 ("statute of repose runs from the time of the acts or omissions alleged to have caused injury").

¶51 In this case, the last culpable act or omission which gave rise to Carlson's amendments to his proposed second amended complaint was Michael Best's alleged failure to advise Carlson in November 2008, about the statute of limitations for his potential claims against Collins. Thus, the six-year statute of repose started running in November 2008 and ended November 2014. Carlson filed his first complaint against Michael Best on January 13, 2016, and filed his initial motion for leave to file his second amended

complaint on October 30, 2018. Therefore, the amendments to Carlson's proposed second amended complaint involved acts or omissions occurring well outside the six-year period of repose in section 13-214.3© of the Code.

¶52 Carlson argues that even if his 2008 claims against Michael Best were filed outside of the six-year statute of repose, the repose period should be tolled because–after the period of repose expired–Michael Best continued to represent him and engaged in a continuing course of negligent conduct. At the outset, we note that as Michael Best observes, Carlson waived this argument by failing to raise it in the circuit court. See, *e.g., Wagner v. City of Chicago*, 166 Ill. 2d 144, 147 (1995) ("as a general rule, any issue not raised at the trial court level is waived"). However, we also note that the waiver rule is a limitation on the parties, not on the court. *Herzog v. Lexington Township*, 167 Ill. 2d 288, 300 (1995). Accordingly, we exercise our discretion to consider this fully briefed argument on its merits. *People v. Begay*, 2018 IL App (1st) 150446, ¶55.

¶53 Illinois courts have consistently held that the statute of repose is not tolled by the continuation of the attorney-client relationship. *Mauer v. Rubin*, 401 Ill. App. 3d 630, 640 (2010); *Hester v. Diaz*, 346 Ill. App, 3d 550, 554 (2004); *Sorenson*, 327 Ill. App. 3d at 710; *Serafin v. Seith*, 284 Ill. App. 3d 577, 585-87 (1996); *Witt v. Jones & Jones Law Offices, P.C.*, 269 Ill. App. 3d 540, 544 (1995). Under the continuous course of treatment doctrine, the plaintiff must show "(1) that there was a continuous and unbroken course of

negligent treatment, and (2) that the treatment was so related as to constitute one continuing wrong." (Emphasis in original.) *Cunningham v. Huffman*, 154 Ill. 2d 398, 406 (1993).

¶54 Thus, even assuming that the statute of repose for legal malpractice actions allowed for a theory of continuous course of negligent representation, it would not apply under the facts in this case because it is undisputed that Michael Best did not continuously represent Carlson but rather represented him for one month in 2010 and again in 2014. By the time Carlson consulted with Michael Best in 2010 and 2014, his claims against Collins were already time-barred by the two-year statute of limitations set forth in section 13-214.3(b) of the Code. See *Carlson*, 2015 IL App (1st) 140526, ¶¶23, 48-49. Therefore, even assuming Michael Best failed to advise Carlson about the statute of limitations for his potential claims against Collins in 2008, Michael Best's alleged omissions, which occurred in 2010 or 2014, were not a continuation of the 2008 omission.

¶55 Carlson contends that the doctrine of equitable estoppel bars Michael Best from asserting that any claims arising out of the alleged 2008 representation are time-barred by the six-year statute of repose because any delay in bringing these claims was caused by Michael Best's breach of the standard of care and fiduciary duty. We disagree.

¶56 "Equitable estoppel is a theory that precludes a litigant from denying prior assertions in cases where

it would be unjust to permit the litigant to disavow express and implied statements upon which another party has relied and that have caused him to forego filing his suit." *Serafin*, 284 Ill. App. 3d at 588. "The common-law doctrine of equitable estoppel, as applied in the context of the statute of repose, parallels the fraudulent concealment statute." *Mauer*, 401 Ill. App. 3d at 648. To establish that either applies, a party must generally show that the "defendant said or did something to lull or induce plaintiff to delay the filing of his claim until after the limitations period has run." *Wolf v. Bueser*, 279 Ill. App. 3d 217, 228 (1996). "[T]he doctrine of equitable estoppel will not apply to a case if defendant's conduct terminated within ample time to allow the plaintiff to still avail himself of any legal rights he may have had." *Serafin*, 284 III. App. 3d at 589; *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 259 (1998) (same).

¶57 If Carlson had engaged Michael Best in 2008, and at that time Michael Best failed to advise him of the two-year statute of limitations applicable to his potential claims against Collins, under the six-year statute of repose, his cause of action would extinguish sometime in 2014. Carlson first officially engaged Michael Best from August 18, 2010, through September 16, 2010, for consultation regarding a potential legal malpractice action against Collins. Parker advised Carlson that a legal malpractice action against Collins "may be tough in the face of the statute of limitations." Parker told Carlson that the applicable statute of limitations for a legal malpractice claim was two years from the date he should have learned of the

malpractice. When Parker advised Carlson in 2010 that his claims against Collins were subject to the two-year statute of limitations, four years remained under the statute of repose. Therefore, equitable estoppel would not apply to bar application of the statute of repose. In other words, when Carlson engaged Michael Best in 2010, he "had ample time to avail himself of any legal rights he may have had." *Serafin*, 284 Ill. App. 3d at 589.

¶58 Carlson next contends that Michael Best had a duty in 2014 to advise him that he had claims against Michael Best arising out of the law firm's alleged representation of him in 2008. We disagree with this contention for two reasons. First, as the above analysis shows, Carlson never had a viable malpractice claim against Michael Best based on the alleged 2008 representation, and therefore, there was nothing for Michael Best to disclose to Carlson in 2014. Second, "[t]his court has rejected the notion that a lawyer has an affirmative obligation to advise a client of the grounds to sue him for legal malpractice." *Lamer v. Levin*, 2015 IL App (1st) 143105, ¶32; see also *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1025 (2010) (finding "no case that would require an attorney to affirmatively advise his client of his negligence and the statute of limitations for suing him").

¶59 Carlson maintains that this court should disregard the above precedent under the facts in this case, arguing that at the time he engaged Michael Best in 2014, "Best was specifically asked to review their

prior work and they accepted that engagement." Carlson asserts that a question of fact exists as to the scope of Michael Best's duty. This argument is contrary to the express language in the parties' engagement letter of February 2014. The engagement letter limited the scope of Michael Best's engagement to advising Carlson on "pending litigation," the pending *Carlson* appeal and the section 2-1401 petition to vacate in the *Willis Capital, LLC*, appeal.

¶60 Michael Best also contends that we should affirm the circuit court's ruling because Carlson fails to satisfy the four factors as set forth in *Loyola*, 146 Ill. 2d at 273.

¶61 b. Application of the *Loyola* Factors

¶62 Our supreme court has identified four factors reviewing courts should consider in determining whether a circuit court abused its discretion in denying leave to amend a pleading: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola*, 146 Ill. 2d at 273. "The party seeking leave to amend bears the burden of demonstrating that all four factors favor the relief requested." *United Conveyor Corp. v. Allstate Insurance Co.,* 2017 IL App (1st) 162314, ¶36. However, if that party fails to establish the first factor, showing that the proposed amendment would cure the

defective pleading, then the court need not proceed to consider the remaining three factors. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶63 We confine our analysis to the first *Loyola* factor because it is dispositive. We find that the proposed amendments to Carlson's second amended complaint-which sought to add a new allegation that Michael Best first represented Carlson in 2008, rather than in 2010, as Carlson alleged in his original and first amended complaints–cannot cure the pleading defects. At his discovery deposition, Carlson testified that he "[d]id not engage Michael Best in 2008." We agree with Michael Best's contention that Carlson's deposition testimony constituted a judicial admission that could not be contradicted by contrary evidence.

¶64 "A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within that party's peculiar knowledge." (Internal quotation marks omitted.) *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 671 (1992). "It must concern a concrete fact and not be merely a matter of inference, opinion, estimate, or uncertain memory [citation], and such admission of fact carries with it an admission of other facts necessarily implied from it [citation]." *Id.* "A judicial admission may not be contradicted and is binding upon the party making such admission." *Id.* "Testimony at a discovery deposition may constitute a judicial admission." *In re Estate of Rennick*, 181 Ill. 2d 395, 407 (1998).

¶65 While discovery deposition testimony is normally treated as evidentiary admissions subject to explanation and contradiction, discovery deposition testimony will be treated as a judicial admission if it is "so deliberate, detailed and unequivocal, as to matters within the party's personal knowledge." *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129, 133 (1992). "The judicial policy behind this rule, which is well accepted in summary judgment cases, is that once a party has given sworn testimony, he should not be allowed to change his testimony to avoid the consequences of his prior testimony." *Id.* The determination of whether a party's statement is sufficiently unequivocal to be considered a judicial admission is a question of law when considering a motion for summary judgment. *Id.* at 134; *Caponi*, 236 Ill. App. 3d at 671.

¶66 In this case, with his counsel by his side, and with knowledge that his testimony was being transcribed and video-recorded, Carlson gave deposition testimony under oath, that he "[d]id not engage Michael Best in 2008." There was no equivocation in Carlson's testimony and his testimony pertained to a matter within his personal knowledge–whether he engaged Michael Best in 2008. Therefore, Carlson's deposition testimony constituted a judicial admission because it was a deliberate, clear, unequivocal statement about a concrete fact within his peculiar knowledge. See, *e.g., Caponi*, 236 Ill. App. 3d at 671.

¶67 Carlson raises a number of arguments in support of his contention that his deposition testimony

did not constitute a judicial admission. For the reasons which follow, we find that none of these arguments are persuasive.

¶68 Carlson argues that his deposition testimony that he "[d]id not engage Michael Best in 2008" is not a judicial admission because he was thinking "out loud" when he answered the deposition question about whether he engaged Michael Best in 2008. We disagree. When deposition testimony is deliberate, clear, and unequivocal about a concrete fact within the party's personal knowledge, this testimony cannot be rendered equivocal by merely asserting that it was the result of "thinking out loud." See, *e.g., Hansen v. Ruby Construction Co.*, 155 Ill. App. 3d 475, 481 (1987) (finding deposition testimony "was quite unequivocal").

¶69 We also reject Carlson's contention that he is not bound by his deposition answer because it constituted a legal conclusion. Carlson argues that even if his deposition answer is construed as an unequivocal statement that he did not "engage" Michael Best, the statement still does not constitute a judicial admission, because judicial admissions only apply to facts and not legal conclusions, and the word "engage" involves a legal conclusion about whether a contract or legally binding relationship existed. A legal conclusion is a "statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result." Black's Law Dictionary (11th ed. 2019). Carlson's deposition answer does not constitute a legal conclusion, rather it concerns an ultimate issue of fact within his personal knowledge: whether he engaged

Michael Best in 2008.

¶70 Carlson next argues that even if he made an unequivocal statement that he believed he did not engage Michael Best in 2008, this statement was not dispositive because the subjective intent of a client about whether an attorney was "engaged" is not dispositive as to whether an attorney-client relationship was created. In the instant matter, Michael Best denied there was any attorney-client relationship in 2008, and Carlson, by his own deposition testimony, claimed not to have engaged Michael Best in 2008.

¶71 Illinois precedent establishes that mutual subjective intent between a potential client and attorney is required lo create an attorney-client relationship. See, *e.g., Pranno Donkle v. Lind*, 2018 IL App (1st) 171915, ¶33 (attorney-client relationship is a voluntary, contractual relationship that requires the consent of both the attorney and client); *Rubin & Norris, LLC v. Panzarella*, 2016 IL App (1st) 141315, ¶37 (attorney-client relationship cannot be created by attorney alone and generally the duty falls upon a potential client to initiate contact with the attorney). If the attorney-client relationship is one established by the intent of the parties under ordinary principles of contract law, which appears to be the present state of the law in Illinois; then no attorney-client relationship was ever formed between Michael Best and Carlson in 2008, as there was no meeting of the minds. As a result, we find that the proposed amendments to Carlson's second amended complaint do not cure the

defects in his prior pleadings.

¶72 Accordingly, we find that in light of the applicable period of repose and Carlson's failure to establish the first *Loyola* factor, the circuit court did not abuse its discretion in denying Carlson's motion for leave to file a second amended legal malpractice complaint.

¶73 2. Denial of Discovery Motion

¶74 Carlson next contends that the circuit court abused its discretion when it denied his motion to conduct further discovery before responding to Michael Best's motion for summary judgment. Carlson asserts that since Michael Best filed its motion for summary judgment "at the very end of party depositions," he needed additional time to depose attorneys Shawn Collins, Patrick Collins, and Fish. Carlson contends that the depositions of these individuals were crucial because they represented him and they had numerous conversations with him that were relevant to the statute of limitations.

¶75 A circuit court is afforded considerable discretion in ruling on matters pertaining to discovery, and we will not disturb such a ruling absent an abuse of that discretion. *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 11 (2009). A circuit court abuses its discretion where its ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would adopt the court's view. *Evitts v. DaimlerChrysler*

Motors Corp., 359 Ill. App. 3d 504, 513 (2005).

¶76 Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) specifies the procedure a party should follow when he or she believes that additional discovery is necessary to adequately respond to a motion for summary judgment. *Brummel v. Grossman*, 2018 IL App (1st) 170516, ¶91. Rule 191(b) requires in relevant part that the party seeking additional discovery provide an affidavit attesting that:

> "[M]aterial facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the. persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with reasons for his belief ***." Ill. S. Ct. R. 191(6) (eff. Jan. 4, 2013).

¶77 Carlson did not support his discovery motion with a Rule 191(b) affidavit, nor did he make any other efforts to comply with the requirements of the rule. "Failure to comply with Rule 191 (b) defeats an objection on appeal that insufficient time for discovery was allowed." *Giannoble v. P&M Heating & Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1064 (1992). Moreover, even if Carlson had sought to comply with Rule 191(b), he could not have done so. Carlson maintains that he needed to take the requested depositions to discover facts about his own

conversations. However, statements that third parties made to Carlson are not "known only to" the third parties as required by the rule. Therefore, we find no abuse of discretion in the circuit court's decision to deny Carlson's motion to conduct additional discovery before responding to Michael Best's motion for summary judgment.

¶78 3. Carlson's Claims Against Collins

¶79 Carlson next contends that Michael Best caused him to lose his legal malpractice claims against Collins because it failed to advise him in August 2010 about the statute of limitations applicable to those claims. Michael Best responds that it did not cause Carlson to lose his legal malpractice claims against Collins because those claims were already time-barred by the applicable statute of limitations triggered by inquiry notice, prior to Carlson engaging Michael Best in August 2010.

¶80 Section 13-214.3(6) of the Code provides that an action for legal malpractice must be filed within two years "from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2012). The question as to when a plaintiff knew or reasonably should have known of his legal injury, so as to trigger the applicable limitations period, is ordinarily a question of fact; however, it may be determined as a matter of law where the undisputed facts allow for only one conclusion. *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 922 (1998).

¶81 The two-year statute of limitations applicable to legal malpractice actions incorporates the "discovery rule," which delays the commencement of the statutory period until the injured party knows or reasonably should know facts that would cause him or her to believe that their injury was wrongfully caused. *Brummel v. Grossman*, 2018 IL App (1st) 162540, ¶126. Discovery for purposes of the statute of limitations may rest upon so-called inquiry notice, where "[o]nce a party knows, or reasonably should know, both of his injury and that the injury was wrongfully caused, the injured person has the burden to inquire further as to the existence of a cause of action." *Id.*; see also *Pruitt v. Schultz*, 235 Ill. App. 3d 934, 936-37 (1992) (discussing inquiry notice). "There is no requirement that a plaintiff must discover the full extent of his or her injuries before the statute of limitations begins to run." *Hoffman v. Orthopedic Systems, Inc.*, 327 Ill. App. 3d 1004, 1010 (2002). "A person knows or reasonably should know an injury is 'wrongfully caused' when he or she possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Carlson*, 2015 IL App (1st) 140526, ¶23 (quoting *Hoffman*, 327 Ill. App. 3d at 1011). "At that point, the burden is upon plaintiff to inquire further as to the existence of a cause of action." *Hoffman*, 327 Ill. App. 3d at 1011.

¶82 A review of the record in this case shows that Carlson was on inquiry notice of his legal malpractice claims against Collins no later than June 2008. In June 2008, Carlson's accountant Flaherty told him

that he "potentially [had] a real problem" regarding the proposed settlement agreement. At his deposition, Carlson verified an e-mail he sent to Collins regarding his conversation with Flaherty concerning the proposed settlement agreement, where the accountant told Carlson among other things: "I don't know what happened here but you left 12 million on the table. You should be able to go back and get it." Contrary to Carlson's suggestion, we do not believe that a reasonable person would consider the statement that he left $12 million on the negotiating table to have been made "in jest." Thus, Carlson was on inquiry notice of his potential legal malpractice claims against Collins no later than June 2008, more than two years before he engaged Michael Best in August 2010.

¶83 Carlson argues that his conversation with Flaherty did not trigger the statute of limitations because, even if it put him on notice that the settlement was insufficient, he did not know that the insufficiency may have had a wrongful cause. Contrary to this assertion, "actual knowledge of the alleged malpractice is not a necessary condition to trigger the running of the statute of limitations." *Carlson*, 2015 IL App (1st) 140526, ¶23. There is no requirement that a plaintiff must discover the full extent of his or her injuries before the statute of limitations begins to run. *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 367 (1995). Here, once Carlson's accountant informed him that he left $12 million on the negotiating table and that he should go back and get it, Carlson knew or should have known, that Collins, as his attorney, should have made certain he was adequately

protected. At that point, Carlson had "'sufficient information concerning [an] injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.'" *Hoffman*, 327 Ill. App. 3d. at 1011 (quoting *Knox College v. Celotex Corp*., 88 Ill. 2d 407, 416 (1981)).

¶84 Carlson alternatively argues that as a result of this court's decision in *Carlson*, 2015 IL App (1st) 140526, we are precluded by the law of the case doctrine and collateral estoppel from finding that the statute of limitations started running prior to November 12 or 13, 2008. Neither doctrine applies in this case.

¶85 The law of the case doctrine bars relitigation of an issue already decided by a reviewing court in a prior appeal. *Preferred Personnel Services, Inc. v. Meltzer, Purtill & Stelle, LLC*, 387 Ill. App. 3d 933, 947 (2009). The doctrine does not apply in a subsequent stage of the litigation when the legal issues, underlying facts, or parties are different. *Id.*; see also *Gauger v. Hendle*, 2011 IL App (2d) 100316, ¶107 (law of the case doctrine does not apply when the legal issues, standards of proof, and parties are different). Collateral estoppel, also referred to as issue preclusion, bars a party from relitigating an issue if the issue decided in the prior litigation is identical to one presented in the current case. *Pine Top Receivables of Illinois, LLC v. Transfercom*, *Ltd.*, 2017 IL App (1st) 161781, ¶8.

¶86 Thus, both the law of the case doctrine and

collateral estoppel require that the court be presented with an issue identical to the one decided in the prior litigation. Neither doctrine applies here because this court's prior decision in *Carlson*, 2015 IL App (1st) 140526, involved different parties and different issues. The core issue in *Carlson* was whether there was any evidence indicating that Carlson knew or should have known or discovered that his former partners had wrongfully caused him injury thereby triggering the two-year statute of limitations for legal malpractice claims. *Id.* ¶3.

¶87 4. Carlson's Claims Against Drinker

¶88 Carlson argues that even if his legal malpractice claims against Collins were time-barred by the time he engaged Michael Best in August 2010, Drinker caused that loss, and Michael Best, in turn, caused him to lose his legal malpractice claims against Drinker. Carlson contends that Drinker committed legal malpractice in November 2008, by failing to advise him that his legal malpractice claims against Collins were subject to the two-year statute of limitations and six-year statute of repose applicable to attorney malpractice actions. Carlson filed a certificate pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2010)), attesting that when he met with attorneys at Drinker in November 2008, they "did not identify any legal malpractice claim that [he] had against Collins or Fish nor did [they] discuss the statute of limitations or statute of repose related to legal malpractice claims." Carlson argues that if the statute of limitations expired on any legal malpractice claims he had against

Collins before August 2010, then Michael Best violated the applicable standard of care by failing to advise him that he had legal malpractice claims against Drinker based on that law firm's failure to advise him that his claims against Collins were subject to the two-year statute of limitations and six-year statute of repose governing attorney malpractice actions.

¶89 Michael Best argues in response that it did not cause Carlson to lose any potential malpractice claims against Drinker because those claims were viable when Carlson last engaged Michael Best in February 2014 and they became time-barred by operation of the applicable statute of repose, which expired after their engagement ended and Carlson engaged new counsel.

¶90 Illinois case law is well settled that when a cause of action is viable at the time an attorney is discharged, and a second attorney is retained with enough time to preserve the plaintiff's cause of action, then the second attorney's failure to preserve that cause of action is a superseding cause of the loss of the action. See *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 755 n.3 (2008) (and cases cited therein). In this case, a review of the record shows that when Carlson last retained Michael Best in February 2014, any potential legal malpractice claims against Drinker were still viable.

¶91 The record reveals that Carlson met with attorneys from Drinker on November 19, 2008, to review the settlement agreement. According to Carlson, the attorneys raised questions about whether

the legal services Collins rendered to him in connection with the settlement agreement had been substandard. *Carlson*, 2015 IL App (1st) 140526, ¶16. Carlson claimed this was the first time he became aware of a possible legal malpractice claim against Collins. Carlson subsequently met with the Drinker attorneys in October 2009, where they discussed his concerns about Collins's handling of the settlement agreement. According to Carlson, the attorneys steered him away from filing a legal malpractice complaint against Collins by focusing on fraud claims against his former business partners.

¶92 The Drinker attorneys' actions in this regard were subject to the two-year statute of limitations and six-year statute of repose and any negligent acts or omissions would have triggered the running of the statute of repose. See, *e.g., Mauer*, 401 Ill. App. 3d at 639 (statute of repose begins to run as soon as the event creating the malpractice occurs). The statute of repose would have started running in October 2009, when Drinker failed to advise Carlson of the two-year statute of limitations. And the statute of repose expired six years later in October 2015.

¶93 Carlson's second engagement with Michael Best began in February 2014 and ended in May 2015, and by September 2015, Carlson had engaged new counsel. Therefore, even if Carlson's legal malpractice claims against Drinker did not accrue until the circuit court dismissed his legal malpractice claims against Collins in January 2014, his claims against Drinker, which did not expire under the statute of repose until October

2015, were still viable after Michael Best's representation ended in May 2015, and he retained new counsel in September 2015. As a result, Michael Best did not cause Carlson to lose any of his legal malpractice claims he may have had against Drinker.

¶94 5. Arguments Raised in Motion for Reconsideration

¶95 Carlson raises two arguments on appeal that the circuit court declined to address in his motion for reconsideration. For reasons which will be discussed below, we believe the circuit court's decision was correct.

¶96 "The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the. original hearing, changes in existing law, or errors in the court's application of the law." *Evanston Insurance*, 2014 IL 114271, ¶36. Generally, new legal arguments raised for the first time in a motion to reconsider are deemed forfeited. See, *e.g., American Chartered Bank v. USMDS, Inc*., 2013 IL App (3d) 120397, ¶13 ("Issues cannot be raised for the first time in the trial court in a motion to reconsider and issues raised for the first time in a motion to reconsider cannot be raised on appeal."); *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶36 (same). However, there is authority supporting the proposition that a circuit court has the discretion to consider a new issue raised for the first time in a motion to reconsider when a party has a reasonable explanation for why he or she

did not raise the issue earlier in the proceedings. *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 195 (1989); *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶41.

¶97 Here, Carlson has not provided a reasonable explanation for why he did not raise his arguments earlier in the proceedings. Therefore, he has forfeited them for review. Forfeiture aside, we find the circuit court did not abuse its discretion in declining to address the two arguments Carlson set forth in his motion to reconsider.

¶98 a. Double Hearsay

¶99 Carlson argues that his e-mail recounting his June 2008 conversation with his accountant John Flaherty, in which Flaherty told him that he left $12 million on the negotiating table, is inadmissible hearsay that did not fall under any exception to the hearsay rule. Hearsay is a statement, other than a statement made by a declarant while testifying at trial or hearing, offered into evidence to prove the truth of the matter asserted, III. R. Evid. 801© (eff. Oct. 15, 2015); *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 728 (2003) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.").

¶100 Carlson's e-mail recounting his conversation with Flaherty presents a potential double hearsay issue since it involves two out-of-court statements. Double hearsay is "[a] hearsay statement that contains

further hearsay statements within it, none of which is admissible unless exceptions to the rule against hearsay can be applied to each level." Black's Law Dictionary (11th ed. 2019); see also *People v. McCullough*, 2015 IL App (2d) 121364, ¶113 (multiple hearsay is not admissible unless each layer of hearsay is excused by its own exception). However, an out-of-court statement offered into evidence for some purpose other than to prove the truth of the matter asserted is not hearsay. *People v. Kliner*, 185 Ill. 2d 81,150 (1998). Therefore, there is no double hearsay where each statement is nonhearsay. IL R. Evid. 801(d)(2)(A) (eff. Oct. 15, 2015) (statement is not hearsay if it is offered against a party and is the party's own statement).

¶101 Here, neither the statement by Flaherty nor the statement by Carlson were hearsay, as neither of the statements was offered for their truth. Rather, the statements were offered to establish that Carlson was put on inquiry notice that there were problems with the proposed settlement agreement."'A statement that is offered to prove that a listener had notice of the of the information contained therein, rather than to prove the truth of the matter asserted, is not hearsay.'" *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 351 (2010) (quoting *People v. Shoultz*, 289 Ill. App. 3d 392, 395-96 (1997)).

¶102 b. Reconsideration Based on Newly Discovered Evidence

¶103 Carlson finally argues that he presented the circuit court with newly discovered evidence in the

form of a certification from Flaherty attesting that the June 2008 conversation never occurred. "When a movant seeks reconsideration based on newly discovered evidence, 'a party must show that the newly discovered evidence existed before the initial hearing but had not yet been discovered or was otherwise unobtainable.'" *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 324 (2010) (quoting *Stringer v. Packaging Corp. of America*; 351 Ill. App. 3d 1135, 1141 (2004)). The statements made by Flaherty in his certification do not qualify as newly discovered evidence for purposes of Carlson's motion for reconsideration. Carlson, as a party to his conversation with Flaherty, identified the conversation as having occurred in June 2008, as noted in his e-mail. Carlson had been aware of the conversation since June 2008. Carlson cannot now argue that the circuit court erred by refusing to consider this to be newly discovered evidence, where Carlson was a party to the conversation he now claims did not occur.

¶104 Carlson asserts that the circuit court's discovery stay prevented him from obtaining Flaherty's statement sooner. The record does not support this assertion. Carlson never requested leave to depose Flaherty. Instead, Carlson waited until June 12, 2019, after he filed his motion to reconsider, to send a document subpoena to Flaherty.

¶105 **III. CONCLUSION**

¶106 The circuit court did not abuse its discretion in denying Carlson's motion for leave to file a second

amended legal malpractice complaint where the proposed amendments concerned allegations of malpractice that were time-barred by the applicable period of repose and Carlson failed to establish the first *Loyola* factor showing that the allegations would cure defects in the prior pleadings. The circuit court did not abuse its discretion in denying Carlson's motion to conduct additional discovery where he failed to support the motion with a Rule 191(b) affidavit.

¶107 Moreover, we conclude that the circuit court properly granted summary judgment in favor of Michael Best on count I of the amended complaint for legal malpractice where there was no genuine issue of material fact as to damages arising out of the legal representation Michael Best provided him in connection with the settlement agreement. Specifically, we find that there is no genuine issue of material fact as to whether Michael Best caused Carlson to lose any potential legal malpractice claims against Collins because any potential claims Carlson had against Collins were already time-barred by the applicable statute of limitations before Carlson engaged Michael Best in August 2010. In addition, we find that there is no genuine issue of material fact as to whether. Michael Best caused Carlson to lose any potential legal malpractice claims against Drinker because any potential claims Carlson had against Drinker were still viable when Carlson engaged successor counsel in November 2010. Furthermore, Carlson cannot sue Michael Best for foiling to inform him of a claim against Michael Best because there is no duty for a law firm to inform a client that he or she

has a claim against it.

¶108 Finally, we conclude that the circuit court did not abuse its discretion in declining to address the arguments Carlson raised in his motion for reconsideration as they were not only waived but without merit. The statement that Carlson contends was hearsay was not in fact hearsay because it was not offered for the truth of the matter asserted. The alleged newly discovered evidence was not in fact newly discovered.

¶109 Affirmed.

No. 1-19-1961

Cite as:	*Carlson v. Michael Best & Friedrich LLP*, 2021 IL App (1st) 191961
Decision Under Review:	Appeal from the Circuit Court of Cook County, No, 16-L-00383; the Hon. Daniel J. Kubasiak, Judge, presiding.
Attorneys for Appellant:	Joseph T. Gentleman, of Chicago, for appellants.
Attorneys for Appellee:	Michael L. Shakman, Zachary J. Freeman, and William J. Katt, of Miller Shakman Levine & Feldman LLP, of Chicago, for appellee.

APPENDIX D

**IN THE CIRCUIT COURT OF
THE COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

WILLIAM CARLSON and WILLIS CAPITAL, LLC,
Plaintiffs,

v.

MICHAEL BEST & FRIEDRICH LLP,
THOMAS CRONIN, AARON L DAVIS, LELAND
W. HUTCHINSON, JR., DANIEL J. KELLEY,
and CRONIN & CO., LTD.,
Defendants

Case No. 2016 L 0383
Judge Daniel J. Kubasiak
Commercial Calendar T

Opinion & Order

This cause is before the Court on the Plaintiffs' Motion to Clarify and Motion to Reconsider the Court's December 6, 2019 Order, which addressed: (1) the motions for summary judgment filed by the defendants, Thomas C, Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., Ltd. ("Cronin Firm") (collectively, "Cronin Defendants"), pursuant to 735 ILCS 5/2-1005(b) as to all relief sought by the Plaintiffs, William Carlson

("Carlson") and Willis Capital, LLC ("Willis") (collectively, "Plaintiffs" or "Carlson"), in Count II of Plaintiffs' First Amended Complaint, and (2) The Cronin Defendants' motion to strike the affidavit of Carlson's expert, Richard H. Lehman. In the December 6, 2019 Order, the Court granted all the Cronin Defendants' motions for summary judgment and their motion to strike the affidavit of Richard H. Lehman.

On January 24, 2020, when Plaintiffs first presented their Motion to Clarify and Motion to Reconsider, they also presented their renewed motion for leave to supplement their expert's affidavit (from Richard H. Lehman), but the motion for leave to supplement the expert's affidavit was denied by the Court at that time. The Court has again reviewed the pleadings, the parties' summary judgment briefs and the exhibits attached thereto, and the briefs submitted on Plaintiffs' Motion to Clarify and Motion to Reconsider. After reviewing these materials and after applying the appropriate standards for summary judgment motions and motions to reconsider, the Court denies Plaintiffs' Motion to Reconsider, but grants (in part) Plaintiffs' Motion to Clarify the December 6, 2019 Order, as explained and clarified below.

In summary, for the reasons stated in the briefs and exhibits submitted, the Court again concludes that the Cronin Defendants are entitled to summary judgment in their favor and against Plaintiffs as to all relief sought in Count II of Plaintiffs' First Amended Complaint. The Court finds that no genuine issue of

material fact exists, and the Cronin Defendants cannot be deemed to be the proximate cause of the loss of Plaintiffs' alleged legal malpractice claims against David J. Fish, Shawn M. Collins, The Collins Law Firm, P.C., and The Fish Law Firm, P.C. (collectively "Fish & Collins"), or the loss of Plaintiffs' alleged legal malpractice claims against David Almeida ("Almeida") and his firm back in 2008-2009, Drinker, Biddle & Reath ("Drinker"), or the loss of Plaintiffs' alleged legal malpractice claims against Michael, Best & Friedrich, LLP ("MBF"), all of whom Plaintiffs allegedly retained at various times since 2007. Plaintiffs admit they did not retain Cronin & Co., Ltd. until November 11, 2010. The Court also concludes that the Cronin Defendants are entitled to summary judgment in their favor and against Carlson as to the fee claim asserted in Count II of Plaintiffs' First Amended Complaint because any such claim for unreasonable fees is time-barred, as a matter of law, by Illinois' two-year statute of limitations governing claims against attorneys and law firms, 735 ILCS 13-214.3(b).

BACKGROUND

Motion for Summary Judgment

The following allegations are contained in the first amended complaint. Plaintiff Carlson, the sole owner and member of plaintiff Willis, founded Belvedere Trading, LLC. ("Belvedere") and made Thomas Hutchinson ("Hutchinson") and Owen O'Neill ("O'Neill") his partners. Hutchinson and O'Neill allegedly "locked Carlson and Willis out" of virtually

all important business decisions and would not provide them with information about the company needed to enjoy the benefits of Belvedere ownership. Carlson and Willis retained Fish & Collins at different points in their litigation and mediation efforts against Hutchinson and O'Neill. According to Carlson, Fish & Collins negligently represented them, leading to a settlement amount that left Carlson and Willis allegedly uncompensated for 49 million dollars of value. In November of 2008, Carlson retained Almeida and Drinker to analyze the Belvedere settlement. Plaintiffs allege that they did not discover their claims against Fish & Collins because the analysis submitted by Almeida and Drinker in November 2008 "did not single out a legal malpractice claim against [Fish & Collins]."

Regarding Count I alleged against MBF, this Court previously granted summary judgment in favor of MBF and against Plaintiffs in its May 3, 2019 and May 7, 2019 Orders. After Carlson's motions to reconsider were denied, Carlson filed a notice of appeal on September 25, 2019 and Carlson is pursuing an appeal of the Orders relating to MBF.

Accordingly, the Court will continue with a discussion on Count II of the first amended complaint. Count II alleges that Carlson retained Cronin on November 11, 2010. Cronin & Co., Ltd. filed a complaint against Fish & Collins on November 18, 2010 and an amended complaint on February 23, 2010. On March 14, 2011, Fish & Collins filed a motion to dismiss the amended complaint. The initial action

against Fish & Collins was voluntarily dismissed pursuant to an agreed tolling agreement on July 13, 2011, and a new action against Fish & Collins was commenced by Cronin on Plaintiffs' behalf on July 5, 2013. The refiled action against Fish & Collins was ultimately dismissed with prejudice by the trial court (Judge Sanjay Tailor) on January 15, 2014, and Plaintiffs appealed. On April 22, 2015, the appellate court affirmed the dismissal of the case with prejudice, noting that Carlson had knowledge of a wrongful cause of his injury no later than September 13, 2008 (and more likely even sooner), *Carlson v. Fish*, 2015 IL App (1st) 140526 ¶41 and therefore the November 18, 2010 filing was untimely.

Plaintiffs' first amended complaint alleges MBF's negligent representation (Count I), and Cronin, Davis, Hutchinson, Kelley & Cronin Firm's (the Cronin Defendants') negligent representation (Count II). Carlson and Willis allege that the Cronin Defendants breached the standard of care by failing to advise Plaintiffs that Plaintiffs allegedly had legal malpractice claims against MBF, Almeida and Drinker, and Fish & Collins, and that Cronin & Co., Ltd. unreasonably billed Carlson.

STANDARD OF LAW

Summary judgment is proper when the pleadings, affidavits, depositions, admissions, and affidavits on file fail to establish a genuine issue of material fact and that the movant is entitled to judgment as a matter of law,735 ILCS 5/2 1005©; *N.*

Ill. Emergency Physicians v. Landau, Omahana & Kopka, Ltd., 216 Ill.2d 294, 305 (2005). A genuine issue of material fact exists when the material facts are disputed or when reasonable persons might draw different inferences from the undisputed facts. *Adams v. N. Ill. Gas Co.*, 211 Ill.2d 32, 43 (2004). The burden of making a *prima facie* showing that there are no genuine issues of material fact is on the moving party. *Williams v. Covenant Med. Ctr.*, 316 Ill.App.3d 682, 689 (4th Dist. 2000). Once the movant has met this initial burden, the non-movant must produce facts that would arguably entitle it to a favorable judgment. *Helfers-Beitz v. Degalman*, 406 Ill.App.3d 264, 267-68 (3rd Dist. 2010). A defendant may be granted summary judgment in two instances; "(1) when the movant affirmatively disproves the non-movant's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law... or (2) when the movant can establish the non-movant lacks sufficient evidence to prove an essential element of the cause of action." *Rice v. AAA Aerostar*, 294 Ill.App.3d 801, 805 (4th Dist. 1998). citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The trial judge cannot make credibility determinations or weigh the evidence at the summary judgment stage. *Pietruszynski v. McClier Corp*. 338 Ill.App.3d 58, 67-68 (2003).

DISCUSSION

In Count II of the first amended complaint, Carlson alleges the Cronin Defendants were negligent in failing to advise Plaintiffs they may have a legal

malpractice claim against MBF based on MBF's alleged failure to timely advise Carlson (and Willis) in August through September of 2010 that Carlson had malpractice claims against Fish & Collins (and perhaps Almeida and Drinker based on their representation of Plaintiffs in November 2008 and October 2009), and that those claims should be filed before the limitations period expired. To prevail on a legal malpractice claim, the plaintiff client must plead and prove: (1) an attorney-client relationship, (2) a duty of due care arising from the attorney-client relationship, (3) a breach of that duty, (4) proximate causation, and (5) that the client suffered injury. *Goldfine v. Barack Ferrozzano, Kirschbaum & Perlman*, 2013 IL App (1st) 111779, ¶82. However, this Court previously granted summary judgment in favor of defendant MBF, finding that MBF's alleged negligence did not proximately cause any claimed loss to Carlson. The Cronin Defendants argue that their alleged negligence in failing to advise Carlson he had a valid malpractice claims against MBF, Almeida, or Drinker or Fish & Collins, and to file such claim(s) against them (MBF, Almeida, Drinker, or Fish & Collins) cannot be deemed to be the proximate cause of any loss to Carlson.

The Court finds that Plaintiffs' own allegations and admissions and the record evidence are dispositive of the matter as to the Cronin Defendants. In summary, Carlson alleged he retained Cronin on November 11, 2010 to pursue Carlson's legal malpractice claims against Fish & Collins. Cronin did so and filed a complaint against Fish & Collins on

November 18, 2010, within a week of being retained. However, as noted, on January 15, 2014, the trial court, through Judge Sanjay Tailor, dismissed Carlson's claims against Fish & Collins based on the statute of limitations. See *William Carlson et al. v. Collins Law Firm, et al.,* No. 13 L 7719. The appellate court affirmed the dismissal on April 22, 2015. *Carlson v. Fish*, 2015 IL App (1st) 140526.

Carlson and Willis also argue that the appellate court has already ruled that the statute of limitations had not begun to run until November 12th or 13th of 2008. Yet the Illinois appellate court did not make such a finding. *See Carlson v. Fish*, 2015 IL App (1st) 140526, ¶33. To the contrary, the appellate court found that "[a]lthough Carlson asserts that it was not until the November 19, 2008, meeting with the Drinker lawyers that he knew he had been wrongfully injured, it is evident he knew weeks, if not months, in advance of that date" *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶33. The Illinois appellate court concluded:

> Carlson's knowledge of a wrongful cause of his injury, even if he had only identified his former partners' fraud as that cause, rather than defendants failure to protect him from that fraud, commenced the two year statute of limitations. Because that date occurred no later than September 13, 2008 (and more likely even sooner), Carlson's complaint, filed on November 18, 2010, was not timely. Thus, the trial court did

> not err in granting a defendants' motion to dismiss.

Id. at ¶ 41. Further, this Court previously found in its May 2019 Orders relating to MBF that Carlson's malpractice claims against Fish & Collins accrued no later than June 2008 and therefore became time-barred by June 2010, months before Carlson even retained Cronin. Specifically, the Court held the following:

> Applying the inquiry notice standard, the Court finds that Carlson was on inquiry notice of his malpractice claims against the Collins Law Firm ("Collins") by June 2008 due to a conversation he had with his accountant.

Thus, as a matter of law, the Court finds that no genuine issue of material fact exists that the alleged negligence of the Cronin Defendants in failing to file malpractice claims against MBF based on MBF's alleged negligence in failing to file malpractice claims on Plaintiffs' behalf against Fish & Collins (or Almeida and Drinker) cannot be deemed to be the proximate cause of any loss to Plaintiffs because any alleged legal malpractice claims that Carlson had against Fish & Collins were already time-barred by the time Carlson retained MBF in August 2010. *See* Court's May 2019 Orders relating to MBF (Carlson's alleged claims against Fish & Collins accrued by June 2008 and thus became time-barred by June 2010, before Carlson retained MBF); *see also Roberts v. Heilgeist*, 124

Ill.App.3d 1082 (1984) (attorney owes no duty to file claim which is already time-barred at time of retention). In addition, for the reasons set forth in the Cronin Defendants' summary judgment briefs and supporting exhibits, the Court finds that no genuine issue of material fact exists that the alleged negligence of the Cronin Defendants in failing to file malpractice claims against Almeida and Drinker cannot be deemed to be the proximate cause of any loss to Carlson. Even assuming arguendo that Carlson had malpractice claims against Almeida and Drinker, any such claims did not accrue until the dismissal of Carlson's malpractice claims against Fish & Collins by the trial court (Judge Sanjay Tailor) on January 15, 2014, at the earliest, pursuant to Illinois adverse judgment rule. The adverse judgment rule provides that a plaintiff generally does not sustain an injury until he or she has suffered an adverse judgment, settlement or dismissal. *Warnock v. Karm Winand & Patterson,* 376 Ill.App.3d 364, 370 (2007) (statute commenced on date of trial court's adverse ruling); *York Woods Cmty Ass'n v. O'Brien*, 353 Ill.App.3d 293, 299-300 (2004) (limitations period did not start until appellate court ruled against plaintiff, and court directed against the filing of "prophylactic malpractice cases," noting they do not promote judicial economy). Also, the record shows that in May 2015, Carlson retained another attorney, Sosa. (Ex. Q to MSJ). In June 2015, Carlson discharged Cronin (Ex. B to MSJ,¶59; Ex. W, Cronin's 6/25/15 Email), and retained another attorney, Asperger, to investigate and review potential claims. (Ex. R to MSJ, 2015 Invoices from Asperger to Carlson). Then in July or August 2015, Carlson

retained yet another law firm, Schuyler, Roche & Crisham, (Ex. F to MSJ, Carlson Dep. at 444:1-446:3), who advised Carlson in September 2015 that Carlson had exhausted all potential claims. (Ex. S to MSJ). The Cronin Defendants thus cannot be deemed to be the proximate cause of the alleged loss of Carlson's malpractice claims against Almeida and Drinker. Summary judgment is therefore entered in favor of the Cronin defendants and against the Plaintiffs as to all relief sought in Count II of Plaintiffs' first amended complaint.

Nor can Davis, Hutchinson or Kelley, individually, be held liable for any failure to advise. Again, to prevail on a legal malpractice claim, the plaintiff client must plead and prove that the defendant attorneys owed the client a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury. *Northern Illinois Emergency Physicians v. Landaff, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 306 (2005). As the Cronin Defendants note, on November 11, 2010, Carlson retained the Cronin firm, and not the individual defendants, to pursue his alleged malpractice claim pursuant to the November 19, 2010 engagement agreement between Carlson and Cronin Firm. Yet at that time, Davis, Hutchinson, and Kelley were not a part of the Cronin Firm and did not work for the Cronin Firm. Davis first started working at Cronin Firm on March 21, 2011. Hutchinson first started in May 2011, but never had any involvement with the Carlson matters until "at least 2012." Lastly, Kelley

first started in 2012, but never had any involvement with any legal malpractice claims. At the Carlson deposition, Carlson stated that he retained the Cronin Firm in November 2011, not the individual lawyers, and he does not know the relationship(s) between Cronin and the individual lawyers.

Ultimately, an attorney-client relationship must arise between the attorney and client before a client can claim legal malpractice against the attorney. *Id*. Carlson has failed to establish that he had an attorney-client relationship with Davis, Hutchison or Kelley individually. As no genuine issue of material fact exists that Cronin Defendants individually cannot be liable to Carlson for his claims, the court grants Davis, Hutchinson, and Kelley's motion for summary judgment in their favor and against Plaintiffs on Count II of the first amended complaint.

Finally, as demonstrated in the Cronin Defendants' motion for summary judgment, their memorandum in support thereof and their reply brief and supporting exhibits, Plaintiffs' fee claim in Count II based on "unreasonable fees" charged by Cronin and his firm is time-barred, as a matter of law, by Illinois' two-year statute of limitations governing claims against attorneys and law firms, 735 ILCS 13-214.3(b), because the record shows that Plaintiffs knew or reasonably should have known they suffered wrongfully caused injuries related to fees and expenses paid to Cronin by the end of 2011 and certainly no later than December 2013, more than two years before Plaintiffs commenced this action on January 13, 2016.

ORDER

It is ordered:

(1) The Motion to Clarify and Motion to Reconsider the Court's December 6, 2019 Order filed by the Plaintiffs, William Carlson and Willis Capital, LLC, is denied in part and granted in part, *i.e.*, the Plaintiffs' Motion to Reconsider is denied, but the December 6, 2019 Order is clarified as set forth in this Opinion & Order;

(2) Summary judgment is hereby granted in favor of the Cronin Defendants, Thomas C. Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., Ltd., and against the Plaintiffs, William Carlson and Willis Capital, LLC, as to all relief sought in Count II of Plaintiffs' First Amended Complaint pursuant to 735 ILCS 5/2-1005;

(3) Summary judgment is hereby granted in favor of the Individual Cronin Defendants, Thomas C. Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., and Daniel J. Kelley, and against the Plaintiffs, William Carlson and Willis Capital, LLC, as to all relief sought in Count II of Plaintiffs' First Amended Complaint pursuant to 735 ILCS 5/2-1005;

(4) Plaintiffs' motions for leave to file a second and third amended complaint are denied; and

(5) This action is dismissed with prejudice in its entirety.

/s/_____
ENTERED,

/s/_____
Judge Daniel Kubasiak, No. 2072

[DATE STAMP]
APR 24 2020
Circuit Court -2072

APPENDIX E

**IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
LAW DIVISION**

William Carlson and Willis Capital, LLC.
Plaintiffs,

v.

Michael Best & Friedrich LLP, Thomas Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr.,
Daniel J. Kelley, and Cronin & Co., Ltd.,
Defendants.

No. 2016 L 0383
Judge Daniel J. Kubasiak
Commercial Calendar T

Opinion

This cause is before the court on (1) defendants Thomas C. Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., LTD's ("Cronin Firm") (collectively, "Cronin Defendants") motions for summary judgment pursuant to 735 ILCS 5/2-1005(b) in their favor and against plaintiffs William Carlson ("Carlson") and Willis Capital, LLC ("Willis") (collectively, "Plaintiffs") as to count II of the amended complaint; and (2) Cronin Defendants' motion to strike the affidavit of Richard

H. Lehman.

The court reviewed the pleadings, the parties' briefs, and the exhibits attached thereto. After reviewing these materials and after applying summary judgment motion standards, the court grants all Cronin Defendants' motions for summary judgment against Plaintiffs on count II of the amended complaint. The court finds that no genuine issue of material fact exists that Plaintiffs' claims against Cronin Defendants are untimely and Cronin Defendants cannot be liable for the alleged professional malpractice that Carlson became aware of no later than June of 2008 as this court held in its previous order. The court grants Cronin Defendants' motion to strike the Lehman affidavit. The court has considered the affidavit in its ruling and finds that it does not overcome the court's previous findings.

BACKGROUND

Motion for Summary Judgment

The following allegations are contained in the amended complaint. Plaintiff Carlson, the sole owner and member of plaintiff Willis, founded Belvedere Trading, LLC ("Belvedere") and made Thomas Hutchinson ("Hutchinson") and Owen O'Neill ("O'Neill") his partners. Hutchinson and O'Neill allegedly "locked Carlson and Willis out of virtually all important business decisions and would not provide them with information about the company needed to enjoy the benefits of Belvedere ownership. Carlson and

Willis retained David J. Fish ("Fish"), Shawn M. Collins ("Collins"), The Collins Law Firm, P.C. ("Collins Firm"), and The Fish Law Firm, P.C. ("Fish Firm") (collectively, FCFFCF"), at different points in their litigation and mediation efforts against Hutchinson and O'Neill. According to Carlson and Willis, FCFFCF negligently represented them, leading to a settlement amount that left Carlson and Willis allegedly uncompensated for 49 million dollars of value. In November of 2008, Carlson and Willis retained David Almeida ("Almeida") of the firm Drinker, Biddle, & Reath ("Drinker") to analyze the Belvedere settlement. The plaintiffs allege that they did not discover their claims against FCFFCF because the analysis submitted by Almeida and Drinker "did not single out a legal malpractice claim against FCFFCF."

Regarding count I alleged against Michael Best & Friedrich, LLP ("MBF"), this court previously granted summary judgment in MBF's favor in its May 3, 2019 order. Accordingly, the court will continue with a discussion on count II of the amended complaint.

Count II of Carlson and Willis' amended complaint alleges that Carlson retained Cronin on November 11, 2010. Cronin and Cronin Firm filed a complaint against FCFFCF on November 18, 2010 and an amended complaint on February 23, 2010. On March 15, 2011, Collins, the Collins Firm and the Fish Firm filed a motion to dismiss the amended complaint, which was granted with leave to refile on July 13, 2011, and which was then appealed. On April 22, 2015,

the appellate court affirmed the dismissal of the case with prejudice, noting that Plaintiffs had knowledge of a wrongful cause of his injury no later than September 13, 2008, and therefore, the November 18, 2010 filing was untimely. Carlson alleges that Cronin Defendants breached their standard of care by failing to advise Plaintiffs that Plaintiffs allegedly had legal malpractice claims against MBF, Almeida and Drinker, and FCFFCF.

The amended complaint alleges MBF's negligent representation (count I), and Cronin, Davis, Hutchinson, Kelley & Cronin Firm's negligent misrepresentation (count II).

STANDARD OF LAW

Summary judgment is proper when the pleadings, affidavits, depositions, admissions, and affidavits on file fail to establish a genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2 1005©; *N. Ill. Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). A genuine issue of material fact exists when the material facts are disputed or when reasonable persons might draw inferences from the undisputed facts. *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32,43 (2004). The burden of making a prima facie showing that there are no genuine issues of material fact is on the moving party. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 689 (4th Dist. 2000). Once the movant has met this initial burden, the non-movant must produce facts that

would arguably entitle it to a favorable judgment. *Helfers-Beitz v. Degelman*, 406 Ill. App. 264, 267-68 (3rd Dist. 2010). A defendant may be granted summary judgment in two instances: "(1) when the movant affirmatively disproves the non-movant's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law...or (2) when the movant can establish the non-movant lacks sufficient evidence to prove an essential element of the cause of action." *Rice v. AAA Aerostar*, 294 Ill. App. 3d 801, 805 (4th Dist. 1998), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The trial judge cannot make credibility determinations or weigh the evidence at the summary judgment stage. *Pietruszynski v. McClier Corp.*, 338 Ill. App. 3d 58, 67-68 (2003).

DISCUSSION

In count II, Carlson alleges that Cronin Defendants were negligent in failing to advise Carlson he may have a legal malpractice claim against MBF based on MBF's alleged failure to timely advise Carlson in August through September of 2010 that Carlson had malpractice claims against Collins, and that those claims should be filed before the limitations period. To prevail on a legal malpractice claim, the plaintiff client must plead and prove: (1) an attorney-client relationship, (2) a duty of due care arising from the attorney-client relationship, (3) a breach of that duty, (4) proximate causation, and (5) that the client suffered injury. *Goldfine v. Barack Ferrozzano, Kirschbaum & Perlman*, 2013 IL App (1st) 111779,

¶82. However, this court previously granted judgment in favor of defendant MBF finding that its alleged negligence did not proximately cause any claimed loss to Carlson. Cronin Defendants argue that the alleged negligence of Cronin Defendants in failing to advise Carlson he had a valid malpractice claim, and to file such claim against MBF, cannot be deemed to be the proximate cause of any loss to Carlson.

The court finds that Plaintiffs own allegations are dispositive of the matter as to the Cronin firm and Cronin Defendants individually. In summary, Carlson alleged he retained Cronin on November 11, 2010 to pursue Carlson's legal malpractice claims against Collins. Cronin did so and filed a complaint against Collins on November 18, 2010, within a week of being retained. However, on January 15, 2014, the trial court, through Judge Sanjay Tailor, dismissed Carlson's claims against Collins based on the statute of limitations. See *William Carlson et al. v. Collins Law Firm, et al.,* No. 13 L 7719. The appellate court affirmed the dismissal on April 22, 2015.

Carlson and Willis also argue that the appellate court has already ruled that the statute of limitations had not begun to run until November 12th or 13th of 2008. Yet the Illinois appellate court did not make such a finding. See *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 33. To the contrary, the appellate court found that "[a]lthough Carlson asserts that it was not until the November 19, 2008, meeting with the Drinker lawyers that he knew he had been wrongfully injured, it is evident he knew weeks, if not months, in

advance of that date." *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 33. The Illinois appellate court concluded:

> Carlson's knowledge of a wrongful cause of his injury, even if he had only identified his former partners' fraud as that cause, rather than defendants failure to protect him from that fraud, commenced the two year stature of limitations. Because that date occurred no later than September 13, 2008 (and more likely even sooner), Carlson's complaint, filed on November 18, 2010, was not timely. Thus, the trial court did not err in granting a defendants' motion to dismiss.

Id. at ¶ 41. Further, this court previously found in its May 3, 2019, order that Carlson's malpractice claims against Collins accrued no later than June 2008 and therefore became time-barred by June 2010, months before Carlson even retained Cronin. Specifically, the court held the following:

> Applying the inquiry notice standard, the court finds that Carlson was on inquiry notice of his malpractice claims against the Collins Law Firm ("Collins") by June 2008 due to a conversation he had with his accountant.
>
> Thus, as a matter of law, the court finds that no

genuine issue of material fact exists that the alleged conduct of Cronin and the Cronin Firm cannot be deemed to be the proximate cause of the loss of Carlson's malpractice claim against Collins.

Nor can Davis, Hutchinson, or Kelley, individually be held liable for any failure to advise. Again, to prevail on a legal malpractice claim, the plaintiff client must plead and prove that the defendant attorneys owed the client a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 306 (2005). As Cronin Defendants note, on November 11, 2010, Carlson retained the Cronin firm, and not the individual defendants, to pursue his malpractice claim pursuant to the November 19, 2010 engagement agreement between Carlson and Cronin Firm. Yet at that time, Davis, Hutchinson, and Kelley were not a part of the Cronin Firm and did not work for the Cronin Firm. Davis first started working at Cronin Firm on March 21, 2011. Hutchinson first started in May 2011, but never had any involvement with the Carlson matters until "at least 2012." Lastly, Kelley first started in 2012, but never had any involvement with any legal malpractice claims. At the Carlson deposition, Carlson stated that he retained the Cronin Firm in November 2011, not the individual lawyers, and he does not know the relationship(s) between Cronin and the individual lawyers.

Ultimately, an attorney-client relationship must arise between the attorney and client before a client can claim legal malpractice against that attorney. *Id.* Carlson has failed to establish that he had an attorney-client relationship with Davis, Hutchinson or Kelley individually. As no genuine issue of material fact exists that Cronin Defendants individually cannot be liable to Carlson for his claims, the court grants Davis, Hutchinson, and Kelley's motion for summary judgment in their favor and against Plaintiffs on count II of the amended complaint.

Motion to Strike Lehman Affidavit

Upon a thorough review of Richard H. Lehman's 21-page affidavit ("Lehman Affidavit"), the court grants the motion to strike the Lehman Affidavit. The court notes that Cronin Defendants raise valid objections as to the content and requirements of the affidavit as governed under Illinois Supreme Court Rule 191. Considering the entire affidavit, the court finds that the affidavit is essentially a litany of conclusions and inadmissable evidence of the affiant's theory of how the matter should have been addressed. Additionally, if not stricken, the affidavit simply fails to overcome the court's prior findings. Cronin Defendants' motion to strike the Lehman Affidavit is granted.

ORDER

It is ordered:

(1) Cronin Defendants Thomas C. Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., LTD pursuant to 735 ILCS 5/2-1005 is granted in their favor and against plaintiffs William Carlson and Willis Capital, LLC;

(2) Defendants Aaron L. Davis, Leland W. Hutchinson, Jr., and Daniel J. Kelley's individual motion for summary judgment pursuant to 735 ILCS 5/2-1005 is granted in their favor and against plaintiffs William Carlson and Capital, LLC;

(3) Defendants Thomas C, Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., LTD are dismissed as defendants from the suit with prejudice;

(4) Defendants Thomas C. Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co. LTD's motion to strike affidavit of Richard H. Lehman is granted;

(5) This case is set for a report on status on all outstanding matters on January 24, 2019, at 9:30 a.m.

/s/
ENTERED,

/s/
Judge Daniel J. Kubasiak, No. 2072

[DATE STAMP]
Judge Daniel J. Kubasiak
DEC -6 2019
Circuit Court – 2072

APPENDIX F

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

William Carlson and Willis Capital, LLC,
Plaintiffs,

v.

Michael Best & Friedrich LLP, Thomas Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., Ltd.,
Defendants

Michael Best & Friedrich LLP,
Counter-Plaintiffs,

v.

Thomas Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., Ltd.,
Counter-Defendants

Case No. 16 L 00383
Hon. Daniel J, Kubasiak

**FINAL JUDGMENT REGARDING
MICHAEL BEST & FRIEDRICH LLP**

This matter coming to be heard on Defendant Michael Best & Friedrich LLP's ("Michael Best") Motion for Entry of Supreme Court Rule 304(a) Finding and Other Relief, the Court being fully advised in the premises and the parties being present in Court through counsel, it is hereby ordered that:

1. Pursuant to Supreme Court Rule 304(a), Plaintiffs William Carlson and Willis Capital, LLC ("Plaintiffs") may appeal the May 3, 2019 Order and Opinion that (a) partially reconsidered the Court's December 13, 2018 Opinion and, following reconsideration, (b) entered judgment in favor of Michael Best with respect to all of Plaintiffs' remaining claims against Michael Best (the "Judgment") because there is no just reason for delaying Plaintiffs' appeal of the Judgment.

2. In light of the entry of the Judgment, Michael Best's contribution counterclaim against Defendants Thomas Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., Ltd. (collectively, the "Cronin Defendants") is dismissed without prejudice with Michael Best having leave to refile its contribution counterclaim against the Cronin Defendants in the event the Judgment is reversed, in whole or in part, on appeal. In the event this dismissal is deemed to be a dismissal with prejudice notwithstanding the foregoing, the Court expressly reserves Michael Best's

right to maintain its contribution counterclaim against the Cronin Defendants in the event the Judgment is reversed, in whole or in part, on appeal.

3. To address a *de minimus* error, the May 3, 2019 Order and Opinion is amended by striking the first sentence of the final paragraph of Section (1) that states, "Should this Opinion and Order be appealed, and should the appellate court find that the statute of limitations did not tun on the Collins claims in June 2008, Carlson's claims were nonetheless untimely."

ENTERED: /s/_____
Hon. Daniel J. Kubasiak

[DATE STAMP]
Judge Daniel J. Kubasiak
MAY -7 2019
Circuit Court - 2072

Michael L Shakman (mlshak@aol.com)
Zachary J. Freeman (zfreeman@millershakman.com)
Julia K. Schwartz (jschwartz@millershakman.com)
Miller Shakman & Beem LLP (Firm I.D. #90236)
180 N. LaSalle St., Suite 3600
Chicago, IL 60601
Tel: 312.263.3700

APPENDIX G

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

William Carlson and Willis Capital, LLC,
Plaintiff,

v. No. 20161 L 0383

Michael Best & Friedrich LLP,
Thomas Cronin, Aaron L. Davis, Leland
W. Hutchinson, Jr., Daniel J. Kelley,
and Cronin & Co., Ltd.,
Defendants.

OPINION AND ORDER

This matter coming before the court on defendant Michael Best & Friedrich LLP's ("Michael Best") motion to reconsider the court's December 13, 2018, Opinion, and the court being fully advised in the premises,

IT IS HEREBY ORDERED:

(1) Defendants Michael Best's motion to reconsider the court's December 13, 2018, Opinion is granted;

A motion to reconsider is a motion that informs

the court about "newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." *Compton v. Country Mut. Ins. Co.,* 382 Ill. App. 3d 323, 331 (1st Dist. 2008). Specifically, newly discovered evidence is defined as evidence that was not available prior to the first hearing. *Id.* The court finds that it erred in its previous application of existing law. Specifically, the court erroneously applied the actual knowledge standard rather than an inquiry notice standard as the legal standard for the discovery rule. 735 ILCS 5/13-214.3(b) provides the following:

> An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

735 ILCS 5/13-214.3(b). The court reviewed the record and case law previously cited. In doing so, the court finds the recent *Constr. Sys. v. FagelHaber, LLC,* controlling on the issue of the

correct legal standard to apply for the discovery rule. *Constr. Sys. v, FagelHaber, LLC,* 2019 IL App (1st) 172430 ¶20. The *FagelHaber* court held that the relevant inquiry of when Construction Systems had knowledge of FagelHaber's failure to provide notice of a mechanic's lien to a bank was when "Construction Systems should have discovered FagalHaber's failure to serve statutory notice of the mechanic's lien on Cosmopolitan prompting it to further investigate FagelHaber's performance" – not when the notice issue was raised as a defense. *Id.* at ¶24.

Applying the inquiry notice standard, the court finds that Carlson was on inquiry notice of his malpractice claims against the Collins Law Firm ("Collins") by June 2008 due to a conversation he had with his accountant. In June 2008, more than two years before Carlson engaged Michael Best on August 18, 2010, Carlson's accountant told Carlson that he had a "real problem" with respect to the February 2008 settlement because he had "left 12 million on the table." As Michael Best argues, the statement is sufficient to put Carlson on notice to inquire further.

The court finds this statement particularly significant because an accountant, hired to consider and advise on the applicable legal and accounting standards, would be a voice of significant weight. As such, under the inquiry

notice standard, Michael Best could not have caused the loss of any claims against Collins because the statute of limitations on those claims started to run more than two years before he engaged Michael Best in on August 18, 2010. Thus, any subsequent negligence action for the loss of claims against Collins has no merit.

Should this Opinion and Order be appealed, and should the appellate court find that the statute of limitations did not run on the Collins claim in June 2008, Carlson's claims were nonetheless untimely. Regarding Carlson's claims against the Drinker Law Firm ("Drinker"), the court finds that whether or not the claims accrued (i) in 2010 when Carlson paid legal fees to other law firms concerning the February 2008 settlement, or (ii) in January 2014 when the trial court dismissed Carlson's claims against the Collins Law Firm, the law requires dismissal of Carlson's claims under either date. Should the court find the claims accrued in 2010, under the analysis discussed above, Carlson's claims became untimely in 2012. Should the court find that the claims accrued in 2014, the claims became barred by statute of repose in October 2015, six years after Drinker's last act of representation. As Michael Best notes, "a cause of action must be nonviable at the time of the defendant's discharge, because if it remained viable at the time of the defendant's discharge and another attorney was retained,

the subsequent attorney's failure to rectify the defendant's negligence acts a superseding cause of the loss of the action." *Nettleton v. Stogsdill,* 387 Ill. App. 3d 743, 755 (2nd Dist. 2008). As such, Michael Best could not have caused the loss of Carlson's claims against Drinker under either accrual date.

(2) Accordingly, the court grants Michael Best summary judgment on the notice issues of Carlson's malpractice claim;

(3) This case is set for a report on status on May 21, 2019, at 9:30 a.m.

_____

ENTERED,

_____

Judge Daniel J. Kubasiak, No. 2072

[DATE STAMP]
Judge Daniel J. Kubasiak
MAY -3 2019
Circuit Court - 2072

APPENDIX H

**IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
LAW DIVISION**

William Carlson and Willis Capital, LLC,
Plaintiffs,

v.

Michael Best & Friedrich LLP,
Thomas Cronin, Aaron L. Davis,
Leland W. Hutchinson, Jr.
Daniel J. Kelley, and Cronin & Co., Ltd.,
Defendants.

No. 2016 L 383
Commercial Calendar T
Judge Daniel Kubasiak

OPINION

This cause is before the court on defendant Michael Best & Friedrich LLP's ("Best") motion for summary judgment as to count I of plaintiffs' William Carlson ("Carlson") and Willis Capital, LLC ("Willis"), amended complaint pursuant to section 2-1005.

The court reviewed the pleadings, the parties briefs and the depositions and exhibits attached thereto. After reviewing these materials, and after

applying summary judgment motion standards, the court grants Best's motion for summary judgment as to any claim that Best failed to advise Carlson and Willis as to any malpractice claim they may have against Best. The court denies, however, Best's motion on all other grounds and finds the other portions of Best's motion raise questions of fact. The court also grants Carlson and Willis leave to file a reply to Best's affirmative defenses.

BACKGROUND

The following allegations are contained in the amended complaint. Plaintiff Carlson, the sole owner and member of plaintiff Willis, founded Belvedere Trading, LLC ("Belvedere") and made Thomas Hutchinson ("Hutchinson") and Owen O'Neill ("O'Neill") his partners. Hutchinson and O'Neill allegedly "locked Carlson and Willis out of virtually all important business decisions and would not provide them with information about the company need to enjoy the benefits of Belvedere ownership. Carlson and Willis retained David J. Fish ("Fish"), Shawn M. Collins ("Collins"), The Collins Law Firm, P.C. ("Collins Firm"), and The Fish Law Firm, P.C. ("Fish Firm") (collectively, "FCFFCF"), at different points in their litigation and mediation efforts against Hutchinson and O'Neill. According to Carlson and Willis, FCFFCF negligently represented them, leading to a settlement that left Carlson and Willis allegedly uncompensated for 49 million dollars of value.

In November of 2008, Carlson and Willis

retained David Almeida ("Almeida") and the firm Drinker, Biddle, & Reath ("Drinker") to analyze the Belvedere settlement. The plaintiffs allege that they did not discover their claims against FCFFCF because the analysis submitted by Almeida and Drinker or "did not single out a legal malpractice claim against FCFFCF."

Count I of Carlson and Willis' amended complaint alleges negligent misrepresentation against Best. On August 18, 2010, Carlson and Willis retained defendant Best for consultation in the legal malpractice matter against FCFFCF, and the representation ended on September 16, 2010. On February 27, 2014, Carlson and Willis entered into a second engagement letter with Best, under which Best was "to serve as a 'second set of eyes' on three matters, including the pending appeal of the case against FCFFCF." On April, 2015, the Illinois appellate court found that Carlson and Willis' action against FCFFCF, filed on November 18, 2010, was untimely, and that the plaintiffs knew the wrongful cause of their injury no later than September 13, 2008. Carlson and Willis allege that Best failed to inform them that the statute of limitations expired during their first engagement of Best. Best also allegedly failed to advise the plaintiffs they had a claim against FCFFCF for overbilling, failed to advise the plaintiffs they had a claim against Best itself, and failed to advise them they had a claim against Almeida and Drinker.

Best filed seven affirmative defenses against Carlson and Willis, alleging: (1) Willis does not have

standing because Best did not represent it; (2) the plaintiffs' claims are barred by the statute of limitations; (3) unclean hands, based on Carlson's alleged misconduct in misleading other lawyers regarding when they knew of their injury; (4) *laches*; (5) waiver, based on the claim that the plaintiffs would have asserted malpractice against Best in the 2010 malpractice case or in a separate lawsuit; (6) comparative fault for the plaintiffs' delay in suing the Fish attorneys; and (7) comparative fault for the plaintiffs delay in suing Drinker.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings, affidavits, depositions, admissions, and affidavits on file fail to establish a genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005©; *N. Ill. Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). A genuine issue of material fact exists when the material facts are disputed or when reasonable persons might draw different inferences from the undisputed facts. *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). A defendant may be granted summary judgment in two instances: "(1) when the movant affirmatively disproves the nonmovant's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law ... or (2) when the movant can establish the nonmovant lacks sufficient evidence to prove an essential element of the cause of action." *Rice v. AAA Aerostar*, 294, Ill. App. 3d 801 805 (4th Dist.

1998), citing *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986).

The burden of making a prima facie showing that there are no genuine issues of material fact is on the moving party. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 689 (4th Dist. 2000). Once the movant has met this initial burden, the non-movant must produce facts that would arguable entitle it to a favorable judgment. *Helfers-Beitz v. Degelman*, 406 Ill, App. 3d 264, 267-68 (3rd Dist. 2010). Summary judgment is considered a "drastic means of disposing of litigation," and "should be allowed only when the right of the moving party is clear and free from doubt." *Adams*, 211 Ill. 2d 32 at 43; *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). The trial court cannot make credibility determinations or weigh the evidence at the summary judgment stage. *Pietruszynski v. McClier Corp*., 338 Ill. App. 3d 58, 67-68 (2003).

Discussion

Statute of Limitations in Underlying Case

"Because a plaintiff must establish that but for the attorney's negligence he would have been successful in the underlying action, plaintiff is essentially required to prove a case within a case." *Sheppard v. Krol*, 218 Ill. App. 3d 254, 257 (1st Dist. 1991). Illinois courts have observed that where an attorney is retained after a claim becomes untimely, there can be no legal malpractice action because the "but for" requirement cannot be met. *Sharpenter v.*

Lynch, 233 Ill. App. 3d 319, 325 (2nd Dist. 1992).

It is undisputed that Carlson executed a retainer with Best on August 18, 2010, and that Best's first representation for Carlson ended on September 16, 2010. Defendant Best argues that the plaintiffs cannot state a malpractice claim against Best because their claims were already untimely at the time Best was retained. Best bases this argument on statements made in Carlson's deposition, as well as in his complaint filed to the ARDC. According to Best, these statements show that at the time of the settlement in February of 2008, Carlson was aware that his settlement arrangement did not compensate him for the full amount owed to him. Yet the court finds that these statements are not sufficiently clear, deliberate, or unequivocal to constitute judicial admissions. *Wausau Ins. Co. v. All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d 1116, 1122 (2nd Dist. 2002). Thus, Best has not met its initial burden in showing it is entitled to summary judgment as to this issue.

In response to Best's argument, the plaintiffs rely on allegations set forth in a proposed second amended complaint, in which Carlson and Willis claimed to have sought legal advice from Chris Parker ("Parker"), Carlson's college friend and an attorney with defendant Best. The plaintiffs argue that in light of the interactions between Carlson and Best, apparently documented in exhibits attached to the second amended complaint, Best owed a duty to Carlson in 2008, and that duty was breached. Yet if the plaintiffs wish to allege any claims based on a duty

and breach existing in 2008, such a claim would clearly be barred by the statute of repose for attorney malpractice claims. 735 ILCS 5/13-214.3©.

Carlson and Willis also argue the appellate court has already ruled that the statute of limitations had not begun to run until November 12th or 13th of 2008. Yet the Illinois appellate court did not make such a finding. To the contrary, the appellate court found that "[a]lthough Carlson asserts that it was not until the November 19, 2008, meeting with the Drinker lawyers that he knew he had been wrongfully injured, it is evident he knew weeks, if not months, in advance of that date." *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶33. The Illinois appellate court concluded:

> Carlson's knowledge of a wrong cause of his injury, even if he had only identified his former partners' fraud as that cause, rather than defendants' failures to protect him from that fraud, commenced the two year statute of limitations. Because that date occurred no later than September 13, 2008 (and more likely even sooner), Carlson's complaint, filed on November 18, 2010, was not timely. Thus, the trial court did not err in granting defendants' motion to dismiss.

Id. at ¶41.

The alleged first attorney-client relationship

between the plaintiffs and Best began in August 18, 2020, and ended in September 16, 2010. The Illinois appellate court held that the statute of limitations began to run "no later than September 13, 2008, and so the claims would have, at the latest, become untimely on September 13, 2020, before the first attorney-client relationship was terminated. Carlson and Willis claim that Best failed to advise them that their claim would be untimely if filed after September 13, 2008. As the court has found, Best has not its initial burden as movant in showing that the plaintiffs knew of their claims against Best before Best was retained. Therefore, a question of fact exists as to this issue, and summary judgment as to this issue is not proper.

That said, the court observes that the issue of timeliness could prove a real challenge to Carlson's case. The issue before the Illinois appellate court in *Carlson v. Fish* was a finding that the two-year statute of limitations had expired before the original malpractice lawsuit filed on November 18, 2010. *Id.* at ¶17. While the Illinois appellate court observed that Carlson had become aware of his claims no later than September 13, 2008, it also observed that the statute of limitations more likely began to run even sooner. *Id.* at ¶41. Moreover, Best has presented evidence in the form of emails, in which Best seems to have specifically advised the plaintiffs regarding the statute of limitations on August 18, 2010, stating:

> Looks like the statute of limitations for a legal malpractice claim is indeed the standard two years (same as a regular

> tort). The two years is construed from the date that you should have learned of the malpractice. There may be an argument to make that you didn't really learn of the malpractice until much later ... possibly when you started to unravel Shawn's activities, or when you learned of the true amount that the company made in 2007?
>
> We will consider your option, but I wanted to let you know.

While the court will not weigh this evidence against the plaintiffs' evidence on a summary judgment motion, this issue will likely prove to be a problem for the plaintiffs. *Pietruszynski*, 338 Ill. App. 3d at 67-68.

The court also finds it troubling that, as the appellate court also observes, the parties to the mediation at issue had agree that the mediation would be principals only, and that it would be non-binding. *Id.* at ¶8. An apparent email sent from Carlson to Collins and Fish on October 9, 2008, also appears to reflect that Carlson was not "coerced or forced to sign" the settlement agreement. To be successful in this case, the plaintiffs will need to show that the attorneys in the underlying malpractice case had caused the lower amount for which the plaintiffs settled, despite these cats. Nonetheless, the court will not rule on this issue of fact in a motion for summary judgment.

The court denies Best's motion for summary

judgment as to the issue of whether the plaintiffs' claims were already untimely when they first retained Best.

Viability of Claim against Drinker

"Where a cause of action remains viable despite the defendant's malpractice and after the defendant's discharge, it cannot be said that the plaintiff lost the cause of action due to the defendant's negligence, because the cause of action still existed at the time of the defendant's discharge." *Nettleton v. Stogsdill*, 287 Ill. App. 3d 743, 755 (2nd Dist. 2008). A portion of Carlson and Willis' count I claim alleges that Best failed to advise the plaintiffs that they had a claim against Drinker. Best argues that the plaintiffs cannot state a claim against Best for this alleged failure because their claims were still viable when they engaged the Cronin law firm in November of 2010. Best appears to claim that Carlson and Willis could have been advised by the Cronin law firm in November of 2010 of the claims against Drinker.

In response, the plaintiffs argue that the y could have brought a claim against Drinker until January 15, 2014. According to Carlson and Willis, no cause of action against Drinker or Best accrued until they lost their claim against Collins and Fish. Thus, the plaintiffs appear to claim that Best had a duty to inform them of their claims against Drinker when the plaintiffs retained Best once against in 2014.

It is true that "a cause of action will rarely

accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which plaintiff has become entangled due to the purportedly negligent advice of his attorney." *Lucey v. Law Offices of Pretzel & Stouffer*, 301 Ill. App. 3d 349, 356 (1st Dist. 1998). However, an exception to this general rule exists. "A legal malpractice claim can accrue before the client suffers a final, adverse judgment in the underlying action where it 'plainly obvious, prior to any adverse ruling against the plaintiff, that he has been injured as the result of professional negligence.'" *Estate of Bass v. Katten,* 375 Ill. App. 3d 62, 70 (1st Dist. 2007), *Nelson*, 2016 IL Appl (1st) 160571, ¶22-23. The incurring of additional attorney fees can trigger the running of the legal malpractice statute of limitations only "where it is clear, at the time the additional fees are included, that the fees are directly attributable to former counsel's neglect." *Lucey*, 301 Ill. App. 3d at 355 (emphasis added); *Learning Curve Int'l, Inc. v. Seyfarth Shaw LLP*, 392 Ill. App. 3d 1068, 1078 (1st Dist. 2009).

The record as it is currently before the court does not clearly reflect exactly when the any claim against Drinker would have accrued, or when it became untimely. Thus, a question of fact exists as to this issue as well.

The court denies Best's motion for summary judgment on this ground.

Duty to Advise as to Malpractice Claims against Best

Best next argues that it had no duty to disclose that Carlson had a claim against Best. Generally, a lawyer does not have an affirmative obligation to advise a client of the grounds to sue him or her for legal malpractice. *Lamet v. Levin*, 2016 IL App (1st) 143105, ¶32. Carlson and Willis have cited no authority binding on this court that would show Best had to disclose any claims the plaintiffs may have against it, and the court is not aware of any authority stating this.

The court grants Best's motion for summary judgment as to the claim that Best failed to advise Carlson and Willis as to claims against Best.

Fraudulent Concealment

Best next argues that Carlson has fraudulently misrepresented and concealed to the Cronin Law Firm when he knew about his claims regarding the settlement amount. Best claims Carlson misrepresented that ht first became concerned about the Collins Law Firm's conduct on November 19, 2008. Yet, according to Best, Carlson's ARDC complaint expressly states that Collins' malpractice was "blatantly obvious" before the February 2008 settlement. As the court has already stated, the ARDC complaint allegation to which Best refers is not sufficiently clear to constitute a judicial admission. Thus, the court cannot conclude as a matter of law, that Carlson discovered his claim in February of 2008. A question of fact exists as to when Carlson was aware

of his claim regarding the settlement amount.

The court denies Best's summary judgment motion o this ground.

Leave to File a Reply and Second Amended Complaint

Lastly, Best argues that the allegations in its affirmative defenses should be deemed admitted, because Carlson and Willis have failed to reply to them. Though this case is hardly in the "early stages of discovery," as Carlson and Willis suggest, the parties have conducted well over a year of discovery in this court with no objections as to the lack of a reply to Best's affirmative defenses. The court finds that Best would not be prejudiced by granting Carlson and Willis leave to reply to the affirmative defenses.

The court grants Carlson and Willis leave to file a reply to Best's affirmative defenses. Nonetheless, the court will not allow Carlson and Willis to file their second amended complaint, which concerns allegations of breaches by Best extending beyond the statute of repose for legal malpractice claims, in the year 2008.

ORDER

It is ordered:

(1) Defendant Michael Best & Friedrich LLP's motion for summary judgment as to count I of plaintiffs', William Carlson and Willis Capital,

LLC, amended complaint is granted as to the claim that Best failed to advise the plaintiffs of any malpractice claim they may have against Michael Best & Friedrich LLP; summary judgment is entered in favor of Michael Best & Friedrich LLP and against plaintiffs William Carlson and Willis Capital, LLC as to this limited issue;

(2) Defendant Michael Best & Friedrich LLP's motion for summary judgment as to count I of plaintiffs', William Carlson and Willis Capital, LLC, amended complaint is denied on all other grounds;

(3) Plaintiffs are to file a reply to Michael Best & Friedrich LLP's affirmative defenses by January 11, 2019;

(4) This case is set for a report on status on January 22, 2019 at 9:30 a.m.

ENTERED,

/s/
Judge Daniel J. Kubasiak, No. 2072

[DATE STAMP]
Judge Daniel J. Kubasiak
DEC 13 2018
Circuit Court - 2072

APPENDIX I

Illinois Official Reports

Appellate Court

Carlson v. Fish, 2015 IL App (1st) 140526

Appellate Court Caption	WILLIAM CARLSON and WILLIS CAPITAL, LLC, Plaintiffs-Appellants, v. DAVID J. FISH and THE FISH LAW FIRM, P.C., SHAWN M. COLLINS and THE COLLINS LAW FIRM, P.C., Defendants-Appellees.
District & No.	First District, Third Division Docket No, 1-14-0526
Filed	April 22, 2015
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 13-L-7719; the Hon. Sanjay Tailor, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Thomas C. Cronin, Leland W. Hutchinson, Jr., and Daniel J, Kelley, all of Cronin & Co., Ltd.,

for appellants.

John J. Duffy, Karen Kies DeGrand, and Michael J. Borree, all of Donohue Brown Mathewson & Smyth, LLC and Patrick M, Gollins, of Perkins Coie, LLP, both of Chicago, for appellees.

Panel

JUSTICE HYMAN delivered the judgment of the court, with opinion, Presiding Justice Pucinski and Justice Lavin concurred in the judgment and opinion.

OPINION

¶1 The application of a statute of limitations, especially in legal malpractice claims, can be tricky and technical, and, as this case shows, deadly to those who fail to adequately anticipate its possibility. Plaintiff William Carlson sued his attorneys, David J, Fish and Shawn M. Collins, and their respective law firms, alleging legal malpractice in their representation of Carlson in a dispute with his former partners in an options trading firm. The underlying dispute was resolved through mediation and resulted in a settlement agreement in which Carlson agreed to sell his share of the firm to his former partners for $17.5 million. Not long after, Carlson came to believe his former partners may have defrauded him into accepting far less for his share of the firm than it was worth and began to investigate whether he might be able to sue his former partners for fraud.

¶2 In the course of Carlson's investigation, which included consultations with defendants and other law firms, as well as mediation and accounting firms, Carlson was advised that defendants' representation in his dispute with his former partners may have been substandard. On November 18, 2010, two years and nine months after the mediation and two years and two months after be began to investigate his fraud claims, Carlson sued defendants for legal malpractice seeking damages in excess of $20 million.

¶3 Defendants filed a motion to dismiss on statute of limitations grounds. While the motion was pending,

Carlson voluntarily dismissed the complaint. Carlson refiled the one-count complaint and defendants again filed a motion to dismiss arguing that Carlson's complaint was barred by the applicable two-year statute of limitations for legal malpractice actions under section 13-214.3(b) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/13-214.3(b) (West 2012)). The circuit court granted the motion, finding that Carlson knew of his injury and had identified his former partners as the wrongful cause more than two years before he filed his complaint against defendants. Carlson contends the trial court erred because (i) no evidence indicated he knew or should have known more than two years before filing his complaint that his former partners had wrongfully caused him injury, and (ii) he timely filed the complaint as he did not know he had a legal malpractice claim until another law firm informed him of it. Alternatively, Carlson contends defendants engaged in fraudulent concealment by failing to disclose that he might have a negligence claim against them, triggering a five-year statute of limitation under section 13-215 of the Code (735 ILCS 5/13-215 (West 2012)).

¶4 We affirm. Carlson's pleadings, including his response brief and affidavit, as well as his email correspondence with defendants, establish that he knew more than two years before he filed his complaint that he bad been wrongfully injured by his former partners, which sufficiently triggered the statute of limitations on his legal malpractice claim against defendants. Further, Carlson fails to make a claim of fraudulent concealment to assert a five-year

statute of limitations.

¶5 **BACKGROUND**

¶6 In 2002, William Carlson, with two partners, Owen O'Neill and Thomas Hutchinson, founded Belvedere Trading, LLC, an options trading company. (Carlson owned his interest in Belvedere through Willis Capital, LLC, a wholly owned limited liability company that is also a plaintiff in this case. Both will be be referred to collectively as "Carlson.") Carlson was the sole managing member and held about a 62% membership interest; O'Neill held about a 25% interest and Hutchinson held the remaining 13% interest. By 2004, O'Neill and Hutchinson were managing members and owned an equal 33.3% interest along with Carlson. Between 2004 and 2006, Carlson took a break from actively trading with the firm, and the partners revised their operating agreement to reflect Carlson's absence, including a redistribution of company profits in favor of the active trading partners, O'Neill and Hutchinson.

¶7 In 2006, a few months after Carlson returned to active trading for Belvedere, he had a falling out with O'Neill and Hutchinson over numerous issues, including profit distribution and management. Carlson retained Shawn Collins and David Fish of the Collins Law Firm to represent him in the dispute. (David Fish later formed the Fish Law Firm while continuing to represent Carlson. Defendants will be collectively referred to as "Collins.") In 2007, Collins, on Carlson's behalf, filed a request for arbitration with the Chicago

Board of Options Exchange. Collins also filed a complaint for injunctive relief in the Cook County circuit court, seeking to dissolve Belvedere and compel it to buy his interest for fair value under section 35-60 of the Illinois Limited Liability Company Act (805 ILCS 180/35-60 (West 2012)).

¶8 In February 2008, Carlson, Hutchinson, and O'Neill agreed to mediate their dispute. The partners agreed that the mediation would be principals only, would be nonbinding, and would be supervised by mediator Douglas Gerrard. Carlson did not obtain an independent appraisal of his interest in Belvedere before the mediation, but in an email to Collins, he estimated that by the end of 2009, the company could be sold for $100 million. The mediation, held on February 13, 2008, resulted in Carlson agreeing to sell his interest in Belvedere for $17.5 million. The three owners signed a document that day delineating the terms of the sale, which were memorialized in a settlement agreement signed on March 6, 2008.

¶9 About six months after the mediated settlement, Carlson began communicating with defendants about his dissatisfaction with the amount he had received for his interest. Beginning in September 2008, Carlson sent numerous email messages to Shawn Collins expressing his frustration and his belief that his former partners had tricked him into taking less money than he should have and may have engaged in fraud. In a September 18, 2008 email message to Collins, Carlson wrote:

> "This email shows I thought I needed [$20 million] about my capital account*** I just wasn't comfortable yet without having gone over the numbers enough. You see, the mediation was to be filled with tricks referencing all sorts of stuff over the 9 month period filled with distractions (2 guys versus 1 guy) *** I had to defend my case against ghosts. [Mediator] Gerrard was confused by the excess of numbers they were distracting him with *** and wasn't asking me much when I was in the room alone after their 90 minute session.
>
> The bottom line is: their ploy was to confuse before the mediation. They sent a bunch of emails on Sunday and Monday regarding options inventory and confidentiality. *** Delay and distract. Thus, I didn't review and rehearse the numbers with you guys enough (there is no one else familiar with the case I could review the numbers with)***."

¶10 In a reply sent later that day, Shawn Collins told Carlson he had made a good deal, stating, "Whenever you are tempted to beat yourself up for not getting a better deal at mediation, remember that it could have very easily been MUCH worse."

¶11 Carlson sent Shawn Collins and David Fish an email on October 9, 2008, inquiring about "any legal

options" he might have pertaining to his settlement and any possible appeals process. After acknowledging that he was not coerced or forced to sign the agreement, Carlson expressed regret at having "sold my founding stake in an explosive business" and recounting his numerous conversations with his accountant who "asked how this happened."

¶12 Shawn Collins responded by email advising Carlson that, as they had already discussed, the settlement could be set aside if procured by fraud and asking Carlson for any information along that line, *"i.e.,* something important about the company that was known to your partners pre-settlement, hut not to you." He also noted that having had several conversations with Carlson about "your displeasure with the settlement, *** I'm not sure that I have anything more to add."

¶13 In an email dated November 4, 2008, Carlson informed Shawn Collins he had consulted with three different law firms, two mediation firms, and one accounting firm about the settlement. He also inquired whether he had any recourse based on new information he learned about his former partners' conduct before the mediation. On November 11, 2008, Carlson emailed Shawn Collins questioning whether certain provisions in the settlement agreement precluded him from bringing a fraud case against his former partners even if they had made false representations during the mediation. And, in a November 13, 2008 email exchange, Carlson and Shawn Collins discussed how to go forward with a

fraud case. Carlson stated, "We need a plan" and presented some "thoughts/reflections *** to get us in the right direction," In response, Shawn Collins presented issues that would need to be addressed if Carlson opted to pursue a fraud claim against his former partners, including determining contingency fee. He further stated:

> "I don't know if a 'fraud' case can be brought in a court, as opposed to arbitration. I'll look into it as soon as I am sure that you want to go forward, and go forward with me. On that note, you've referenced a couple of times recently the possibility of you working with another lawyer, perhaps in addition to me, or otherwise. You need to do what you feel is best for you, Bill. If you want to work with another lawyer, you should. No hard feelings. I'd like to be the one to help you, if there is anything legally to be done here. But only you can decide whether you want to go forward, and with whom."

¶14 That same day, Carlson responded, stating:

> "I think you're a great man. I think you're a great attorney. But, this Arbitration arrangement has cost our side millions. I can't begin to count what *** and how much that mediation cost. How am I expected to live with 2 dumb-ass 25 yr olds standing in my trading

> spots and using the technology from the company I founded. How about dealing with the deception that has gone on for a long time. No sharing of development info is a huge deal *** and something I stressed from the start.
>
> How is someone like me supposed to tolerate my life being given away. No technology, wrong buyout amount, no spots. Game over. Cavalier Mediator. Sickening. Maybe a fair fight when I'm ready to go *** instead of the slow drain over 8 months that is sure to affect one's judgment. What resulted is not easy to swallow.

¶15 Carlson also suggested that if Collins represented him, he might need co-counsel with experience in the areas, stating, "This may have helped us in Round 1."

¶16 On November 19, 2008, as part of his ongoing investigation, Carlson met with attorneys from the law firm of Drinker, Biddle & Reath, LLP. Carlson contends that while discussing a possible fraud claim against his former partners he was first made aware of a possible claim against Collins when the Drinker lawyers raised questions about whether Collins' legal services in connection with the settlement agreement had been substandard.

¶17 On November 18, 2010, just less than two years

following his meeting with the Drinker lawyers, Carlson filed his initial legal malpractice complaint against Collins. After Collins filed a motion to dismiss on statute of limitations grounds, Carlson voluntarily dismissed the complaint. Carlson refiled the complaint on July 5, 2013, alleging, in part, that defendants breached their professional duties by: (1) failing to obtain an independent appraisal of Belvedere's value before the mediation session; (2) permitting him to attend the mediation session without an attorney present; (3) advising him to sign the settlement agreement without any changes; and (4) failing to protect him from a fraud that his former partners were perpetuating.

¶18 On August 28, 2013, defendants filed a motion to dismiss under section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2012)), arguing that Carlson's complaint was barred by the applicable two-year statute of limitations for legal malpractice actions. 735 ILCS 5/13-214.3(b) (West 2012). Carlson filed a memorandum in opposition to the motion to dismiss and attached an affidavit stating that in September and October 2008, he began to "consider how [he] had been defrauded by his former partners." His affidavit further stated that by November 4, 2008, he was "building a case for fraud against my former partners," on November 11, 2008, he shared with Collins his "continued ideas about going forward" with the fraud case against his former partners, and on November 13, 2008, he told Collins that his former partners' conduct "amounts to nothing less than '[c]heating–this whole thing is the biggest lie I've ever

witnessed.'" Carlson also averred that he was not aware of any potential malpractice case against defendants until his November 19, 2008 meeting with the Drinker lawyers.

¶19 After a hearing, the trial court granted defendants' motion to dismiss with prejudice, finding that the cause of action accrued when Carlson knew he had been injured, which was no later than September 2008 and had identified his former partners as the cause, which was no later than November 12 or 13, 2008. Because Carlson's complaint was filed on November 18, 2010, more than two years after it had accrued, the circuit court found it was time-barred under section 13-214.3(b) of the Code (735 ILCS 5/13-214.3(b) (West 2012)).

¶20 **ANALYSIS**

¶21 Statute of Limitations

¶22 Carlson first contends the circuit court erred in dismissing his legal malpractice complaint on statute of limitations grounds. Section 2-619(a) of the Code allows for the involuntary dismissal of an action that "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2012). Whether a cause of action was properly dismissed under section 2-619(a)(5) of the Code based on the statute of limitations is a matter we review *de novo. Ferguson v. City of Chicago,* 213 Ill. 2d 94, 99 (2004).

¶23 Section 13-214.3(b) of the Code states that an

action for legal malpractice must be filed within two years "from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-2l4.3(b) (West 2012). This statute of limitations incorporates the discovery rule, "which delays commencement of the statute of limitations until the plaintiff knows or reasonably should have known of the injury and that it may have been wrongfully caused." *Dancor International, Ltd. v. Friedman, Goldberg* & *Mintz,* 288 Ill. App. 3d 666, 672 (1997). Significantly, actual knowledge of the alleged malpractice is not a necessary condition to trigger the running of the statute of limitations, *SK Partners I, LP v. Metro Consultants, Inc.,* 408 Ill. App. 3d 127, 130 (2011) ("under the discovery rule, a statute of limitations may run despite the *lack* of actual knowledge of negligent conduct" (emphasis in original)). A statute of limitations begins to run when the purportedly injured party "has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue." *Dancor,* 288 Ill. App. 3d at 673. Knowledge that an injury has been wrongfully caused "does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action." (Emphasis and internal quotation marks omitted.) *Castello v. Kalis,* 352 Ill. App. 3d 736, 744 (2004). A person knows or reasonably should know an injury is "wrongfully caused" when he or she possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. *Hoffman v. Orthopedic*

Systems, Inc., 327 Ill. App. 3d 1004, 1011 (2002). The law is well settled that once a party knows or reasonably should know both of his injury and that it was wrongfully caused, "the burden is upon the injured person to inquire further as to the existence of a cause of action." (Internal quotation marks omitted.) *Castello,* 352 Ill. App. 3d at 745. "For purposes of a legal malpractice action, a client is not considered to be injured unless and until he [or she] has suffered a loss for which he [or she] may seek monetary damages." *Northern Illinois Emergency Physicians v. Landau, Omahana* & *Kopka, Ltd.,* 216 Ill. 2d 294, 306 (2005).

¶24 Carlson asserts that beginning in September 2008, he suspected that his former partners had procured the settlement agreement through fraud and commenced an investigation that extended until November 2008. He contends, however, that suspicion does not trigger the statute of limitations and he did "know or have reason to know" that he had been injured or that his injury had been wrongfully caused until November 19, 2008, when he met with attorneys from Drinker, Biddle & Reath. Carlson relies on *LaManna v. G.D. Searle & Co.,* 204 Ill. App. 3d 211 (1990), and *Young v. McKiegue,* 303 Ill. App. 3d 380 (1999), to support his argument that the discovery rule was not triggered while he was investigating whether he had a claim against his former partners.

¶25 In *LaManna,* the plaintiff alleged she became infertile because of an infection caused by defendant's contraceptive device. In reversing the trial court's summary judgment order in defendant's favor, the

trial court held the statute of limitations begins to run at the point when the party reasonably should have known that an injury was wrongfully caused and not when a party is suspicious or attempts to discover whether the injury is wrongfully caused. *LaManna,* 204. Ill. App. 3d at 218.

¶26 Carlson contends that, as in *LaManna,* he only suspected that his injury was wrongly caused and was still in the process of investigating possible fraud by his former partners up until his meeting with the Drinker lawyers on November 19, 2008. We disagree with Carlson's contention. First, *LaManna* is distinguishable and does not support Carlson's argument. In *LaManna,* the plaintiff was not investigating to determine what the wrongful cause of her injury was, but whether she was injured and whether there was any wrongful cause at all. It was possible the plaintiff was not infertile, as one doctor told her or that her infertility was caused by something other than the contraceptive device. Conversely, Carlson believed not long after entering the settlement agreement that his partners may have engaged in fraud during the negotiation and that any injury he suffered, namely the difference between what he received for his share of the company and what that share was worth, directly resulted from the alleged fraud. Moreover, contrary to Carlson's assertions, the *LaManna* court did not deviate from precedent regarding the discovery rule. *LaManna,* 204 Ill. App. 3d at 218.

¶27 Similarly, *Young v. McKiegue*, 303 Ill. App. 3d

380 (1999), fails to support Carlson's argument because there the statute of limitations was tolled while the plaintiff investigated whether her injury—her husband's death in the hospital—was wrongfully caused. Until two medical experts reviewed her husband's medical records and determined that the physicians caring for her husband had deviated from the standard of care, she did not know or have reason to know that her injury was wrongfully caused. *Id.* at 389.

¶28 Defendants maintain that Carlson made several judicial admissions showing that he knew he had been wrongfully injured more than two years before he filed his legal malpractice complaint. They also assert that email correspondence between Carlson and Collins starting in September 2008 supports a finding that Carlson failed to satisfy the statute of limitations.

¶29 As to judicial admissions, defendants point to Carlson's statement in his response brief to the motion to dismiss that before November 19, 2008, he "may well have believed that Belvedere cheated him as part of the settlement." Further, in an affidavit attached to that brief, Carlson stated that on November 11, 2008, he told defendants he was "thinking about a fraud case against his former partners and on November 13, 2008, told them that his former partners' conduct at the mediation amounted to nothing less than "cheating." Lastly, defendants point out that during oral argument on the motion to dismiss, the trial judge asked the following question of Carlson's attorney:

> "THE COURT: Your position is that although the plaintiff knew of his injury, let's say, as late as November 13th, and also knew on that date that his injury had wrongfully been caused because his former partners had defrauded him, the "cause of action as to his lawyers would not have accrued on that date because he did not know his injuries were wrongfully caused also by his lawyers. Would that be a fair characterization of your position?
>
> CARLSON'S ATTORNEY: I think that's fair. What I am saying is the cause of action did not accrue because he was—the cause of action against his lawyers did not accrue because the standard in *Jackson, Jordan, Mitsias*, elsewhere, is that, as *Mitsias* says, there has to be some awareness of some possible fault on the part of the defendant in question. *** Awareness of misconduct of the lawyers."

¶30 Defendants contend these statements constitute judicial admissions that preclude Carlson from now arguing that he did not know until November 19, 2008 that he had been wrongfully injured.

¶31 Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need

for proof of the fact. *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.,* 401 Ill. App. 3d 33, 86 (2010). For a statement to constitute a judicial admission, it must be clear, unequivocal, and uniquely within the party's personal knowledge. Williams *Nationalease, Lid. v. Motter*, 271 Ill. App. 3d 594, 597 (1995). The statement also must be an intentional statement relating "to concrete facts and not an inference or unclear summary." *Serrano v. Rolman*, 406 Ill. App. 3d 900, 907 (2011). Evidentiary admissions can be controverted or explained by the party, while judicial admissions cannot be controverted or explained. *Pryor v. American Central Transport, Inc.,* 260 Ill. App. 3d 76, 85 (1994).

¶32 We agree with Collins that Carlson's statements in his response brief and his attached affidavit constitute admissions that he knew before November 19, 2008, that he had been wrongfully injured by his former partners. Carlson explicitly stated in his response brief that before November 19, 2008, he "may well have believed that Belvedere cheated him as part of the settlement." Further, as noted, in his affidavit, Carlson stated that in September and October 2008, he began to "consider how [he] had been defrauded by his former partners" and by November 11, 2008, was "thinking about a fraud case" against his former partners.

¶33 This finding is further supported by the email exchange between Carlson and defendants beginning in September 2008, in which Carlson expressed his dissatisfaction" with the results of the mediation and

raised concerns that his former partners had engaged in fraud to induce him into signing the settlement agreement. In his September 18, 2008 email to Shawn Collins, Carlson stated that his former partners' "ploy was to confuse" and to "delay and distract" and that they were trying to confuse the mediator with an excess of numbers. He continued to investigate through October and by November 4, 2008, was building a case for fraud against his former partners. By November 13, 2008, Carlson had concluded that his former partners' conduct amounted to "no less than cheating" and solicited ideas from Collins about a plan for going forward with a fraud case. Although Carlson asserts that it was not until the November 19, 2008 meeting with the Drinker lawyers that he knew he had been wrongfully injured, it is evident he knew weeks, if not months, in advance of that date.

¶34 Carlson contends, however, that even if he knew or should have known before November 19, 2008, that he had been injured by his former partners, his legal malpractice claim was timely because he did not know until he met with the Drinker lawyers that defendants were at least partly responsible for his injuries. For support, Carlson cites *Mitsias v. 1-Flow Corp*., 2011 IL App (1st) 101126, and *Hochbaum v. Casiano*, 292 Ill. App. 3d 589 (1997). In *Mitsias*, following shoulder surgery, the plaintiff experienced severe shoulder pain and was diagnosed with chondrolysis, a condition that causes destruction of cartilage. *Mitsias*, 2011 IL App (1st) 10126, ¶6. The plaintiff sued the surgeon and the hospital where the surgery occurred, alleging medical malpractice. *Id.* ¶7. Later, during the deposition of one

of her physicians, the plaintiff learned six years after her surgery that research had uncovered a link between the pain pump used during her surgery and cartilage destruction. *Id.* ¶8. Plaintiff voluntarily dismissed her complaint and refiled, adding product liability claims against the pain pump manufacturer. *Id.* ¶10. The trial court granted the product liability defendants' motions to dismiss plaintiff's complaint as untimely, finding that the statute of limitations on the medical malpractice claim and the products liability claim commenced at the same time, when plaintiff knew she had been injured and that the injury had been wrongfully caused. *Id.* ¶14.

¶35 The appellate court reversed, finding that the plaintiff had not slumbered on her rights because "there is no question that plaintiff could not have known of any potential products liability cause of action against the pain pump manufacturers while the causal link between her injury and the pain pump used upon her was not scientifically discoverable. As has been discussed, our supreme court has expressed concern that plaintiffs should not be '"held to a standard of knowing the inherently unknowable."' *Id.* ¶29 (quoting *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981)).

¶36 In *Hochbaum*. also cited by Carlson, the plaintiff brought a medical malpractice action against her treating physicians and a products liability action against Prozac manufacturers seeking damages for personal injuries she sustained When she attempted suicide while being treated with Prozac. *Hochbaum*,

292 Ill. App. 3d at 591. The trial court granted summary judgment in defendants' favor because plaintiff's complaint was not filed within the two-year limitations period applicable to medical malpractice and products liability actions. *Id.* at 593. The appellate court reversed, finding that the plaintiff did not learn about a possible connection between Prozac and suicidal behavior until she heard about it in the news media 18 months after her suicide attempt. *Id.* at 595.

¶37 Carlson argues that as in *Mitsias* and *Hochbaum*, his knowledge that he had a fraud claim against his former partners did not mean he knew that he also had a separate legal malpractice claim against his former lawyers. Further, because he is not a lawyer he contends he was not equipped to discern that his lawyers may have committed malpractice until he obtained independent legal advice from the Drinker lawyers.

¶38 We disagree. First, unlike in *Mitsias* and *Hochbaum*, where the claims were unknown until uncovered by scientific research or a news report, Carlson's claim for legal malpractice against his lawyers was not "unknowable." While investigating whether his former partners had engaged in fraud during mediation, he could certainly have tried to determine whether his legal representation in that proceeding was substandard. Indeed, that is what he eventually did, when he met with the Drinker lawyers. The fact that he waited until November 19, 2008, to have that meeting does not mean that day initiated his cause of action against Collins. Further, the trail of

emails between Carlson and defendants shows that Carlson was not happy with his attorneys' representation in the mediation before his meeting with the Drinker lawyers. For instance, Carlson's November 13, 2008, email message to Collins suggesting that co-counsel with experience in the options market might have been helpful during the mediation is evidence that by that date, Carlson knew that defendants may have failed to provide adequate legal representation. Unlike the injury in *Mitsias*, which was scientifically unknowable, Carlson's claim against defendants was knowable and known by Carlson before November 18, 2008.

¶39 More importantly, as stated already, knowledge that an injury has been wrongfully caused "does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action." (Emphasis and internal quotation marks omitted.) *Castello*, 352 Ill. App. 3d at 744. Carlson knew that he had been wrongfully injured no later than November 13, 2008, and thus even though he may not yet have known that defendants' representation was partly responsible and that their conduct gave rise to a legal malpractice cause of action, the statute of limitations commenced because Carlson did have knowledge that he was injured and that his injury was wrongfully caused. In short, Carlson's identification of one wrongful cause of his injuries initiates his limitations period as to all other causes, particularly when, as here, he claims his partners engaged in fraud and the defendants failed to protect him from fraud, those claims are inseparable.

¶40 *Blue Water Partners, Inc. v. Mason*, 2012 IL App (1st) 102165, is illustrative. In *Blue Water*, the plaintiffs sued their former partners alleging, among other claims, wrongful diversion of business opportunities and breach of promise. *Id.* ¶16. In short, the plaintiffs alleged that their business partners improperly formed a company to directly compete with the company plaintiff and defendants had formed earlier. *Id.* ¶17. The trial court ruled in defendants' favor, finding that plaintiffs extinguished their claims against defendants when both parties signed a series of documents releasing the other from all claims. *Id.* ¶18. Plaintiffs then sued their attorneys alleging they committed legal malpractice by assisting defendants in creating the competing company. *Id.* ¶23. The trial court found that the legal malpractice claim was time-barred because at the time plaintiffs signed the release they knew or should have known that defendants engaged in purportedly wrongful conduct by helping plaintiffs' former partners incorporate the competing company. *Id.* ¶32. ln affirming the trial court, the appellate court held that the limitations period on plaintiff's claim against his lawyer commenced at the same time as his claim against his former partner because the two claims were inseparable. *Id.* ¶67.

¶41 Carlson's knowledge of a wrongful cause of his injury, even in if he had only identified his former partners' fraud as that cause, rather than defendants' failure to protect him from that fraud, commenced the two year statute of limitations. Because that date occurred no later than September 13, 2008 (and more

likely even sooner), Carlson's complaint, filed on November 18, 2010, was not timely. Thus, the trial court did not err in granting defendants' motion to dismiss.

¶42 Fraudulent Concealment

¶43 Carlson contends, for the first time, that defendants fraudulently concealed that their own legal malpractice may have contributed to Carlson's injuries, triggering a five-year statute of limitations under section 13-215 of the Code. 735 ILCS 5/13-215 (West 2012). As a preliminary matter, we address defendants' contention that Carlson has waived this issue by failing to property plead it in his complaint or raise it in his response to defendants' motion to dismiss. This court has consistently held that issues not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. See *Eagan v. Chicago Transit Authority*, 158 Ill. 2d 527, 534 (1994). Although Carlson did not raise the fraudulent concealment issue in his complaint or in his response to defendants' motion to dismiss, during the hearing on defendants' motion to dismiss, Carlson's lawyer did argue that defendants had "lulled" Carlson by telling him he made a good settlement, which precluded him from knowing he might have a claim of legal malpractice. Thus, we will address the issue.

¶44 Under the fraudulent concealment doctrine, the statute of limitations will be tolled if the plaintiff pleads and proves that fraud prevented discovery of a cause of action. *Clay v. Kuhl*, 189 Ill. 2d 603, 613

(2000). If the fraudulent concealment doctrine applies, a plaintiff can commence her suit at any time within five years after she discovers she has a cause of action. 735 ILCS 5/13-215 (West 2012). As a general matter, one alleging fraudulent concealment must "'show affirmative acts by the fiduciary designed to prevent the discovery of the action.'" *Clay*, 189 Ill. 2d at 613 (quoting *Hagney v. Lopeman*, 147 Ill. 2d 458, 463 (1992)). In other words, a claimant must show "affirmative acts or representations [by a defendant] that are calculated to lull or induce a claimant into delaying filing his [or her] claim or to prevent a claimant from discovering his [or her] claim." *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 257 (1998). But there is a widely recognized exception to this rule in cases where the existence of a fiduciary relationship is plainly established. *DeLuna v. Barciaga*, 223 Ill. 2d 49, 76 (2006) (citing *Crowell v. Bilandic*, 81 Ill. 2d 422, 428 (1980)). "[A] fiduciary who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of a cause of action, has fraudulently concealed that action, even without affirmative acts or representations." (Emphasis omitted.) *Id.* at 77. Our supreme court has recognized that an attorney-client relationship constitutes a fiduciary relationship. *Id.* (and cases cited there).

¶45 Carlson asserts that instead of advising him that he might have a claim of legal malpractice against them for failing to protect him from his former partners' fraudulent conduct, defendants reassured him that the settlement agreement was good under the circumstances and could have been much worse.

Carlson also argues defendants failed to advise him of their conflict of interest and the possibility that their representation might be materially limited by their personal interests. Carlson's reliance on *DeLuna* for the proposition that defendants had a duty to affirmatively advise him to pursue a legal malpractice action against them is misplaced. In *DeLuna*, the plaintiffs alleged that their attorney misled them by telling them that their underlying medical malpractice case was going well when it had, in fact, been dismissed, and failed to disclose material facts bearing on the procedural status of the case. *DeLuna*, 223 Ill. 2d at 79-80. Moreover, the plaintiffs alleged that they could not speak English and that they relied in good faith on their attorney's reassurances. *Id.* at 80-81. Carlson fails to cite a case holding that a lawyer has an affirmative obligation to advise a client to sue the attorney for legal malpractice.

¶46 We also reject Carlson's contention that he was "lulled" by defendants into thinking that his only option was a fraud case against his former partners. Carlson consulted with three law firms, two mediation firms, and an accounting firm between September and November 2008, and was not solely reliant on defendants and their advice in determining how to remedy his injury. And when Carlson informed Collins he was leaning toward filing a claim of fraud against his former partners, Collins advised Carlson that if he wanted to work with another lawyer, he should. Thus, absent evidence of fraudulent concealment, a five-year statute of limitations does not apply.

¶47 **CONCLUSION**

¶48 Because Carlson failed to timely file his legal malpractice complaint, we affirm the circuit court's order granting defendants' motion to dismiss with prejudice.

¶49 Affirmed.

APPENDIX J

[SUPREME COURT OF ILLINOIS SEAL AND LETTERHEAD]

November 30, 2022

In re: William Carlson et al., petitioners, v. Thomas Cronin et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 01/04/2023.

Very truly yours,

/s/

Clerk of the Supreme Court

APPENDIX K

[SUPREME COURT OF ILLINOIS SEAL AND LETTERHEAD]

October 04, 2022

Joseph T. Gentleman
Attorney at Law
161 N. Clark Street, Suite 1600
Chicago, IL 60601

In re: Carlson v. Reyes
128862

Today the following order was entered in !he captioned case:

Motion by Movants for a supervisory order. **Denied**.

Order entered by the Court.

Very truly yours,

/s/

Clerk of the Supreme Court

cc: Hon. Jesse Gregory Reyes
Hon. LeRoy K. Martin, Jr.
Hon. Mary K. Rochford
Peter D. Sullivan

APPENDIX L

128862

E-FILED
8/31/2022 12:48 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

NO.

IN THE SUPREME COURT OF ILLINOIS

WILLIAM CARLSON and
WILLIS CAPITAL., LLC,
Plaintiffs/Appellants/movants,

v.

JUSTICE JESSE G. REYES,
JUSTICE LEROY K. MARTIN, Jr
JUSTICE MARY K. ROCHFORD,
Respondents.

Appellate court 1-20-0724
Trial court case number 16 L383

MOTION FOR SUPERVISORY ORDER

NOW COME Plaintiffs by and through their attorney, Joseph T. Gentleman and for their motion for supervisory order state as follows:

1. The plaintiffs respectfully request a supervisory order vacating the opinion of the Illinois Appellate Court, First District in this matter and/or instructing the appellate court to address all the arguments made in the plaintiffs/appellants' brief and Petition for Rehearing and then to remand this case to the trial court for a trial on the merits. The plaintiffs have filed concurrently a Petition for Leave to Appeal in this matter. As an alternative remedy, the extraordinary circumstances of this case also calls for a supervisory order.

2. A supervisory order is warranted in this case because of a pattern of erroneous lower court decisions delaying justice and denying plaintiffs a day in court is a matter vital to the administration of justice that cannot be adequately addressed through the normal appellate process. In fact, the appellate court intentionally refused to address in any manner several of plaintiffs' arguments that were dispositive of this matter and that required reversal. This case does not involve a situation where the appellate court considered and rejected plaintiffs' arguments that were dispositive and required reversal instead this case involves a total and complete abdication of the duties and responsibilities owed by the appellate court to all litigants.

Standards governing Supervisory orders.

3. Under the Illinois Constitution, this Court has "[g]eneral administrative and supervisory authority over all courts" in Illinois. Ill Const. art. VI

section 16. This Court's supervisory authority is "unlimited in extent and hampered by no specific rules." *Vasquez Gonzalez v. Union Health Servs., Inc.*, 2018 IL 123025 para. 16. In fact, this Court has exercised its supervisory authority in cases where the parties did not seek its review of the judgment below. See e.g. *In re Estate of Funk*, 221 Ill.2d 30(2006); *City of Urbana v. Andrew N.B.*, 211 Ill.2d 456(2004); *McDunn v. Willimas*, 156 Ill.2d 288(1993). The Court has granted supervisory relief when the dispute between the parties involves a matter of importance to the administration of justice, the normal appellate process will not afford adequate relief, and intervention is necessary to keep an inferior tribunal from acting beyond the scope of its authority. See *Vasquez*, 2018 IL 123025 para. 17. Illinois Supreme Court Rule 383 governs Supervisory orders. Rule 383 states "a motion requesting the exercise of the Supreme Court's supervisory authority shall be supported by explanatory suggestions and shall contain or have attached to it the lower court records or other pertinent material that will fully present the issues, authenticated as required by Rule 328."

4. The supporting record in this case consists of the appellate court common law record, the briefs filed by the parties and the orders entered by the appellate court on July 4, 2022 and July 29, 2022. A copy of everything but the common law record is attached.

Argument.

5. This Court should grant plaintiffs' Motion for

Supervisory order because, with all due respect, the appellate court failed to address in any manner, shape or form dispositive issues that were raised in plaintiffs' briefs.

Plaintiffs have a viable claim for legal malpractice against the defendants based on their failure to file claims on behalf of plaintiffs against Drinker before the statute of limitations expired in 2012 when the defendants were still representing the plaintiffs.

6. The appellate court mistakenly found that plaintiffs could not establish a *prima facia* case against the defendants for legal malpractice based upon their failure to timely assert claims on behalf plaintiffs against Drinker because the appellate only addressed one of the arguments raised by the plaintiffs. The appellate court found that the statute of repose expired on those claims in October of 2015. (A150-171). The appellate court stated "we focus our attention on subsection © which provides that an action for damages based on tort, contract or otherwise against an attorney arising out of an act or omission in the performance of professional services may not be commenced more than six years after the date on which the act or omission occurred, 735 ILCS 5/13-214.3 © (West)." (A161 para. 41). The appellate court then went on to analyze the statute of repose. The appellate court stated "statute of repose begins to run on the last date on which the attorney performs the work involved in the alleged negligence. *Snyder v. Herdelberger*, 2011 IL 111052 para. 18." (A162 para.

42). The appellate court then found "the last act or omission which gave rise to Carlson's potential claims of legal malpractice against Drinker occurred in October 2009, when Drinker purportedly failed to advise Carlson of the two-year statute of limitations regarding his claims against Collins. Thus, the six year statute of repose started running in October 2009, when Drinker purportedly failed to advise Carlson of the two-year statute of limitations regarding his claims against Collins." (A162 para. 43).

7. With all due respect; the appellate court misunderstood plaintiffs' claim and did not address dispositive arguments raised by plaintiffs. Plaintiffs asserted claims against the defendants that that they violated the standard of care because they did not file claims on behalf of plaintiffs against Drinker before the statute of limitations expired on plaintiffs' claims against Drinker **and/or** before the statute of repose expired on those claims. (A56-69). The undisputed record in this case establishes that Cronin represented Carlson from November 2010 through at least April of 2015. (C6166-6172p48-66, C6207-6214p126-159, C5580p88-102, 111). Carlson, his expert, the "law of the case" doctrine and other arguments in plaintiffs' briefs establish that the statute of limitations on plaintiffs' claims against Drinker commenced in late 2010 an expired in late 2012 when it is undisputed that defendants were still representing plaintiffs. As the plaintiffs argued in their briefs and Petition for Rehearing, if the statute of limitations on plaintiffs' claims against Drinker expired in 2012, then it is TOTALLY and COMPLETELY irrelevant and

immaterial to the analysis involved in this case that the appellate court believes the statute of repose expired on plaintiffs' claims against Drinker in 2015. (A56-69, A127-148. A198). When the statute of repose expired, is TOTALLY and COMPLETELY irrelevant and immaterial because the statute of limitations expired in 2012 when it is undisputed that plaintiffs were represented by defendants.

8. The plaintiffs presented numerous arguments in their briefs and Petition for Rehearing that established that the statute of limitations on plaintiffs' claims against Drinker expired in 2012 while the defendants were representing the defendants. (A56-69, A127-148). In fact, the plaintiffs even argued to the appellate court that the appellate court and defendants were barred by doctrine of "law of the case" or collateral estoppel from contradicting a prior final judgment entered in this matter that found that the statute of limitations expired on plaintiffs' claims against Drinker in 2012. (A56-69). Michael Best ("Best")filed a motion for summary judgment related to Count I of the complaint in this matter and in support of that motion Best argued that the claims of negligence in Count I that alleged that Best was negligent when they failed to advise plaintiffs that they had claims against Drinker had no merit because the statute of limitations on Carlson's claims against Drinker commenced in 2010, after Carlson retained and paid attorneys and expired in 2012. (C3362). Best argued that "Carlson was injured by any Drinker malpractice years before the trial court dismissed his compliant in the underlying lawsuit in January 2014,"

(C3362). Best also argued that "the claims accrued in 2010 when Carlson paid legal fees to other law firms[Cronin] concerning the February 2008 settlement and the claims became barred by the statute of limitations two years later in 2012." (C3491-3493). Best concluded that they were not the proximate cause of any loss of Carlson's claims against Drinker because those claims expired in 2012 when Cronin was representing Carlson and Best was not Carlson's attorney in 2012. The trial court accepted Best's arguments and granted Best's motion for summary judgment and stated "the law requires dismissal of Carlson's claims ... [because] Carlson's claims became untimely in 2012." (C5423). Thus, the trial court rendered a final judgment in this case that found that the statute of limitations on any claims plaintiffs had against Drinker expired in 2012. The appellate court affirmed the decision, so the trial court decision is final and binding upon defendants, the trial court, the appellate court and this Court. (A1-35).

9. The "law of the case" doctrine provides that where an issue has been litigated and decided, a court's unreversed decision on a question of law or fact settles that question for all subsequent stages of the suit. *Stickler v. American Augers, Inc.*, 325 Ill.App.3d 506, 510(2001). The rule of the "law of the case" doctrine is a rule of practice based upon sound policy that once a trial court decides an issue that the issue is settled for all aspects of that case. *Id.* This authority establishes that once the trial court entered a final judgment finding that Best was not liable for malpractice because the statute of limitations

commenced on plaintiffs' claims against Drinker in 2010 and expired in 2012, that the trial court and the appellate court CANNOT do an about face and find that the statute of limitations commenced at any other time.

10. The plaintiffs made the arguments above plus additional arguments about the statute of limitations that were never addressed in any manner, shape or form by the appellate court. (A56-69). The plaintiffs ask this Court to review the briefs and opinion rendered by the appellate court and this Court will see that the appellate court opinion completely ignored numerous dispositive arguments. In fact, the plaintiffs even took the time to draft a Petition for Rehearing to alert the appellate court that it had ignored numerous issues and that it did not address arguments that the appellate court was duty bound to address.

11. Actually, Cronin did not even make any arguments in his appellate brief or cite any authority that the "law of the case" doctrine and collateral estoppel did not apply therefore Cronin waived or forfeited any arguments that "law of the case' and collateral estoppel do not apply. (A90-125). A party's failure to raise an issue in its brief is deemed a forfeiture of that issue. *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 124-25(2004). Furthermore, it is well established that issues not presented in a brief are not properly before the court and are deemed waived. *In re A.W.J.,* 197 Ill.2d 492, 499(2001). Arguments unsupported by citation to authority do not merit

consideration by a court. *Vernon Hills III Partnership v. St. Paul Fire & Marine Insurance Co.*, 287 Ill.App.3d 303, 311 (1997). A court should not become an advocate for, as well as the judge of points a party seeks to raise and a party should not turn a court "into a repository for [a party] to foist the burden of argument and research." *Enadeghe v. Dahms*, 2017 IL. App. 162170 para. 23. This Court should certainly not make any arguments on behalf of defendants. Thus, this Court has no choice but to find that that the statute of limitations on any claims that plaintiffs had against Drinker commenced in 2010 and expired in 2012.

12. Furthermore, the doctrine of collateral estoppel prohibits the trial court and appellate court or any court from contradicting the previous finding. (A56-69). The doctrine of collateral estoppel bars re-litigation of issues that have been determined by a valid and final judgment. *People v. Terrell*, 185 Ill.2d 467, 475(1998). For collateral estoppel to apply (1) the issues must be identical; (2) a final judgment on the merits must have been obtained in the previous adjudication and (3) the party against whom estoppel is asserted must have been the party or in privity with a party to the prior adjudication. *Cree Development v. Mid America Advertising*, 324 Ill.App.3d 534,539(2001). There is no generally prevailing definition of privity that applies to all cases rather determining privity requires careful consideration of the circumstances of each case. *Hayes v. State Teacher Certification Bd.,* 359 Ill.App.3d 1153, 1159(2005). Privity exists when a non party has the same legal

interest as a party. *In re Marriage of Mesecher*, 272 Ill.App.3d 73, 76(2005).

13. Collateral estoppel applies because the issues involved are identical because Best claimed IN THIS CASE that the statute of limitations commenced on claims plaintiffs had against Drinker in 2010 and expired in 2012. The trial court granted Best's motion for summary judgment, IN THIS CASE, so there was a final judgment. Defendants are in privity with Best because they are both attorneys who represented plaintiffs, they are parties in the same case and they both raised arguments about when the statute of limitations commenced on claims plaintiffs had against Drinker. Best and the defendants in this case have the same exact interest in a determination of when the statute of limitations commenced on claims plaintiffs had against Drinker thus there are in. "privity." It would also be fundamentally unfair for the trial court to find that Best should obtain a judgment in its favor because the statute of limitations commenced in 2010 and then for the very same trial judge to then find that defendants in Count II should obtain a judgment in their favor because the statute of limitations commenced at some other time. All the parties to this case and this Court are stuck with the fact that there is a final judgment in this case that found that the statute of limitations on claims plaintiffs had against Drinker commenced in 2010 and expired in 2012.

14. Even if the appellate court found that it is not bound by the prior decision by the "law of the case"

doctrine, defendants were legally prohibited from asserting that the statute of limitations commenced on plaintiffs' claims against Drinker in January of 2014. (A56-69). Cronin swore under oath in his deposition that he "evaluated very thoroughly what Drinker Biddle had done," he "discussed whether he[Carlson] had potential claims against Drinker ..." he analyzed Drinker's legal work to determine whether or not Drinker committed legal malpractice and he provided an official legal opinion about Drinker's performance to plaintiff. (C6303p44line11p46line 17). This testimony is a judicial admission by Cronin that in November of 2010 Carlson paid for his legal opinion about whether or not Drinker committed malpractice. A judicial admission is a deliberate, clear and unequivocal statement made by a party in a deposition about a concrete fact within the party's knowledge. *Installco, Inc. v. Whiting Corp.*, 336 Ill.App.3d 776, 788 (2003). This judicial admission by Cronin that Carlson paid Cronin monies so that he could provide an opinion about whether or not Drinker breached the standard of care in 2010 satisfies the legal requirements to commence the statute of limitations in 2010 because it admits plaintiffs suffered damage by paying attorney fees and any person who pays an attorney to review the legal work of another attorney establishes that the person reasonably knows of any wrongful injury. This is especially true in the instant case when the appellate court previously found in the appeal of Carlson v Best that the statute of limitations commenced when Carlson met with Drinker to review the Belvedere settlement despite the fact Drinker did not advise Carlson in writing about any malpractice of

Collins. Now, we have an attorney admitting he was paid to provide a legal opinion about Drinker's performance to Carlson in November 2010 so that must commence the statute of limitations on any claim for malpractice against Drinker. Certainly, Cronin, the attorney who received monies from the client to opine about the malpractice of another attorney cannot argue in good faith that the statute of limitations did not commence at that time but instead commenced over three years later in January of 2014.

15. The plaintiffs also made arguments that based upon the record related to Count 11, which includes the judicial admission of Cronin, the statute of limitations pertaining to plaintiffs' claims against Drinker commenced in 2010 and expired in 2012. (A56-69). The statute of limitations governing legal malpractice cases can be found in 735 ILCS 214.3 and it states that the statute of limitations commences when the plaintiff knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused. *Jackson Jordan v. Leydig*, 158 Ill.2d 240, 249 (1994). A legal malpractice action may accrue prior to the trial court entry of an adverse judgment if it is "plainly obvious that the plaintiff has. been injured as a result of professional negligence and where an attorney's neglect is a direct cause of the legal expense incurred by the plaintiff." *Nelson v. Padgitt*, 2016 ILApp(1st) 160571, para. 14; *Construction Systems, Inc. v. FagelHaber, LLC*, 2019 IL App(1st) 172430. The undisputed evidence and Cronin's judicial admission establish as a matter of law in this case that that the statute of limitations

commenced on plaintiffs' claims against Drinker in 2010 because Cronin judicially admits that plaintiffs retained and paid him in November of 2010 to provide legal advice about Drinker's representation. This is sufficient to commence the statute of limitations because the Carlson paid an attorney to review Drinker's performance. In addition, plaintiffs presented unrebutted expert testimony that Carlson's claims against Drinker commenced in 2010 and expired in 2012. (C6216-6236).

16. The above establishes that the statute of limitations on plaintiffs' claims against Drinker expired in 2012 when defendants were still representing plaintiffs, so the appellate court did not even need to analyze when the statute of repose expired.

17. It is a little troubling that the appellate court totally ignored all these arguments made in the briefs and did not address any of these issues in any manner in the Opinion. The appellate court shockingly did not even address these arguments despite the fact that the plaintiffs filed a Petition for Rehearing that clearly and unequivocally stated that the appellate court did not address these dispositive issues. It should be noted that the appellate court denied the Petition for Rehearing a mere 4 business days after it was filed by a simple order offering no explanation whatsoever for its failure to address these dispositive issues. (A200). It appears that the appellate court did not even seriously consider the Petition for Rehearing because it acted in such a hasty manner.

18. The plaintiffs are entitled to a Supervisory Order from this Court under the circumstances. The instant matter is of importance to the administration of justice because this Court cannot allow the appellate courts to completely and totally ignore dispositive issues involved in an appeal and violate a party's right to due process. The due process clauses of the federal and state constitutions are not coextensive because the state constitution provides broader rights of due process. *Van Harken v. City of Chicago*, 305 Ill.App.3d 972, 980(1999). To state a claim under the Due Process Clause, one must show that he was deprived of life, liberty or property and the deprivation was brought without due process of law. *Roehrborn v. Lambert*, 277 Ill.App.3d 181 (1995). Due process concerns principles of fundamental justice and fairness. *People v. Lindsey*, 199 Ill.2d 460(2002). Due process is a flexible concept that depends upon the circumstances of the particular matter in issue. *Scott v. Department of Commerce and Community Affairs*, 84 Ill.2d 42(1981). The essence of procedural due process is meaningful notice and meaningful opportunity to be heard. *In re D.R.*, 307 Ill.App3d 478(1999). A state violates a person's right to due process whenever it engages in conduct that is deemed oppressive, arbitrary and unreasonable. *People v. McCauley*, 163 Ill.2d 414(1994). A hearing with a predetermined outcome is no hearing at all for purposes of due process. *Marconi v. Chicago Heights Police Pension Bd.*, 361 Ill.App.3d 1(2005). A party should have the opportunity to be heard and fair consideration of a party's arguments must be performed otherwise due process is violated; *Six Brothers King Drive Supermarkets, Inc., v. Department*

of Revenue, 192 Ill.App.3d 976(1989). Due process also requires a fair and impartial hearing. *Smith v. Department of Registration & Ed.*, 412 Ill. 332(1952). When the evidence establishes that the outcome of a hearing has been predetermined regardless of proof or arguments made, the concerns and goals of due process have not been met and such a hearing is nothing more than a sham proceeding that is countenanced by a court would eviscerate the protections afforded by the due process clause. *Marconi v. Chicago Heights Police Pension Bd.*, 361 Ill.App.3d 1(2005). In *Pettigrew v National Accounts Systems, Inc.*, 67 Ill.App.2d 344, 351 (1966) the court stated "a fundamental requisite of procedural due process is that every man shall have the protection of his day in court ... shall afford him an opportunity to be heard ... and shall assure him an inquiry on the issues of the case ..." While it is true that due process is not violated by erroneous decisions made by a court it is violated when a court does not even address material and dispositive issues.

19. The plaintiffs' rights to due process were violated because they lost his ability to pursue their extremely valuable lawsuit that seeks tens of millions of dollars in damages because the appellate court refused to address or acknowledge dispositive arguments raised by the plaintiffs in their briefs. Actually, it is undisputed that the appellate court did not address plaintiffs' arguments so that requires reversal of this matter and establishes as a matter of law that there was no fair and reasonable consideration of plaintiffs' claims. Accordingly, the

appellate court ruling was nothing more than a predetermined sham of a proceeding and it must be vacated because it violated plaintiffs' right to due process.

20: If this Court does not grant the relief sought, then the plaintiffs would not have had their case decided on the merits of the arguments properly raised and presented to the courts. The appellate court chose to intentionally ignore arguments that required reversal because the "law of the case" doctrine and other unopposed arguments required the appellate court to follow prior final judgments in this case.

21. The normal appellate process will not afford relief to the plaintiffs. The plaintiffs pursed an appeal and properly presented the arguments to the appellate court but the appellate court intentionally chose to ignore the dispositive arguments. This is not a case where the appellate court considered and rejected the plaintiffs' arguments instead this is a case where the appellate court completely and totally ignored arguments that were material and dispositive. If this Court does nothing, then the plaintiffs have no appellate remedies available to them. The plaintiffs should not be forced to seek permission of this Court to accept the Petition for Leave to Appeal because the chances are slim for any party that a Petition for Leave to Appeal will be granted.

22. The plaintiffs' explanatory suggestions include directing the appellate court to address all arguments made in plaintiffs' brief and to render an

opinion based upon the merits of the arguments. This Court must grant the relief sought otherwise it would countenance the appellate court violating the duties owed to litigants and their oath of office to carry out their duties in good faith and with competence. It is axiomatic that the appellate court must consider all relevant and material arguments involved in a matter and clearly that did not happen in this matter. If this Court does not grant the relief sought, then it countenances the abdication of the duties the appellate court justices owe to society to perform their jobs competently.

23. The plaintiffs' explanatory suggestions also include that this Court should not even bother to remand this matter to the appellate court panel that heard this case because the appellate court panel has established it is not interested in deciding this matter on the merits and this Court can easily discern from this motion, the briefs filed in the appellate court and the Petition for Leave to appeal the judgment entered by the trial court is erroneous and must be reversed. The plaintiffs are also concerned about how this matter could be "randomly" assigned to the same exact appellate panel that was involved with a prior appeal in this matter Carlson v Best, 2021 Ill.App 191961(A1-35) because the plaintiffs were never advised that this appeal was assigned to this appellate panel because it previously heard a prior appeal. It appears that the appellate court may have somehow manipulated the "random" assignment in this matter in an effort to assign this appeal to the same panel that previously heard this matter. The fact that the same panel heard

both appeals makes the fact that the panel intentionally ignored dispositive issues even more troublesome. The same panel was obviously aware of the prior appeal and that there was a final judgment in that appeal that found that the statute of limitations on plaintiffs' claims against Drinker commenced in 2010 and expired in 2012 yet that panel decided to ignore the previous rulings made in the case and all the arguments made that the prior decision was binding. The appellate court acted beyond its scope of authority by failing to do the very job they were elected or appointed to perform.

WHEREFORE, Plaintiffs pray that this court enter a supervisory order requiring the appellate court to address all arguments raised in the parties briefs or that this Court order the appellate court to reverse and remand this matter to the trial court for a trial on the merits, or that this Court enter an order reversing the order of the appellate court and trial court and ordering a trial on the merits and for further relief that is just and equitable in the circumstances.

Respectfully Submitted

WILLIAM CARLSON and
WILLIS CAPITAL, LLC,

By: /s/_____
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APPENDIX M

128858

NO.

IN THE SUPREME COURT OF ILLINOIS

WILLIAM CARLSON and
WILLIS CAPITAL., LLC,
Plaintiffs/Appellants,

v.

THOMAS CRONIN, AARON L. DAVIS,
LELAND W. HUTCHINSON, JR.,
DANIEL J. KELLEY,
and CRONIN & CO., LID,
Defendants/Appellees.

Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-20-0724 there Heard on Appeal from the Circuit Court of Cook County, Illinois, Law Division Case No. 16 L 383.
The Honorable Daniel J. Kubasiak, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

BRIEF AND APPENDIX

ORAL ARGUMENT REQUESTED

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E-FILED
8/30/2022 3:08 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

Prayer for Relief

The plaintiffs seek leave to appeal to the Illinois Supreme Court and they pray that the decision of the appellate court and trial court are reversed and this matter is remanded to the trial court for a jury trial on the merits of plaintiffs' claims.

Date of Pertinent Orders

On December 6, 2019 the trial court entered an order granting defendants' motion for summary judgment. (C6804-09). On April 24, 2020 the trial court denied plaintiffs' motion to reconsider. (C7140-7148). On June 20, 2022 the appellate court issued an opinion affirming the trial court. (Appendix "AP"70-92). On July 26, 2022 the appellate court denied the Petition for Rehearing without hearing argument. (A16).

Points Relied Upon for This Petition

The questions presented in this appeal are of the highest importance and this Court should accept this appeal for numerous reasons. First, if this Court does not grant this Petition, the plaintiffs' rights to (due process will be violated. The plaintiffs presented numerous arguments in their briefs that established that the statute of limitations on plaintiffs' claims against Drinker had commenced in 2010 and expired in 2012 when the defendants were still representing the plaintiffs. The appellate court completely ignored these arguments and did not address the arguments in any manner, shape or form thus violating the plaintiffs' rights to due process. The plaintiffs have filed a Motion for Supervisory Order concurrently with this Petition.

Second, the appellate court decision must be vacated because it will create confusion pertaining to when the statute of repose commences. The opinion in this case stated that the statute of repose governing attorneys commences on the last act of negligence not the first act of negligence which runs contrary to this Court's decision in *Cunningham v. Huffman*, 154 Ill.2d 398 (1993) which stated "we reject adoption of the continuous course of treatment doctrine." If this appeal is not accepted, the first district has unilaterally altered how the statute of repose will be applied to situations when there may be numerous acts of alleged negligence which occurred almost a year apart that did not involve an "unbroken course of negligence."

Third, this Court should grant the Petition because the appellate court decision creates a new

body of law that provides immunity for an attorney who works as part of a legal team as long as the attorney is not a party to a retainer agreement. The appellate court improperly found that individual attorneys who worked as part of a legal team and whose names appeared on numerous documents filed in plaintiffs' cases were not liable for legal malpractice because only Cronin was a party to retainer agreement with plaintiffs.

Fourth, this Court should grant the Petition because the appellate court decision creates a body of law that states that the statute of limitations on a client's claim for overbilling commences before the billing even occurred. Obviously, there is no Illinois law that supports the fact that the statute of limitations commences on a claim before the negligent or wrongful act occurs.

Statement of Facts.

In 2002, William Carlson ("Carlson"), the sole owner and member of Willis Capital LLC, founded Belvedere Trading, LLC. (C5554 paragraph "p"3-4). Belvedere was created to trade S & P 500 equity index options. (C5554p3). Carlson made Thomas Hutchinson ("Hutchinson") and Owen O'Neill ("O'Neill") his partners. (C5554p3).

In 2005, Carlson took a leave of absence due to health concerns. (C5554p7-8). When he returned in 2006, Hutchinson and O'Neill intended to squeeze Carlson and Willis out of Belvedere. (C5555p9). They

refused to allow him to resume equal use of Belvedere assets and claimed that Willis was no longer an equal owner of the company. (C5555p9).

In around March 2007, Carlson and Willis retained The Collins Law Firm, P.C. to represent them in confronting Hutchinson and O'Neill. (C5556p11). Collins initially filed a claim in arbitration for breach of contract, breach of fiduciary duties and other relief on or about May 17, 2007. (C5556p12). Then, on October 12, 2007, Collins filed a complaint seeking dissolution and other relief against Belvedere, Hutchinson and O'Neill in the Circuit Court of Cook County, Illinois, Chancery Division. (C5556p13). In February 2008, the chancery court granted Hutchinson's and O'Neill's motion to compel arbitration in the chancery case. (C5557p15). That same day, Collins arranged an immediate mediation of Carlson's and Willis' claims to occur the next business evening. (C5557p16). The mediation was postponed two days and occurred on the evening of February 13, 2008. (C5557p16).

On February 12, 2008, Collins met with plaintiffs and falsely informed plaintiffs that their ownership interest in Belvedere was being legally diluted each and every day by Hutchinson and O'Neil. (C5557p17). Collins also falsely informed plaintiffs that they could not obtain current Belvedere financial documents in either the chancery lawsuit or the arbitration that would enable them to establish an accurate valuation of plaintiffs' interests in Belvedere. (C5557p17). At this meeting, plaintiffs were also

informed by Collins that "[plaintiffs] would be lucky to get $8 ½ million ... your equity is dropping like a stone ... you are being reduced here ... there is nothing we can do about it." (C5557p17). Carlson asked Collins how could the actions of Belvedere be legal and he said "your documents are bad" "we've gone about as far as we can with this." (C5557p17). Collins did not attend the February 13, 2008, mediation; instead Collins advised Carlson that he refused to participate in the mediation and that Carlson had to attend the mediation without legal representation. (C5557-5558p17-18).

At the mediation, Carlson was told by the mediator he should accept $17.5 million for his interest in Belvedere because the mediator said he had spoken to Collins and "[y]our attorney says this doesn't look good" because he said your documents are bad causing plaintiffs to lose their ownership interest each and every day. (C5558p20). The plaintiffs reached a settlement at the mediation because they felt they had no "other options at all" based upon the fact they were falsely told that they could not get financial documents from Belvedere including a copy of the capital account, that the documents governing Belvedere were "bad" meaning that plaintiffs equity was being legally diluted every day and that plaintiffs' attorney told them the night before they would be lucky to get $8 million. (C5558p20, C2780pg180lines14-24,2781pg183lines8-14).

After the mediation, a written settlement agreement was drafted by Hutchinson and O'Neil.

(C5559p21). Collins negligently did not contest any of the additional terms offered by Hutchinson and O'Neil and advised plaintiffs to sign the agreement. (C5559p21).

On November 17, 2008 plaintiffs entered into an engagement agreement with Drinker, Biddle & Reath ("Drinker") which stated that Drinker would provide "an assessment of your rights and potential litigation relating to your separation from Belvedere." (C5569p47, C2939-2940). On November 19, 2008, Carlson met with the attorneys at Drinker and during this meeting, they criticized the legal work performed by the Collins firm. (C5570p50). This was the first time anyone alerted plaintiffs to the fact that Collins and Fish had done something wrong. (C5570p50). On November 26, 2008, Drinker submitted a written analysis to plaintiffs and despite the fact that Drinker promised in writing to advise plaintiffs about all claims that arose out of the Belvedere settlement and despite the fact Drinker criticized Collin's work, Drinker's analysis did not discuss any issues related to legal malpractice. (C5571p51). On December 4, 2008 Carlson wrote an email to Almeida asking to pick up his file since the engagement ended and shortly thereafter Carlson picked up the file. (C5572p54-55).

In August of 2010, Carlson approached Michael Best("Best") and asked the firm to provide further legal advice about his situation and on August 18, 2010, plaintiffs entered into a written engagement letter with Best pertaining to a "legal .malpractice matter." (C5579p84). During the engagement, Best

reviewed all relevant and material documents and met with Carlson. (C5579p85). On September 16, 2010 Best sent Carlson an email ending their representation (C5579p86, C2992pg.471ines11-12).

On or around November 11, 2010, plaintiffs retained Defendant Thomas Cronin("Cronin") to bring a legal malpractice matter against Collins. (C5580p88). The retainer agreement stated that "we anticipate using associate lawyers and perhaps other attorneys to prosecute this litigation." (C604-606). Pursuant to this agreement, Cronin created a legal team involving numerous attorneys who would work together on plaintiffs' matters. Attorney Davis worked as an associate of Cronin & Co., on plaintiffs' matters from March of 2011 through July 15, 2013. (C5582p95, C5380-81). Attorney Hutchinson began working on Carlson matters in 2012 as "of counsel" to the Cronin firm and he worked on plaintiffs' matters until at least April of 2015. (C5582p96, C5383-84). Davis' name appeared on the legal malpractice complaint filed against Collins, his name appeared on appellate briefs that were filed in Carlson v Collins. and his name appears on the reported appellate court opinion in Carlson v Collins. (C5582p96, C5383-84). Kelley began working on Carlson's cases in April of 2012, as "of counsel" to the Cronin firm and he worked on plaintiffs' matters until at least April of 2015. (C5583p97, C5386-87). Kelley worked on all the Carlson matters, he attended approximately 17 face to face meetings to discuss the cases, he was involved at the earliest stages of the legal malpractice case Carlson v. Collins, his name appears on plaintiffs'

appellate brief filed in Carlson v. Collins and his name appears on the reported appellate court decision in Carlson v Collins. (C5583p97, C5386-87).

Cronin filed a complaint alleging legal malpractice against Collins on November 18, 2010. (C5581p90). On March 15, 2011 Collins filed a motion to dismiss based upon the statute of limitations. (C5581p92). On July 13, 2011, a voluntary dismissal was entered in the Collins matter. (C5581p93).

On or about March 26, 2012 Cronin filed a section 5/2-1401 Petition on behalf of plaintiffs against Belvedere and others. (C5581p94). On June 7, 2013, the section 5/2-1401 Petition was dismissed by the trial court was affirmed on appeal on March 16, 2015. (C5581p94). On July 5, 2013, Cronin refiled the complaint against Collins. (C5585p99). On January 15, 2014, Judge Sanjay Tailor granted a motion to dismiss the refiled legal malpractice case because he found that the statute of limitations had expired when he stated "that the plaintiff knew of his injury, which is certainly no later than September and by November 12th or 13th he had identified his former partners as the wrongful cause of the injury. At that point, he was on inquiry notice ..." (C5585p100, C3080pg44lines10-15). Plaintiffs appealed and the appellate court affirmed on April 22, 2015. (C5586p101, C3058-3068).

After November 26, 2008, plaintiffs did not engage Drinker to perform any legal work related to the Belvedere litigation. (C3669p12). In approximately December of 2008, W Trading, not the plaintiffs,

engaged Drinker to perform legal work for some software development issues that arose. (C3669p13).

On January 13, 2016 plaintiffs filed a complaint for legal malpractice against numerous defendants. (C70-187). Count I alleged a claim for legal malpractice against Best and Count II alleged claims against the Cronin defendants. (C70-187). On July 20, 2018 Best filed a motion for summary judgment. (C1954-1970). On December 14, 2018 the Court denied Best's summary judgment except "as to the claim that Best failed to advise plaintiffs of any malpractice claim they may have against Michael Best & Friedrich" and the order also denied plaintiffs leave to file a SAC. (C3469). On January 16, 2019 Best filed a motion to reconsider. (C3486-3595). On May 3, 2019 the trial court granted Best's motion to reconsider. (C3874-3876). The trial court found that the plaintiffs' claims that Best committed malpractice when they failed to file claims against Drinker had no merit because the statute of limitations commenced upon the retention of Cronin "Carlson's claims became untimely in 2012" when Best was not representing plaintiffs at that time. (C3874-3876). On June 4, 2019 plaintiffs filed a motion to reconsider which was denied on August 29, 2019, (C3908-3936, C5415). The plaintiffs then appealed the decision related to Count I. (C5416-5434). On July 15, 2021 the appellate court issued a ruling on the appeal pertaining to Count I. (A35-69).

On October 2, 2019 Cronin, Davis, Hutchinson and Kelley ("Cronin") filed motions for summary judgment. (C5437-6493). On December 6, 2019 the

trial court granted the motions for summary judgment (C6804-6809). On January 3, 2020 plaintiffs filed a motion to reconsider and to clarify. (C6813-6952). On April 24, 2020 the trial court denied plaintiffs' motion to reconsider. (C7140-7148). On May 18, 2020 plaintiffs filed a notice of appeal. (C7153-7159).

A. Plaintiffs' legal malpractice claim against Drinker was barred by the statute of limitations before the statute of repose expired.

This Court should grant the Petition for Leave to Appeal because if it does not grant it then plaintiffs' right to due process has been violated. The plaintiffs argued to the appellate court that the defendants in this appeal violated the standard of care when they failed file a claim for legal malpractice on behalf of the plaintiffs against the Drinker firm before the statute of limitations and/or statute of repose expired on those claims. The plaintiffs argued that if EITHER the statute of Limitations OR statute of repose expired during the time the defendants represented the plaintiffs, that the defendants were liable for legal malpractice because the claims expired during the time the defendants represented the plaintiffs.

The appellate court apparently misunderstood plaintiffs' arguments and mistakenly found that plaintiffs could not establish a *prima facia* case against the defendants based upon their failure to assert claims against Drinker because this Court found that the statute of repose expired on those

claims in October of 2015. The appellate court stated "we focus our attention on subsection © which provides that an action for damages based on tort, contract or otherwise against an attorney arising out of an act or omission in the performance of professional services may not be commenced more than six years after the date on which the act or omission occurred, 735 ILCS 5/13-214.3 © (West)." (A, page 12). The appellate court stated the "statute of repose begins to run on the last date on which the attorney performs the work involved in the alleged negligence. *Snyder v. Herdelberger*, 2011 IL 111052 para. 18." (A82 para. 42). The appellate Court then found "the last act or omission which gave rise to Carlson's potential claims of legal malpractice against Drinker occurred in October 2009, when Drinker purportedly failed to advise Carlson of the two-year statute of limitations regarding his claims against Collins. Thus, the six year statute of repose started running in October 2009, when Drinker purportedly failed to advise Carlson of the two-year statute-of limitations regarding his claims against Collins." (A83 para. 44). The conclusion reached by the appellate court is wrong for numerous reasons.

First, with all due respect, the appellate court misunderstood plaintiffs' claim. Plaintiffs claimed that defendants violated the standard of care because they did not file claims against Drinker before the statute of limitations expired on Carlson's claims against Drinker **and/or** before the statute of repose expired on those claims. The undisputed record in this case establishes that defendants represented plaintiffs from November 2010 through at least April of 2015.

Carlson, his expert, the "law of the case" doctrine and other arguments establish that the statute of limitations on plaintiffs' claims against Drinker commenced in late 2010 an expired in late 2012 when it is undisputed that defendants were still representing plaintiffs. If the statute of limitations on plaintiffs' claims against Drinker expired in 2012, then it is TOTALLY and COMPLETELY irrelevant and immaterial to the analysis involved in this case that the statute of repose expired on Carlson's claims against Drinker in 2015. When the statute of repose expired, is TOTALLY and COMPLETELY irrelevant and immaterial because the statute of limitations expired in 2012 when it is undisputed that plaintiffs' were represented by defendants.

Actually, the appellate court and defendants are barred by doctrine of "law of the case" or collateral estoppel from contradicting a prior final judgment entered in this matter that found that the statute of limitations expired on plaintiffs' claims against Drinker in 2012. Best filed a motion for summary judgment related to Count I of the complaint in this matter and in support of that motion Best argued that the claims of negligence in Count I that alleged that Best was negligent when they failed to advise Carlson that they had claims against Drinker had no merit because the statute of limitations on plaintiffs' claims against Drinker commenced in 2010, after Carlson retained and paid attorneys and expired in 2012. (C3362). Best argued that "Carlson was injured by any Drinker malpractice years before the trial court dismissed his compliant in the underlying lawsuit in

January 2014." (C3362). Best also argued that "the claims accrued in 2010 when Carlson paid legal fees to other law firms[Cronin] concerning the February 2008 settlement and the claims became barred by the statute of limitations two years later in 2012." (C3491-3493). Best concluded that they were not the proximate cause of any loss of plaintiffs' claims against Drinker because those claims expired in 2012 when Cronin was representing Carlson and Best was not Carlson's attorney in 2012. The trial court accepted Best's arguments and granted Best's motion for summary judgment and stated "the law requires dismissal of Carlson's claims ... [because] Carlson's claims became untimely in 2012." (C5423). Thus, the trial court rendered a final judgment in this case that found that the statute of limitations on any claims plaintiffs' had against Drinker expired in 2012. The appellate court affirmed the decision, so the trial court decision is final and binding upon Cronin and the appellate court.

The "law of the case" doctrine provides that where an issue has been litigated and decided, a court's unreversed decision on a question of law or fact settles that question for all subsequent stages of the suit *Stickler v. American Augers, Inc.*, 325 Ill.App.3d 506, 510(2001). The rule of the "law of the case" doctrine is a rule of practice based upon sound policy that once a trial court decides an issue that the issue is settled for all aspects of that case. *Id.* This authority establishes that once the trial court entered a final judgment finding that Best was not liable for malpractice because the statute of limitations

commenced on plaintiffs' claims against Drinker in 2010 and expired in 2012, that the trial court and the appellate court CANNOT do an about face and find that the statute of limitations commenced at any other time.

Actually, the appellate court did not even address the merits of the argument that the statute of limitations on plaintiffs' claims against Drinker expired in 2012 or that the appellate court was bound by the "law of the case" with that decision. The plaintiffs even filed a Petition for Rehearing that clearly and unequivocally alerted the appellate court that it had not addressed the arguments in any manner, shape or form. (A93-120). It appears that the appellate court did not even bother to consider any arguments in the plaintiffs' briefs and the Petition for Rehearing or address the fact that it ignored a dispositive issue because the appellate court denied the Petition for Rehearing on July 26, 2022 , a mere 4 business days after it was filed. The appellate court offered no explanation whatsoever for completely ignoring plaintiffs' arguments because it entered an order that merely stated the Petition for Rehearing was denied without offering any explanation or excuse. It was quite shocking that the appellate court ignored a central dispositive issue in this case and then when confronted with the fact that it ignored a central dispositive issue it decided not to even respond.

The failure of the appellate court to address the merits of plaintiffs' arguments in any meaningful manner that the statute of limitations expired in 2012

or that the finding was "law of the case" which bound the appellate court to follow clearly violated the plaintiffs' right to due process under the law. The due process clauses of the federal and state constitutions are not coextensive because the state constitution provides broader rights of due process. *Van Harken v. City of Chicago*, 305 Ill.App.3d 972, 980(1999). To state a claim under the Due Process Clause, one must show that he was deprived of life liberty or property and the deprivation was brought without due process of law. *Roehrborn v. Lambert*, 277 Ill.App.3d 181(1995). Due process concerns principles of fundamental justice and fairness. *People v. Lindsey*, 199 Ill.2d 460(2002). Due process is a flexible concept that depends upon the circumstances of the particular matter in issue. *Scott v. Department of Commerce and Community Affairs*, 84 Ill.2d 42(1981). The essence of procedural due process is meaningful notice and meaningful opportunity to be heard. *In re D.R.*, 307 Ill.App3d 478(1999). A state violates a person's right to due process whenever it engages in conduct that is deemed oppressive, arbitrary and unreasonable. *People v. McCauley*, 163 Ill.2d 414(1994). A hearing with a predetermined outcome is no hearing at all for purposes of due process. *Marconi v. Chicago Heights Police Pension Bd.*, 361 Ill.App.3d 1(2005). A party should have the opportunity to be heard and fair consideration of a party's arguments must be performed otherwise due process is violated. *Six Brothers King Drive Supermarkets, Inc., v. Department of Revenue*, 192 Ill.App.3d 976(1989). Due process also requires a fair and impartial hearing: *Smith v. Department of Registration & Ed.*, 412 Ill. 332(1952).

When the evidence establishes that the outcome of a hearing has been predetermined regardless of proof or arguments made, the concerns and goals of due process have not been met and such a hearing is nothing more than a sham proceeding that is countenanced by a court would eviscerate the protections afforded by the due process clause. *Marconi v. Chicago Heights Police Pension Bd.*, 361 Ill.App.3d 1 (2005). In *Pettigrew v National Accounts Systems, Inc.*, 67 Ill.App.2d 344, 351(1966) the court stated "a fundamental requisite of procedural due process is that every man shall have the protection of his day in court ... shall afford him an opportunity to be heard ... and shall assure him an inquiry on the issues of the case ..." While it is true that due process is not violated by erroneous decisions made by a court it is violated when a court does not even address material and dispositive issues.

The plaintiffs' rights to due process were violated because they lost his ability to pursue their extremely valuable lawsuit that seeks tens of millions of dollars in damages because the appellate court refused to address or acknowledge dispositive arguments that the appellate court was bound by previous appellate court decisions. Actually, it is undisputed that the appellate court did not address plaintiffs' arguments that require reversal of this matter so that establishes as a matter of law that there was no fair and reasonable consideration of plaintiffs' claims. Accordingly, the appellate court ruling was nothing more than a predetermined sham of a proceeding and it must be vacated because it

violated plaintiffs' right to due process.

Actually, it should also be pointed out Cronin did not even make any arguments in his appellate brief or cite any authority that the "law of the case" doctrine and collateral estoppel did not apply therefore Cronin waived or forfeited any arguments that "law of the case' and collateral estoppel do not apply. A party's failure to raise an issue in its brief is deemed a forfeiture of that issue. *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 124-25(2004). Furthermore, it is well established that issues not presented in a brief are not properly before the court and are deemed waived. *In re A.W.J.*, 197 Ill.2d 492, 499(2001). Arguments unsupported by citation to authority do not merit consideration by a court. *Vernon Hills III Partnership v. St. Paul Fire & Marine Insurance Co.*, 287 Ill.App.3d 303, 311 (1997). A court should not become an advocate for, as well as the judge of points a party seeks to raise and a party should not turn a court "into a repository for [a party] to foist the burden of argument and research." *Enadeghe v. Dahms*, 2017 IL. App. 162170 para. 23. This Court should certainly not make any arguments on behalf of Cronin.

Furthermore, there are numerous other reasons laid out in plaintiffs briefs that support the fact the statute of limitations on plaintiffs' claims against Drinker expired in 2012 during the time that the defendants represented the plaintiffs which are incorporated by reference herein because of page limitations. These include collateral estoppel and judicial admissions made by the defendants.

Second, the appellate court decision misstates Illinois law pertaining to when the statue of repose commences and would cause great confusion to future cases involving the statute of repose. The appellate court found that the statute of repose expired on the last day that it believed that Drinker represented the plaintiffs. The appellate court relied upon one sentence in *Snyder v. Heidelberger*, 2011 IL 111052 that stated that the statute of repose commences upon the "last date on which the attorney performs the work involved in the alleged negligence." (A83 para. 42). Opinion page 13). The appellate misunderstands the holding in *Snyder* in particular and the statute of repose in general.

Actually, the first district in *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶20. has already rejected the appellate court's reasoning. In *Lamet* the client argued that "the statute of repose did not begin to run until the last date on which Levin performed his alleged acts of negligence. i.e. June 10 2011. Levin on the other hand, argues that Lamet's entire action is predicated on Levin's failure to recognize and advise him in 1994 that she had no legitimate defenses ..." *Id.* at para. 19. The first district agreed with Levin and stated "the statute of repose in a legal malpractice case begins to run as soon as an event giving rise to the malpractice claim occurs, regardless of whether plaintiffs injury has yet been realized." *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶20. The first district stated "Illinois courts have consistently held that the statute of repose is not tolled merely by the continuation of the attorney client relationship. Rather where there is a

single overt act from which subsequent damages may flow, the statute [of repose] begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so **despite the continuing nature of the injury** .... Moreover, the period of repose is not tolled by the attorney's ongoing duty to correct past mistakes." *Id.* at para. 20. (emphasis added).

In the instant case, the negligence arises out of Drinker's written Opinion in November of 2008 so even if Drinker could have cured that negligence in October of 2009 that would not toll the statute of repose. Drinker's first act of malpractice occurred in November of 2008 thus the statute of repose commenced in November of 2008 and expired in November of 2014. Moreover, in the statement of facts on pages 12 and 13, Carlson submitted uncontroverted evidence to establish that Drinker's representation of Carlson ended in December of 2008 when Carlson picked up his file from Drinker and that any later work done by Drinker in 2009 was related to another entity and other unrelated matters. (C3669p12-J 8). Thus, even if the statute of repose commenced on the last day Drinker performed the negligent work, that would be December of 2008 not October of 2009.

B. The individual attorneys are liable.

The appellate court also erred when it found that the individual attorneys who indisputably represented Carlson as part of a legal team, indisputably provided legal advice to Carlson in the

underlying matter(s) and whose names appeared on documents and briefs filed in the underlying matter(s) are not liable. The appellate court found that the individual attorneys were not liable for their malpractice as part of a legal team because Carlson entered a written retainer with Cronin only. This Court stated, "[t]he record in this case shows Carlson entered into an attorney-client relationship with Thomas Cronin and the Cronin law firm but not the individual attorneys employed by the firm." (A83-84). This Court concluded the "engagement letter between Carlson and Cronin, which provided that although the law firm anticipated, "using associate lawyers and perhaps other attorneys to prosecute this litigation" the firm would "remain primarily responsible for the prosecution of the litigation." (A83-85).

In essence, the appellate court is now attempting to create an entire new body of law that states that an attorney can work on a legal matter for a client with another attorney as co-counsel, or as in the instant case as part of a legal team, but only the attorney who has a written engagement agreement will be liable for any malpractice committed by the attorneys working together as a legal team on the matter. If this were the law in Illinois, then attorneys who work as co-counsel on a case that have separate law practices can set up a fee arrangement with a client that insulates one of the attorneys from any legal malpractice claims. All the attorneys would need to do is have only one of the attorneys execute a written retainer with the client and then the attorney who did not execute the contract would be immune

from liability despite the fact the attorney worked on the entire matter with another attorney. This is not the law in Illinois or any other state.

The Opinion rendered by the appellate court that, if an attorney works as co-counsel with another attorney that as long as an attorney is not party to a written retainer he is immune from liability, would rewrite 100's if not thousands of years of precedent pertaining to attorney client relationships. It has been black letter law for centuries that all attorneys who actually provide negligent legal advice to a third person are liable to the third person no matter what some retainer agreement states and no matter if they are an associate, partner or part of a team of attorneys working on a matter. Using the appellate court's flawed logic, attorneys can now write retainers to insulate themselves from liability for their negligent acts by simply naming only one attorney in the retainer agreement as the responsible party. Obviously, such a precedent is ridiculous and an affront to long established public policy.

In Illinois, public policy prevents an attorney from limiting the liability of the attorney because the Rules of Professional Conduct and Illinois case law prohibit such. Whether an agreement violates public policy depends upon the particular facts of the case. *Kleinwort v. Quantum Fin.*, 181 Ill.2d 214, 226(1997). A contract will be declared void as against public policy if the contract terms violate the constitution, the statutes or decisions of the courts or if manifestly injurious to the public welfare. *Id.* The Illinois Rules of

Professional Conduct is a strong indicator of public policy. *Marvin N. Benn & Associates, Ltd. v. Nelson Stell and Wire, Inc.*, 107 Ill.App.3d 447(1982); *Mohanty v. St. John Heart Clinic,* 225 Ill.2d 62(2006). The appellate court's ruling would wrongfully allow attorneys to limit their liability in contravention of the Rules of Professional Conduct and Illinois case law.

Furthermore, it is well established in Illinois that a written retainer agreement is not a requisite to establishing a duty or a claim for legal malpractice. The attorney's duty to his client is not limited to the terms of the attorney-client contract. *Keef v. Widuch*, 312 Ill.App.3d 571, 577 (2001). **Independent of any written attorney-client contract**, an attorney has duties to exercise competence, provide advice to the client about legal remedies and inform the client about the scope of the attorney's representation. *Id.* (emphasis added). The Illinois Supreme Court has even stated the requirement of competence is a duty traditionally imposed in the attorney-client relationship that **"exists without regard to the terms of a contract of employment."** *Collins v. Reynard*, 154 Ill.2d 48, 55-56(1992)(emphasis added). In fact, many Illinois courts have found attorneys owe a duty of care even without a contract. In *Wildey v. Paulsen*, 385 Ill. App. 3d 305, 312(2008) the client met with an attorney on several occasions and discussed issues related to a legal matter. The parties never executed a retainer agreement and the attorney was not paid any monies. The attorney provided advice to the client in order to formulate a strategy which included providing advice about a letter the plaintiff

sent to a third party. The appellate court found that an attorney client relationship was formed and that the attorney owed duties to the client. In *Meriturn Partners, LLC*, 2015 IL App (1st) 131883 (2015) the appellate court found that the attorney owed a duty despite the fact the attorney never knew the identity of some of the plaintiffs. The appellate court reasoned that since the attorney provided advice to a group of people on a conference call that relied upon the advice that the attorney owed them a duty. *Id.* at paras. 13 and 14. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311(7th Cir. 1978) the 7th Circuit interpreting Illinois law stated "A professional relationship is not dependent upon the payment of fees nor, as we have noted, upon the execution of a formal contract."

This authority establishes that the terms of a retainer play little if any role in determining whether an attorney owes a duty of care or breached a duty of care. The relevant and material issue a court should consider is NOT the terms of a retainer instead the relevant and material issue is what does the evidence establish the attorney knew and what the attorney actually did for the client. In the instant case, it is undisputed that Davis, Hutchinson and Kelley formed a legal team with Cronin, met with Carlson numerous times to discuss all the issues, provided him with legal advice, they all drafted pleadings and documents together and filed the documents in court with their names on the documents so they all owed Carlson a duty of care even if there was no written retainer agreement between them or even if there was only a

written retainer with Cronin.

B. Carlson claims for overbilling could not possibly be barred hy the statute of limitations.

The appellate court also erred when it found that the statute of limitations on plaintiffs' claims for overbilling commenced by December of 2013 because Carlson's fee claim involves billing after December of 2013 and there is no evidence in the record to establish that any alleged the cap was violated. The Opinion rendered by the appellate court essentially finds that the statute of limitations commenced on plaintiff's attorney fee claims in December of 2013 for legal work that was performed after December 2013 and through 2014. In other words, the Opinion finds that the statute of limitations on Carlson's claims of overbilling in January 2014, February 2014, March 2014, April of 2014, etc. commenced in December 2013. Obviously, the statute of limitations governing legal malpractice claims cannot commence before the negligent legal work was performed or in this case before Carlson was billed by Cronin. Since it would be legally impossible for the statute of limitations to commence on a claim for legal malpractice before the malpractice occurred, this Court must grant the Petition for Rehearing and vacate its prior order.

Furthermore, this Court's decision that that the statute of limitations commenced in December of 2013 is not even supported by defendants in their appellate brief. Defendants did not argue in their appellate brief

that the statute of limitations commenced in December of 2013 or prior to that time

WHEREFORE, plaintiffs ray that this Court grant the Petition for Leave to Appeal and that this Court enter an order revering the order of the trial court and appellate court and remand this matter to the trial court for a trial on the merits and for further relief that is just and equitable.

ORAL ARGUMENT REQUESTED

Respectfully Submitted,

WILLIAM CARLSON and
WILLIS CAPITAL, LLC,

By: /s/_____
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in

the Rule 34l(d) cover, the Rule 341 (h)(1) table of contents and statement of points and authorities, the Rule 34© certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a) is 20 pages or words

/s/
Joseph T. Gentleman

APPENDIX N

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Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

Appellate Court No. 1-20-0724

APPEAL NO. 1-20-0724
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM CARLSON and
WILLIS CAPITAL., LLC,
Plaintiffs/Appellants,

v.

THOMAS CRONIN, AARON L. DAVIS,
LELAND W. HUTCHINSON, JR,
DANIEL J. KELLEY,
and CRONIN & CO., LTD,
Defendants/Appellees.

Appellate Court No: 1-20-0724
Trial Court No. 16 L 383
Trial Judge Daniel J. Kubasiak
Notice of Appeal filed on
May 18, 2020

Appeal from the Circuit Court of Cook County,
Illinois – Law Division
Case No. 16 L 383

The Honorable Daniel J. Kubasiak, Judge Presiding

PETITION FOR REHEARING
ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

This Court should grant Carlson's Petition for Rehearing because, with all due respect, this Court failed to address issues that were raised in Carlson's briefs, misunderstands when the statute of repose commences, misunderstands the factual record, failed to consider some undisputed facts and otherwise erred.

A. Carlson's claim against Drinker was barred by the statute of limitations before the statute of repose expired.

This Court mistakenly found that Carlson could not establish a *prima facia* case against Cronin based upon his failure to assert claims against Drinker because this Court found that the statute of repose expired on those claims in October of 2015. This Court stated "we focus our attention on subsection © which provides that an action for damages based on tort, contract or otherwise against an attorney arising out of an act or omission in the performance of professional services may not be commenced more than six years after the date on which the act or omission occurred, 735 ILCS 5/13-214.3 © (West)." (Opinion, page 12). This Court then went on to analyze the statute of repose. This Court stated "statute of repose begins to run on the last date on which the attorney performs the work involved in the alleged negligence. *Snyder v. Herdelberger*, 2011 IL 111052 para. 18." (Opinion page 13): This Court then found "the last act or omission which gave rise to Carlson's potential claims of legal malpractice against Drinker occurred in October 2009, when Drinker purportedly failed to advise Carlson of the two-year statute of limitations regarding his

claims against Collins. Thus, the six year statute of repose started running in October 2009, when Drinker purportedly failed to advise Carlson of the two-year statute of limitations regarding his claims against Collins." (Opinion page 13). This conclusion is wrong for at least three reasons.

First, with all due respect, this Court misunderstands Carlson's claim. Carlson claimed that Cronin violated the standard of care because he did not file claims against Drinker before the statute of limitations expired on Carlson's claims against Drinker and/or before the statute of repose expired on those claims. The undisputed record in this case establishes that Cronin represented Carlson from November 2010 through at least April of 2015. Carlson, his expert and the "law of the case" doctrine establish that the statute of limitations on Carlson's claims against Drinker commenced in late 2010 an expired in late 2012 when it is undisputed that Cronin was still representing Carlson. If the statute of limitations on Carlson's claims against Drinker expired in 2012, then it is TOTALLY and COMPLETELY irrelevant and immaterial to the analysis involved in this case that this Court believes the statute of repose expired on Carlson's claims against Drinker in 2015. When the statute of repose expired, is TOTALLY and COMPLETELY irrelevant and immaterial because the statute of limitations expired in 2012 when it is undisputed that Carlson was represented by Cronin.

Actually, this Court and Cronin are barred by

doctrine of "law of the case" or collateral estoppel from contradicting a prior final judgment entered in this matter that found that the statute of limitations expired on Carlson's claims against Drinker in 2012. Best filed a motion for summary judgment related to Count I of the complaint in this matter and in support of that motion Best argued that the claims of negligence in Count I that alleged that Best was negligent when they failed to advise Carlson that they had claims against Drinker had no merit because the statute of limitations on Carlson's claims against Drinker commenced in 2010, after Carlson retained and paid attorneys and expired in 2012. (C3362). Best argued that "Carlson was injured by any Drinker malpractice years before the trial court dismissed his compliant in the underlying lawsuit in January 2014." (C3362). Best also argued that "the claims accrued in 2010 when Carlson paid legal fees to other law firms [Cronin] concerning the February 2008 settlement and the claims became barred by the statute of limitations two years later in 2012." (C3491-3493). Best concluded that they were not the proximate cause of any loss of Carlson's claims against Drinker because those claims expired in 2012 when Cronin was representing Carlson and Best was not Carlson's attorney in 2012. The trial court accepted Best's arguments and granted Best's motion for summary judgment and stated "the law requires dismissal of Carlson's claims ... [because] Carlson's claims became untimely in 2012." (C5423). Thus, the trial court rendered a final judgment in this case that found that the statute of limitations on any claims Carlson had against Drinker expired in 2012. The appellate court affirmed the decision, so the trial

court decision is final and binding upon Cronin and this Court.

The "law of the case" doctrine provides that where an issue has been litigated and decided, a court's unreversed decision on a question of law or fact settles that question for all subsequent stages of the suit. *Stickler v. American Augers, Inc*., 325 Ill.App.3d 506, 510(2001). The rule of the "law of the case" doctrine is a rule of practice based upon sound policy that once a trial court decides an issue that the issue is settled for all aspects of that case. *Id.* This authority establishes that once the trial court entered a final judgment finding that Best was not liable for malpractice because the statute of limitations commenced on Carlson's claims against Drinker in 2010 and expired in 2012, that the trial court and this Court CANNOT do an about face and find that the statute of limitations commenced at any other time.

Actually, Cronin did not even make any arguments in his appellate brief or cite any authority that the "law of the case" doctrine and collateral estoppel did not apply therefore Cronin waived or forfeited any arguments that "law of the case' and collateral estoppel do not apply. A party's failure to raise an issue in its brief is deemed a forfeiture of that issue. *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 124-25(2004). Furthermore, it is well established that issues not presented in a brief are not properly before the court and are deemed waived. *In re A. W.J.* 197 Ill.2d 492, 499(2001). Arguments unsupported by citation to authority do not merit consideration by a

court. *Vernon Hills III Partnership v. St. Paul Fire & Marine Insurance Co.*, 287 Ill.App.3d 303, 311 (1997). A court should not become an advocate for, as well as the judge of points a party seeks to raise and a party should not turn a court "into a repository for [a party] to foist the burden. of argument and research." *Enadeghe v. Dahms*, 2017 IL. App. 162170 para. 23. This Court should certainly not make any arguments on behalf of Cronin. Thus, this Court has no choice but to find that that the statute of limitations on any claims that Carlson had against Drinker commenced in 2010 and expired in 2012.

It is a little troubling that this Court totally ignored these issues and the arguments of the parties and did not address these issues in any manner in the Opinion. Since this Court and all the parties are bound by the final judgment that found that the statute of limitations on claims Carlson had against Drinker expired in 2012, this Court has no choice but to grant the Petition for Rehearing and remand this matter for a trial on the merits.

Furthermore, the doctrine of collateral estoppel prohibits the trial court from contradicting the previous finding. The doctrine of collateral estoppel bars re-litigation of issues that have been determined by a valid and final judgment. *People v. Terrell*, 185 Ill.2d 467, 475(1998). For collateral estoppel to apply (1) the issues must be identical; (2) a final judgment on the merits must have been obtained in the previous adjudication and (3) the party against whom estoppel is asserted must have been the party or in privity with

a party to the prior adjudication. *Cree Development v. Mid America Advertising*, 324 Ill.App.3d 534,539(2001). There is no generally prevailing definition of privity that applies to all cases rather determining privity requires careful consideration of the circumstances of each case. *Hayes v. State Teacher Certification Bd.*, 359 Ill.App.3d 1153, 1159(2005). Privity exists when a non party has the same legal interest as a party. *In re Marriage of Mesecher*, 272 Ill.App.3d 73, 76(2005).

Collateral estoppel applies because the issues involved are identical because Best claimed IN THIS CASE that the statute of limitations commenced on claims Carlson had against Drinker in 2010. The trial court granted Best's motion for summary judgment, IN THIS CASE, so there was a final judgment. Cronin is in privity with Best because they are both attorneys who represented Carlson, they are parties in the same case and they both raised arguments about when the statute of limitations commenced on claims Carlson had against Drinker. Best and Cronin have the same exact interest in a determination of when the statute of limitations commenced on claims Carlson had against Drinker thus there are in "privity." It would also be fundamentally unfair for the trial court to find that Best should obtain a judgment in its favor because the statute of limitations commenced in 2010 and then for the very same trial judge to then find that Cronin should obtain a judgment in his favor because the statute of limitations commenced at some other time. All the parties to this case and this Court are stuck with the fact that there is a final judgment in

this case that found that the statute of limitations on claims Carlson had against Drinker commenced in 2010.

Even if this Court finds that it is not bound by the prior decision, Cronin is legally prohibited from asserting that the statute of limitations commenced on Carlson's claims against Drinker in January of 2014. Cronin swore under oath in his deposition that he "evaluated very thoroughly what Drinker Biddle had done," he "discussed whether he[Carlson] had potential claims against Drinker ..." he analyzed Drinker's legal work to determine whether or not Drinker committed legal malpractice and he provided an official legal opinion about Drinker's performance to plaintiff. (C6303p44line11-p461ine17). This testimony is a judicial admission by Cronin that in November of 2010 Carlson paid for his legal opinion about whether or not Drinker committed malpractice. A judicial admission is a deliberate, clear and unequivocal statement made by a party in a deposition about a concrete fact within the party's knowledge. *Installco, Inc. v. Whiting Corp.*, 336 Ill.App.3d 776, 788 (2003). This judicial admission by Cronin that Carlson paid Cronin monies so that he could provide an opinion about whether or not Drinker breached the standard of care in 2010 satisfies the legal requirements to commence the statute of limitations in 2010 because it admits Carlson suffered damage by paying attorney fees and any person who pays an attorney to review the legal work of another attorney establishes that the person reasonably knows of any wrongful injury. This is especially true in the instant case when this Court

previously found in the appeal of Carlson v Collins that the statute of limitations commenced when Carlson met with Drinker to review the Belvedere settlement despite the fact Drinker did not advise Carlson in writing about any malpractice of Collins. Now, we have an attorney admitting he was paid to provide a legal opinion about Drinker's performance to Carlson in November 2010 so that must commence the statute of limitations on any claim for malpractice against Drinker. Certainly, Cronin, the attorney who received monies from the client to opine about the malpractice of another attorney cannot argue in good faith that the statute of limitations did not commence at that time but instead commenced over three years later in January of 2014.

Based upon the record related to Count II, which includes the judicial admission of Cronin, the statute of limitations pertaining to Carlson's claims against Drinker commenced in 2010 and expired in 2012. The statute of limitations governing legal malpractice cases can be found in 735 ILCS 214.3 and it states that the statute of limitations commences when the plaintiff knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused, *Jackson Jordan v. Leydig*, 158 Ill.2d 240, 249 (1994). A legal malpractice action may accrue prior to the trial court entry of an adverse judgment if it is "plainly obvious that the plaintiff has been injured as a result of professional negligence and where an attorney's neglect is a direct cause of the legal expense incurred by the plaintiff." *Nelson v. Padgitt*, 2016 IL App(1st) 160571, para. 14;

Construction Systems, Inc. v. FagelHaber, LLC, 2019 IL App(1st) 172430. The undisputed evidence and Cronin's judicial admission establish as a matter of law in this case that that the statute of limitations commenced on Carlson's claims against Drinker in 2012 because Cronin judicially admits that Carlson retained and paid him in November of 2010 to provide legal advice about Drinker's representation. This is sufficient to commence the statute of limitations because the Carlson paid an attorney to review Drinker's performance. In addition, Carlson presented unrebutted expert testimony that Carlson's claims against Drinker commenced in 2010 and expired in 2012. (C6216-6236).

The above establishes that the statute of limitations on Carlson's claims against Drinker expired in 2012 when Cronin was still representing Carlson, so this Court did not even need to analyze when the statute of repose expired. This Court should vacate the opinion and enter an order finding that the statute of limitations expired in 2012 and remand this matter for a trial upon the merits.

Second, this Court misstated and misunderstands the law pertaining to when the statue of repose commences. Carlson argued in his prior briefs that Cronin violated the standard of care because he did not file claims on behalf of Carlson against Drinker before the statute of limitations and/or before the statute of repose expired and that both the statute of limitations and statute of repose expired DURING the time Cronin represented

Carlson. This Court relied upon one sentence in *Snyder v. Heidelberger*, 2011 IL 111052 that stated that the statute of repose commences upon the "last date on which the attorney performs the work involved in the alleged negligence." (Opinion page 13). The Court misunderstands the holding in *Snyder* in particular and the statute of repose in general.

Actually, the first district in *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶20. has already rejected this Court's reasoning. In *Lamet*, the client argued that "the statute of repose did not begin to run until the last date on which Levin performed his alleged acts of negligence. i.e. June 10 2011. Levin on the other hand, argues that Lamet's entire action is predicated on Levin's failure to recognize and advise him in 1994 that she had no legitimate defenses ..." *Id.* at para. 19. The first district agreed with Levin and stated "the statute of repose in a legal malpractice case begins to run as soon as an event giving rise to the malpractice claim occurs, regardless of whether plaintiffs injury has yet been realized." *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶20. The first district stated "Illinois courts have consistently held that the statute of repose is not tolled merely by the continuation of the attorney client relationship. Rather where there is a single overt act from which subsequent damages may flow, the statute [of repose] begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so **despite the continuing nature of the injury** .... Moreover, the period of repose is not tolled by the attorney's ongoing duty to correct past mistakes." *Id.* at para. 20. (emphasis

added).

In *Mauer v. Rubin*, 401 Ill.App.3d 630(2010). the client argued that the attorney was negligent when he drafted a defective marital settlement agreement and when he. when he negligently withdrew a 1401 Petition. The client then argued that the statute of repose would not commence until the time the attorney's "representation of him ended." *Id.* at 638. The appellate court found that the statute of repose commenced upon the first negligent act not some potential later negligent act. The appellate court stated "the statute of repose ... begins to run as soon as an event creating the malpractice occurs ..." *Id.* at 638-648. The appellate court also specifically rejected the client's argument that the statute of repose did not commence until the "last act of representation upon which the malpractice is founded." *Id.* at 645. The appellate court relied upon *Hester v. Diaz*, 346 Ill.App.3d 255(2004) when it rejected the argument that the statute of repose commenced when the representation ended.

In *Hester v. Diaz*, 346 Ill.Ap.3d 255,257 (2004) the appellate court found that the statute of repose commenced when a case was dismissed for want of prosecution not when the attorney subsequently failed to appear in court at a bearing where the trial court could have considered reinstatement of the case.

The case cited by this Court, *Snyder v. Heidelberger*, 2011 IL 111052, to support the conclusion that the statute of repose expired is not

applicable to the instant case. In Snyder, the client argued that he suffered two injuries from the alleged malpractice and one of the injuries did not occur until the death of a person and the attorney argued that the client suffered an injury when the defective quitclaim deed was drafted. *Id.* at para. 3. In *Snyder*, the issue was whether 735 ILCS 5/13-214.3(d) applied or not. Section 214.3(d) states "when the injury caused by the act or omission does not occur until the death of the person ... the action may be commenced within 2 years after the date of the person's death ..." *Id.* The Illinois Supreme Court found that section (d) did not apply because there was only one injury that occurred. *Id.* at 8. The Court then concluded that the latest the statute of repose could commence was at the end of the attorney client relationship. *Id.* at 9. The Court did not analyze a situation where an attorney claims there were multiple negligent acts and then decide which act triggered the statute of repose. As the above authority makes crystal clear, if there are numerous negligent acts, the statute of repose commences upon the first negligent act NOT the last one.

In the instant case, the negligence arises out of Drinker's written Opinion in November of 2008 so even if Drinker could have cured that negligence in October of 2009 that would not toll the statute of repose. Drinker's first act of malpractice occurred in November of 2008 thus the statute of repose commenced in November of 2008 and expired in November of 2014. Moreover, in the statement of facts on pages 12 and 13, Carlson submitted uncontroverted evidence to establish that Drinker's representation of

Carlson ended in December of 2008 when Carlson picked up his file from Drinker and that any later work done by Drinker in 2009 was related to another entity and other unrelated matters. (C3669p12-18). Thus, even if the statute of repose commenced on the last day Drinker performed the negligent work, that would be December of 2008 not October of 2009.

Finally, since it is undisputed that Carlson's claim was based upon Drinker's written legal memorandum, the statute of repose commenced on the day that opinion was rendered. In *Frika v. Bauer*, 309 Ill.App.3d 82(1999) the appellate court stated "where the work involves tangible documents, the period[of repose] begins when the attorney delivers his or final work product to the client, regardless of the continuing duty to correct any defect or omission related to the work product." In the instant case, Carlson alleges that Drinker was negligent by failing to advise him of the statute of limitations on his claims against Collins in the written opinion letter prepared by Drinker in November of 2008. The holding in *Frika* establishes that the statute of repose commenced when Drinker prepared and submitted the written opinion to Carlson in November of 2008.

Furthermore, Carlson and Cronin did not present evidence to establish that Carlson retained the legal services of Drinker after December 2008 to address any matters related to Collins and that Drinker committed some negligent act in 2009. In fact, the record establishes that the relationship between Carlson and Drinker ended in December of 2008 when

Carlson picked up his file from Drinker. The undisputed sworn testimony establishes that Carlson never retained Drinker to provide legal advice pertaining to these matters after December 2008. The undisputed record establishes that Carlson retained Drinker to handle separate and independent matters in 2009. More importantly, Cronin never introduced evidence to establish that Carlson had an attorney client relationship with Drinker in 2009 pertaining to the Collins matter or underlying matter, never introduced evidence to establish that Drinker owed a duty of care to Carlson in 2009 and never introduced expert testimony to establish that Drinker committed some negligent act in 2009. If Cronin wants to argue that there was some negligent act performed by Drinker that occurred in 2009 that tolled the statute of repose until that time, he needs to present evidence to support the argument. Since Cronin did not introduce evidence to establish these elements, this Court cannot even consider the argument that the statute of repose commenced in 2009 instead of November of 2008.

B. The individual attorneys are liable.

This Court also erred when it found that the individual attorneys who indisputably represented Carlson, indisputably provided legal advice to Carlson in the underlying matter(s) and whose names appeared on documents and briefs filed in the underlying matter(s) are not liable. This Court initially stated "[o]ur courts have determined that although the rules of professional conduct may be relevant to the

standard of care in legal malpractice claim, the rules, in and of themselves do not establish liability in a legal malpractice case." (Opinion, page 14). With all due respect, the Rules of Professional Conduct are not involved in this case in any way, shape or form. Carlson has not cited or relied upon any Rules of Professional Conduct to support his claims against the individual attorneys so any statement or discussion about such is totally and completely irrelevant to any issue in this case.

Carlson did not cite or rely upon any Rules of Professional Conduct instead he cited Illinois Supreme Court Rule 721(b). Rule 721(b) is NOT and has NEVER been a Rule of Professional Conduct. Instead, Rule 721(b) is the law of the land which means all attorneys are subject to this Rule Supreme Court Rule 1 states that the "rules apply to both civil and criminal proceedings ... [and] shall govern all proceedings in the trial court ... " Illinois Supreme Court Rule 1. In fact, the Illinois Supreme Court has stated the Illinois Supreme Court Rules "have force of law" and strict compliance is required by all. *Harris v. Annunzio*, 411 Ill.124(1952). Rule 721(b) merely establishes that all attorneys who provide legal advice to a client on a matter and/or all attorneys who work on a legal matter for a client are personally responsible or personally liable for any negligence that arises out of the representation. In other words, partners, associates, members of a legal team and the law firm itself are all liable for negligence as long as they provided legal advice to a client on a matter or worked on the case.

This Court also found that the individual attorneys were not liable for their malpractice because Carlson entered a written retainer with Cronin only. This Court stated, "[t]he record in this case shows Carlson entered into an attorney-client relationship with Thomas Cronin and the Cronin law firm, but not the individual attorneys employed-by the firm." (Opinion, page 14). This Court concluded the "engagement letter between Carlson and Cronin, which provided that although the law firm anticipated, "using associate lawyers and perhaps other attorneys to prosecute this litigation" the firm would "remain primarily responsible for the prosecution of the litigation." (Opinion, page 14).

In essence, this Court is now attempting to create an entire new body of law that states that an attorney can work on a legal matter for a client with another attorney as co-counsel, or as in the instant case as part of a legal team, but only the attorney who has a written engagement agreement will be liable for any malpractice committed by the attorneys working together as a legal team on the matter. If this were the law in Illinois, then attorneys who work as co-counsel on a case that have separate law practices can set up a fee arrangement with a client that insulates one of the attorneys from any legal malpractice claims. All the attorneys would need to do is have only one of the attorneys execute a written retainer with the client and then the attorney who did not execute the contract would be immune from liability despite the fact the attorney worked on the entire matter with another attorney. This is not the law in Illinois or any other

state.

The Opinion rendered by this Court that, if an attorney works as co-counsel with another attorney that as long as an attorney is not party to a written retainer he is immune from liability, would rewrite 100's if not thousands of years of precedent pertaining to attorney client relationships. It has been black letter law for centuries that all attorneys who actually provide negligent legal advice to a third person are liable to the third person no matter what some retainer agreement states and no matter if they are an associate, partner or part of a team of attorneys working on a matter. Using this Court's flawed logic, attorneys can now write retainers to insulate themselves from liability for their negligent acts by simply naming only one attorney in the retainer agreement as the responsible party. Obviously, such a precedent is ridiculous and an affront to long established public policy.

In Illinois, public policy prevents an attorney from limiting the liability of the attorney because the Rules of Professional Conduct and Illinois case law prohibit such. Whether an agreement violates public policy depends upon the particular facts of the case. *Kleinwort v. Quantum Fin.*, 181 Ill.2d 214, 226(1997). A contract will be declared void as. against public policy if the contract terms violate the constitution, the statutes or decisions of the courts or if manifestly injurious to the public welfare. *Id.* The Illinois Rules of Professional Conduct is a strong indicator of public policy. *Marvin N. Benn & Associates, Ltd. v. Nelson*

Stell and Wire, Inc., 107 Ill.App.3d 447(1982); *Mohanty v. St. John Heart Clinic*, 225 Ill.2d 62(2006). This Court's ruling would wrongfully allow attorneys to limit their liability in contravention of the Rules of Professional conduct and Illinois case law.

Furthermore, it is well established in Illinois that a written .retainer agreement is not a requisite to establishing a duty or a claim for legal malpractice. The attorney's duty to his client is not limited to the terms of the attorney-client contract. *Keef v. Widuch*, 312 Ill.App.3d 571, 577 (2001). **Independent of any written attorney-client contract**, an attorney has duties to exercise competence, provide advice to the client about legal remedies and inform the client about the scope of the attorney's representation. *Id.* (emphasis added). The Illinois Supreme Court has even stated the requirement of competence is a duty traditionally imposed in the attorney-client relationship that "**exists without regard to the terms of a contract of employment**," *Collins v. Reynard*, 154 Ill.2d 48, 55-56(1992)(emphasis added). In fact, many Illinois courts have found attorneys owe a duty of care even without a contract. In *Wildey v. Paulsen*, 385 Ill. App. 3d 305, 312(2008) the client met with an attorney on several occasions and discussed issues related to a legal matter. The parties never executed a retainer agreement and the attorney was not paid any monies. The attorney provided advice to the client in order to formulate a strategy which included providing advice about a letter the plaintiff sent to a third party. The appellate court found that an attorney client relationship was formed and that the

attorney owed duties to the client. In *Meriturn Partners, LLC*, 2015 IL App (1st) 131883 (2015) the appellate court found that the attorney owed a duty despite the fact the attorney never knew the identity of some of the plaintiffs. The appellate court reasoned that since the attorney provided advice to a group of people on a conference call that relied upon the advice that the attorney owed them a duty. *Id.* at paras. 13 and 14. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311(7th Cir. 1978) the 7th Circuit interpreting Illinois law stated "A professional relationship is not dependent upon the payment of fees nor, as we have noted, upon the execution of a formal contract."

This authority establishes that the terms of a retainer play little if any role in determining whether an attorney owes a duty of care or breached a duty of care. The relevant and material issue a court should consider is NOT the terms of a retainer instead the relevant and material issue is what does the evidence establish the attorney knew and what the attorney actually did for the client. In the instant case, it is undisputed that Davis, Hutchinson and Kelley formed a legal team with Cronin, met with Carlson numerous times to discuss all the issues, provided him with legal advice, they all drafted pleadings and documents together and filed the documents in court with their names on the documents so they all owed Carlson a duty of care even if there was no written retainer agreement between them or even if there was only a written retainer with Cronin.

Finally, this Court erred because is based its decision upon false facts that do not exist This court also stated, "no allegations of negligent conduct were asserted against the attorneys in their individual capacities." (Opinion, page 14). This is TOTALLY and COMPLETELY false. Carlson not only alleged facts specifically against the individual attorneys in the amended complaint pages 11-13(C536-538), the proposed second amended complaint paragraphs 115-126(C2545-2692) and the proposed third amended complaint paragraphs 142-151 (C3969-4127) but also presented sworn testimony about the work performed by all attorneys and Carlson even presented expert testimony to establish that all attorneys violated the standard of care.

Carlson presented undisputed evidence to establish that pursuant to the retainer with Cronin that attorneys Davis, Hutchinson and Kelley worked as one team of lawyers who collaborated on every single move, they all attended numerous meetings with Carlson, they each provided legal advice to Carlson, that their names were on documents filed in Carlson v Collins, that they owed a duty of care to Carlson and that they breached the. duties they owed to the Carlson. (C5553-5593p88-98). Carlson also presented sworn testimony from Cronin that stated "we would work collaboratively on written work," that Hutchinson "would draft" documents and he "performed services" for plaintiffs. (C6349 page 228 lines 5-9, C6348 page 223 line 18 to page 224 line 16). Carlson's affidavit and the affidavit from Davis confirm that Davis worked as an associate of Cronin &

Co., on Carlson's matters from March of 2011 through July 15, 2013. (C5582p95, C5380-81). Carlson's affidavit and the affidavit from Hutchinson confirm that Hutchinson began working on Carlson matters in 2012 as "of counsel" to the Cronin firm, that his name appeared on the legal malpractice complaint filed against Collins, his name appeared on appellate briefs that were filed in Carlson v Collins and his name appears on the reported appellate court opinion in Carlson v Collins. (C5582p96, C5383-84). Carlson's affidavit and the affidavit from Kelley confirm that Kelley began working on Carlson's cases in April of 2012, as "of counsel" to the Cronin firm, that he worked on all the Carlson matters through the last appeal, that Kelley attended approximately 17 face to face meetings to discuss the cases, that Kelley was involved at the earliest stages of the legal malpractice case Carlson v. Collins, Kelley's name appears on Carlson's appellate brief filed in Carlson v. Collins and his name appears on the reported appellate court decision in Carlson v Collins. (C5583p97, C5386-87). The above evidence establishes that Davis, Hutchinson and Kelley worked together as one legal team with Cronin, that they together all provided legal advice to plaintiffs, they together all personally appeared for Carlson in lawsuits that were filed and therefore they all owed Carlson a duty of care.

Finally, Carlson even produced unrebutted expert testimony establishing that Davis, Hutchinson and Kelley violated the standard of care and were individually liable. (C6216-6236p23-24). Carlson's expert testified that "when a lawyer actually

participated in the representation and performs services on a matter, the lawyer is liable for the breaches of that lawyer's duties carrying out the representation ... that each [Davis, Hutchinson and Kelley]... actually participated in the very matters at issue in Cronin firm's representation of Carlson ... [and] despite what each of these defendants has said in his affidavit each of these defendants is subject to liability for failing to meet the standard of care in carrying out the representation of Carlson to the same extent that Thomas Cronin and his firm are subject to liability." (C6229-6230). This expert testimony stands unrebutted so this Court must accept this testimony at true. The above establishes beyond any shadow of a doubt that Carlson presented uncontested evidence to support the fact that each individual attorney owed a duty to Carlson, that they breached their duty and that Carlson was harmed by the breaches.

C. Carlson claims for overbilling could not possibly be barred by the statute of limitations.

This Court erred when it found that the statute of limitations on Carlson's overbilling claim commenced by December of2013 because Carlson's fee claim involves billing after December of 2013 and there is no evidence in the record to establish that any alleged fee cap was violated. This Court stated "once the fee cap of $250,000 was exceeded, Carlson knew or reasonably should have known that any additional work began the fee cap for which he was billed, was not contemplated in the retainer agreement." (Opinion, page 17). This Court also stated "emails and

spreadsheets, dating from January 2012 to December 2013 demonstrate that any injury from alleged overbilling occurred possibly as early as the end of 2011, but no later than December 2013. By the latter date, Carlson clearly possessed sufficient information such that he knew or reasonably should have known that he was being overbilled by Cronin." (Opinion, page 18). This Court concluded, "the record confirms evidence showing that by the end of 2011, and certainly no later that December 2013, Carlson possessed sufficient information such that he knew or reasonably should have known that not only had the fee cap been exceeded, but that he was not receiving itemized billing." (Opinion, page 17). This Court then identified numerous emails Carlson sent to Cronin discussing the amount of fees he paid apparently in an effort to establish that Carlson knew how much he paid Cronin. Essentially, this Court found that the day after Carlson paid $250,000 in attorney fees or by the latest December of 2013 that he had knowledge that his attorney at the time breached his duty of care by charging him more than some alleged $250,000 fee cap. The Court's conclusion is erroneous for numerous reasons including because it presumes, without evidence, that there was some violation of a fee cap and it means that the statute of limitations on claims based on overbilling commenced before the legal work was performed or legal fees were incurred or paid by Carlson.

First, the Opinion rendered by this Court essentially finds that the statute of limitations commenced on Carlson's fee claims in December of

2013 for legal work that was performed after December 2013 and through 2014. In other words, the Opinion finds that the statute of limitations on Carlson's claims of overbilling in January 2014, February 2014, March 2014, April of 2014, etc. commenced in December 2013. Obviously, the statute of limitations governing legal malpractice claims cannot commence before the negligent legal work was performed or in this case before Carlson was billed by Cronin. Since it would be legally impossible for the statute of limitations to commence on a claim for legal malpractice before the malpractice occurred, this Court must grant the Petition for Rehearing and vacate its prior order.

Furthermore, this Court's decision that that the statute of limitations commenced in December of 2013 is not even supported by Cronin in his appellate brief. Cronin did not argue in his appellate brief that the statute of limitations commenced in December of 2013 or prior to that time. Cronin probably decided not to make any argument in his appellate brief that the statute of limitations commenced "by the end of 2011 [or by] December 2013" because Cronin realized that there were bills for unreasonable and unnecessary fees based upon work performed after 2011 and December 2013 and payments were made by Carlson through at least May of 2014. It is undisputed that plaintiffs paid attorney's fees to Cronin starting in November of 2010 and the last payment was May 23, 2014. (C6166-6172p48-66, C6207-6214p126-159, C5580p88-102, 111). Cronin realized that it would be impossible for the statute of limitations to commence in 2011 for fees

incurred for legal work that were not even incurred until years later so they decided not to present any argument to support that position. Cronin also realized that it would be impossible for the statute of limitations to commence by December of 2013 because again fees were incurred after that time and Cronin continued to represent the plaintiffs until at least April 22, 2015. Illinois law and common sense establish that the statute of limitations cannot commence on a claim for charging unreasonable and unnecessary fees until at least the time the attorney stopped charging unreasonable and unnecessary fees and until the time the attorney ceased representing the client.

Second, not only was there no violation of any alleged fee cap, there was no evidence presented by anyone that a fee cap was violated. It should be noted that Carlson has not and does not allege and his expert does riot opine that Cronin breached the standard of care by violating some alleged fee cap. This Court appears to have made up another fact from whole cloth to support dismissal of Carlson's claims when it found that the record contained evidence of a violation of some alleged fee cap. It is quite troubling that this Court has taken it upon itself to scour the record for facts to support arguments and has made numerous arguments for Cronin. This Court must explain why it is advocating on behalf of a party because Illinois law is crystal clear that Courts should not advocate for one party. Moreover, Carlson is the master of his claims and this Court, nor should any court, be rewriting a Carlson's complaint and making up facts in an effort

to dismiss those claims. Since Carlson never alleged that Cronin violated the standard of care based upon the violation of some alleged fee cap and since Carlson never presented evidence to establish some violation of an alleged fee cap, this Court cannot base its decision to affirm on that issue.

Furthermore, Cronin himself never presented any evidence to this Court to establish that a fee cap was violated. Sure, Cronin's insurance company attorney made a statement or argument in his brief filed in the trial court that some alleged fee cap was violated but that is not evidence. This Court can only consider arguments supported by evidence at the summary judgment stage and Cronin never produced any evidence of a violation of some alleged fee cap. In order for Cronin to establish some violation of an alleged fee cap, he would have to produce evidence about the alleged fee cap covered, the exact date the fee cap was violated, that he had a duty of care to not violate the alleged fee cap and expert testimony to establish that he violated the standard of care. Cronin did not present evidence or even argue in his appellate brief that all these necessary elements have been satisfied. This begs the question yet again why this Court would make arguments for Cronin especially when Cronin did not present such evidence or arguments.

Even if this Court still decides to consider whether some alleged violation of a fee cap triggered the statute of limitations, the evidence supports the fact that there was no violation of any fee cap. This

Court relied upon the written engagement agreement executed by Carlson and Cronin but once the terms of this agreement are read, the sworn testimony of Cronin is reviewed, and the timeline of events is properly understood it will be clear that no fee cap was violated.

The written retainer agreement relied upon by this Court to support its decision stated that it only applied to "the above referenced matter" which was identified as "*William Calson and Willis Capital v. David J Fish, et al.* No. 10 L 13175." (C5996-5998). Thus, the alleged fee cap was limited to attorney fees incurred in Carlson v. Collins, 10 L 13175. In other words, the fee cap could only be violated if Cronin charged Carlson more than $250,000 in fees in 10 L 13175. The undisputed record in this case establishes that 10 L 13175 was filed in November of 2010 and was voluntarily dismissed approximately 7 months later on July 13, 2011 without even briefing any motions to dismiss. (C5581p90, C5581p93). Thus, the case that the alleged fee cap applied to was only pending for about 7 months and little or no work was done because the case was voluntarily dismissed by Cronin without the trial court even addressing a motion to dismiss. The timeline establishes with absolute certainty that it was IMPOSSIBLE for $250,000 in attorney fees to be incurred and paid in 10 L 13175. Therefore, the record establishes as a matter of law that no fee cap was EVER violated.

Moreover, this Court shockingly ignored the evidence presented by Carlson that Cronin explained

to him that there was no violation of any fee cap because the fee cap did not cover other matters. It is undisputed that Carlson asked Cronin about the $250,000 attorney's fee cap that was a term of initial retainer agreement and Cronin explained to Carlson that the fee cap did not apply because there were numerous cases in addition to the initial case for legal malpractice in 10 L 13175 (C5590p111). Cronin explained that the fee cap only applied to fees incurred in the legal malpractice case 10 L 13175 in the trial court and it did not apply to CBOE case, the fraud case filed against Belvedere, the appeal of the fraud case or the appeal involved with the legal malpractice case. (C5590p111). In fact, on or about May 20, 2014, Cronin and Carlson exchanged emails and Cronin explained that the $250,000 fee cap did not apply because it only applied to the legal malpractice case and Cronin stated "those three actions–malpractice, CBOE and section 1401–were distinct and separate and, most respectfully, **pursuing these three actions is what took so much time and why the 250k multiplied.**" (C6125-6126)(emphasis added). These facts are not disputed and Cronin has never presented any evidence to establish that the fee cap was violated. This begs the question if Cronin never presented evidence and did not argue in his appellate brief that an alleged fee cap was violated then why is this Court basing a decision on such? Obviously, this Court should not base any decision upon an issue under these circumstances.

In addition, Cronin never sent Carlson any bills or time sheets so there was no way Carlson could

EVER discern what time was spent on any specific case. (C5590p111). To this day, Carlson have not seen any time sheets from Cronin identifying what time was spent on what case. To this day, plaintiffs have no idea how much money was paid for legal fees pertaining to the legal malpractice case or to determine if any contractual cap had been violated. Furthermore, clients are presumed to not be able to discern when malpractice occurs so there is no evidence to establish that the plaintiffs knew of a wrongful cause to any injury. *Butler v Mayer Brown*, 301 Ill.App.3d 919, 923(1998).

Finally, at a minimum, a question of facts exists as to whether the statute of limitations expired on any claim for overbilling. The Opinion does not mention one exact date because it says that the statute of limitations commenced "at the end of 2011" or "no later than December 2013." (C7148). The Illinois Supreme Court has made it clear that a case can only be decided by a trial court when only one conclusion can be reached and the conclusion must be reasonable. *Jackson Jordan, Inc. v. Leydig*, 158 Ill.2d 240, 250-51 (1994). Since the trial court's decision has not identified one conclusion as to when the statute of limitations commenced, it should be left to a jury to decide.

D. Plaintiffs' expert opinions cannot be ignored.

This Court correctly found nothing wrong with Lehman's affidavit. In other words, this Court agreed

with Carlson that there were no technical deficiencies which prevented the trial court or this Court from relying upon Lehman's uncontested opinions. This establishes that Lehman's affidavit and opinions were properly before the trial court and this Court. Since this Court agrees with Carlson that there was nothing technically wrong with Lehman's affidavit and since Lehman's opinions were not contested by Cronin, this Court has no choice but to accept Lehman's opinions. This Court has no choice but to accept Lehman's opinions because they involve proximate cause which involves a question of fact within the sole province of the jury and this Court has no legal-right to interfere with the role of the jury.

Instead of finding technical problems with Lehman's affidavit, this Court instead disagreed with some of Lehman's opinions. This Court stated "in his affidavit, Lehman opined that an error was made in determining when the six year statute of repose bean to run. Lehman opined that the statue began to run as soon as the event giving rise to the legal malpractice occurred." (Opinion, page 19). This Court concluded "contrary to Lehman's averments concerning when the six year statute of repose began to run, our Supreme Court has determined that, "the period of repose in a legal malpractice case begins to run on the last date on which the attorney performs the work involved in the alleged negligence." (Opinion, page 19).

With all due respect, this Court is incorrect and Lehman is correct when he states that the statute of repose commences upon the first negligent act not the

last act. Lehman has more than 30 years litigating claims for legal malpractice and the issues involved in those cases. Legal malpractice cases are extremely complicated cases and experience with those types of cases is paramount. With all due respect, Lehman's knowledge and understanding of issues involved in legal malpractice cases including the statute of repose is much more vast than any Justice on this panel. Furthermore, as the cases cited above establish stated, this Court does not understand when the statute of repose commences.

This Court then discussed Lehman's opinion about the attorney fees charged by Cronin. This Court concluded, "Lehman's opinions here do not create an issue of material fact precluding summary judgment in favor of the Cronin defendants." (Opinion, page 20). This court reasoned Lehman's opinions should be disregarded because they involved, "a claim which we have determined is time-barred, as a matter or law, by the two-year statute of limitations ...". (Opinion, page 20). As stated above, this Court incorrectly found that the statute of limitations commenced on the overbilling claims, therefore this Court must consider Lehman's opinions.

Finally, this Court did not even address Lehman's opinions that the individual defendants violated the standard of care. Since this court found nothing technically wrong with the affidavit, this Court cannot ignore these opinions. These opinions clearly and unequivocally establish that the individual defendants are liable.

WHEREFORE, plaintiffs pray that this Court vacate its order and remand this matter to the trial court for a jury trial on the merits and for further proceedings and for further relief that is just and equitable in the circumstances.

Respectfully Submitted,

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WILLIS CAPITAL, LLC,

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APPENDIX O

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No. 1-20-0724

In the Appellate Court of Illinois
First Judicial District

WILLIAM CARLSON and WILLIS CAPITAL, LLC,
Plaintiffs-Appellants,

v.

THOMAS CRONIN, AARON DAVIS, LELAND W. HUTCHISON, JR., DANIEL J. KELLEY, and CRONIN & CO., LTD,
Defendants-Appellees.

On Appeal from the Circuit Court
Cook County, Illinois

No.: 16 L 383

The Honorable Daniel J. Kubasiak, Judge Presiding

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

This appeal represents yet another chapter in a successive series of purported legal malpractice claims–all filed by plaintiffs William Carlson and his company, Willis Capital LLC ("Willis") in the wake of Carlson's settlement of a dispute with his former partners at Belvedere Trading, LLC ("Belvedere"). Following a February 2008 mediation, Carlson settled the dispute with his former partners, accepting $17.5 million in exchange for his interest in Belvedere, with the settlement memorialized in March. At that time, plaintiffs were represented by Shawn Collins ("Collins") and David Fish ("Fish"). Plaintiffs retained two separate firms to review the Belvedere settlement–Drinker, Biddler & Reath, LLP ("Drinker") and Michael Best & Friedrich ("Michael Best")–before finally retaining Cronin and Co., Ltd. ("the Cronin Firm") in November 2010.

Within a week of its retention, the Cronin Firm filed a legal malpractice action on plaintiffs' behalf against Fish, Collins, and their respective firms (collectively "Fish/Collins"). The action was dismissed as untimely in January 2014. Shortly after this Court affirmed that dismissal on appeal, plaintiffs discharged the Cronin Defendants and retained no fewer than three different lawyers and firms to review the 2008 settlement and the legal advice and services provided by plaintiffs' prior counsel.

The present appeal arises from the January 2016 legal malpractice action bought by plaintiffs

against Michael Best and the Cronin Defendants (Thomas Cronin, Aaron Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and the Cronin Firm), claiming that both were professionally negligent for failing to advise Carlson concerning his potential malpractice claims against plaintiffs) previous attorneys and law firms. This Court has already affirmed the trial court's entry of summary judgment in favor of Michael Best. Before this Court now for review is the trial court's entry of summary judgment in favor of the Cronin Defendants.

ISSUE PRESENTED FOR REVIEW

1. Did the trial court properly enter summary judgment in favor of the Cronin Defendants?

2. Did the trial court commit reversible error by striking the affidavit of plaintiffs' expert?

3. Did the trial court abuse its discretion in denying plaintiffs leave to amend their complaint?

STATEMENT OF FACTS

The facts underlying the present appeal have been exhaustively detailed in at least three previous appeals filed by plaintiffs that have been resolved by this Court: *Willis Capital LLC v. Belvedere Trading LLC*, 2015 IL App (1st) 132183, *Carlson v. Fish,* 2015 IL App (1st) 140526 *("Carlson I"),* and *Carlson v. Michael Best & Friedrich LLP*, 2021 IL App (1st) 191961 *("Carlson II"*), pet. for leave to appeal denied,

Carlson v. Michael Best & Friedrich LLP, No. 127711, 2021 Ill. LEXIS 1007 (Nov. 24, 2021).

Though the history of plaintiffs' successive legal malpractice claims (and appeals) leading to this point is convoluted, the facts relevant to the issues now before this Court are relatively straightforward.

I. The Dissolution of Belvedere Trading LLC

The story begins with the dispute among the partners of Belvedere Trading addressed in *Willis Capital LLC*. In March 2007, plaintiffs retained attorneys Fish/Collins to represent them in that dispute. *Carlson II,* 2021 IL App (1st) 191961 at ¶5. The dispute proceeded to principals-only mediation in February 2008, at which time Carlson agreed to sell plaintiffs' interest in Belvedere for $17.5 million. *Id.* at ¶8. The terms of the settlement were memorialized in a settlement agreement executed on March 4, 2008. *Id.* at ¶9. "Beginning in September 2008, and continuing through November 2008, Carlson exchanged e-mails with Shawn Collins concerning his belief that [his former partners] had fraudulently tricked him into selling his interest in Belvedere for less than the company's true value." *Id.* at ¶11.

In November 2008, after consulting with "three different law firms, two mediation firms, and one accounting firm about the settlement," and believing the settlement may have been fraudulently induced by his former partners' wrongful conduct, Carlson discussed with Collins the possibility of having the

agreement set aside by the court. *Id.* at ¶13.

II. Plaintiffs' Consultations with Various Attorneys

A. Drinker, Biddle & Reath, LLP

Carlson met with David Almeida, an attorney at Drinker, Biddle & Reath, LLP ("Drinker"), on November 19, 2008. *Carlson I*, 2015 IL App (1st) 140526 at ¶16. Carlson asked Almeida and Drinker to review the Belvedere settlement agreement, and Carlson raised questions regarding the legal services that had been provided by Fish/Collins. *Id.* Carlson claimed he first learned of a potential legal malpractice claim against Fish/Collins at this time. *Id.* Plaintiffs consulted Drinker again in October 2009 (Carlson *II,* 2021 IL App (1st) 191961. at ¶91), discussing "what claims could be brought against Shawn Collins or David Fish." (C5015, C5191, C5195,)

B. Michael Best & Friedrich–First Engagement

Between November and December 2008, Carlson consulted with Chris Parker, a college friend who was an attorney with Michael Best. *Id* at ¶12. Carlson sought advice as to the viability of a fraud claim against his former Belvedere partners and began to express dissatisfaction with the legal representation provided by Fish/Collins. *Id.*

Carlson formally engaged Michael Best from

August 18, 2010 through September 16, 2010, for consultation regarding a potential legal malpractice action against Fish/Collins. *Id.* at ¶14. "Parker told Carlson that the applicable statute of limitations for a legal malpractice claim was two-years from the date he should have learned of the malpractice" and advised that, based on the statute of limitations, "a legal malpractice action against [Fish/]Collins 'may be tough.'" *Id.*

C. Cronin and Co., Ltd.

Plaintiffs did not retain Cronin and Co., Ltd. ("the Cronin Firm") until November 11, 2010. *Carlson II,* 2021 IL App (1st) 191961 at ¶15. Within one week, the Cronin Firm filed the legal malpractice claim against Fish/Collins addressed in *Carlson I*. *Id.* at ¶16. In addition, in March 2012, the Cronin Firm filed the §2-1401 petition addressed in *Willis Capital LLC*, seeking to vacate the Belvedere settlement based on Carlson's former partners' alleged fraudulent conduct. *Willis Capital LLC*, 2015 IL App (1st) 132183 at ¶13.

The trial court dismissed the §2-1401 petition on June 7, 2013, finding that Willis' petition failed to state a claim for either rescission or fraudulent concealment, that Willis' fraud and breach of fiduciary duty claims were barred by a mutual release in the settlement agreement, and that Willis failed to exercise due diligence because it never attempted to obtain the financial records or an appraisal of Belvedere before entering into the 2008 settlement. *Id.* at ¶15. The trial court entered judgment on January 6,

2014, awarding attorneys' fees to Belvedere and plaintiffs' former partners. *Id.* at ¶16. On March 15, 2015, this Court reversed the award of attorney fees, but affirmed the dismissal of plaintiffs' §2-1401 petition. *Id.* at ¶26.

On January 15, 2014, the trial court dismissed the legal malpractice action against Fish/Collins as untimely. *Carlson II,* 2021 IL App (1st) 191961 at ¶23. This Court affirmed that dismissal on April 22, 2015, finding that the two-year limitation period governing claims against attorneys (735 ILCS 5/13-214.3) commenced "no later than September 2008 (and more likely even sooner)," when Carlson had "knowledge of a wrongful cause of his injury, even in if he had only identified his former partners' fraud as that cause." *Carlson I,* 2015 IL App (1st) 140526 at ¶41. The Cronin Defendants' representation of plaintiffs came to an end sometime between April and June 2015. (Pl. Br. at 16, 19, 29 and 33; V1 C539.)

D. Michael Best & Friedrich–Second Engagement

Carlson retained Michael Best a second time on February 27, 2014 to serve as a consultant with respect to the appeals in *Carlson I* and *Willis Capital, LLC*. According to plaintiffs, this engagement continued through October 29, 2015. (V3 C5588 at ¶107; Pl. Br. at 12.) In affirming judgment in favor of Michael Best, however, this Court indicated that this second engagement ended in May 2015, when plaintiffs decided not to pursue a petition for leave to

appeal. *Collins II,* 2021 IL App (1st) 191961 at ¶27.

E. Plaintiffs' Subsequent Counsel Commencing In May 2015

Following the conclusion of the appeals in *Carlson I* and *Willis Capital, LLC*, Carlson continued to seek legal counsel to pursue legal claims related to: (a) the March 2008 Belvedere settlement and (b) his previous attorneys' purported malpractice. Carlson retained: (1) Mildred Sosa in May 2015 (V2 C5255-58; V3 C6100), (2) Jeffrey Asperger of Asperger Associates in June 2015 (V2 C5265-71), and (3) Schuyler, Roche, & Crisham in July 2015 (V3 6114). Schuyler Roche attorney Charles Cole advised Carlson that plaintiffs' legal options had been exhausted. (V3 C6123.)

Carlson met his current counsel around December 2015 (C5077), and plaintiffs filed this action on January 13, 2016. (C71.)

III. Plaintiffs' Malpractice Claims

Having failed to obtain relief from Fish/Collins (*Carlson I*), plaintiffs then pursued claims against their subsequent attorneys, Michael Best and the Cronin Firm, but not against Almeida/Drinker. In Count I of their Amended Complaint, plaintiffs asserted legal malpractice claims against Michael Best for: (1) failing to advise them regarding the statute of limitations on their malpractice claim against Fish/Collins; (2) failing to advise plaintiffs that plaintiffs had a malpractice claim against Drinker for

failing to advise them regarding the statute of limitations on their malpractice claim against Fish/Collins; and (3) failing to advise plaintiffs that they had a malpractice claim against Michael Best itself. (V1 C534.)

Count II of plaintiffs' Amended Complaint asserted claims against the Cronin Firm and four individual attorneys (collectively, "the Cronin Defendants") for failing to advise plaintiffs to pursue malpractice claims against both Almeida/Drinker and Michael Best. (V1 C539.) Plaintiffs also alleged overbilling by the Cronin Defendants and failure to account for billed time. (V1 C53940.) Plaintiffs alleged they never received a detailed statement of work performed and did not know "what fees were incurred in the malpractice case and what legal fees were incurred in the fraud case," but believed that under no circumstance would it cost in excess of $750,000 to work on two motions to dismiss, two appeals and initiate three proceedings." (V1 C538-39.)

A. Michael Best's Motion for Summary Judgment

Michael Best moved for summary judgment as to the claims in Count I on numerous grounds, including: (1) plaintiffs' claims against Fish/Collins were already time-barred before plaintiffs retained Michael Best in August 2010; (2) plaintiffs' claims against Drinker remained viable after plaintiffs discharged Michael Best and retained successor counsel; (3) a law firm owes no duty to advise a client

of potential claims against the law firm itself; and (4) plaintiffs admitted all factual allegations of Michael Best's affirmative defenses by failing to file a reply. (C1956-57.)

While Michael Best's summary judgment motion was pending, plaintiffs moved for leave to file a Second Amended Complaint. (C2545.) Leave was denied. (C2695.)

On December 14, 2018, the trial court initially granted Michael Best's motion as to plaintiffs' claim that Michael Best should have advised them of potential malpractice claims they may have had against Michael Best itself, but denied summary judgment as to all other claims. (V2 C3478.) *Carlson II*, 2021 IL App (1st) 191961 at ¶32. Shortly thereafter, however, on May 3, 2019, the trial court granted Michael Best's Motion to Reconsider and granted summary judgment in favor of Michael Best on all claims. (V2 C3876.) *Id.* at ¶33.

First, the trial court found that plaintiffs were on inquiry notice of their malpractice claims against Fish/Collins in June 2008 based on a conversation Carlson had with his accountant in which the accountant advised Carlson that he had "left 12 million on the table" in the Belvedere settlement. (V2 C387 5.) Because Plaintiffs' claims against Fish/Collins accrued more than two years before plaintiffs retained Michael Best in August 2010, the trial court held, "any subsequent negligence action [against Michael Best] for the loss of claims against Fish/Collins has no

merit." (V2 C3875.)

As to plaintiffs' potential malpractice claims against Drinker, the trial court explained that Michael Best could not be held liable for the loss of those claims regardless of whether the claims accrued in 2010 or 2014:

> Should the court find the claims accrued in 2010, under the analysis discussed above, Carlson's claims became untimely in 2012. Should the court find that the claims accrued in 2014, the claims became barred by statute of repose in October 2015, six years after Drinker's last act of representation. As Michael Best notes, "a cause of action must be nonviable at the time of the defendant's discharge, because if it remained viable at the time of the defendant's discharge and another attorney was retained, the subsequent attorney's failure to rectify the defendant's negligence acts a superseding cause of the loss of the action." *Nettleton v. Stogsdill,* 387 Ill. App. 3d 743, 755 (2nd Dist. 2008). As such, Michael Best could not have caused the loss of Carlson's claims against Drinker under either accrual date.

(V2 C3875-76.) On May 7, 2019, the trial court entered its order, pursuant to Supreme Court Rule 304(a), finding no just cause to delay appeal from the

judgment in favor of Best. (V2 C3905.)

Within 30 days of the trial court's Rule 304(a) finding, on June 4, 2019, plaintiffs moved to reconsider the orders granting summary judgment in favor of Michael Best. (V2 C3908.) The following day, plaintiffs filed a "Motion for Leave to File a Third Amended Complaint *Instanter* and/or Motion for Ruling on Motion for Leave to File a Second Amended Complaint *Instanter."* (V2 C3969.) Plaintiffs argued that they "should be able to file a third amended complaint to address arguments raised for the first time by Michael Best in August of 2018 and to add additional facts [learned in discovery]." (V2 C3978.)

Plaintiffs' motion to reconsider was denied on August 29, 2019 (V2 C5415) and plaintiffs appealed. (V2 C5416).

On appeal, this Court first affirmed the trial court's denial of plaintiffs' motion for leave to filed their Second Amended Complaint. Addressing the four factors courts should consider in reviewing a trial court's denial of leave to amend, this Court found the first factor dispositive: "whether the proposed amendment would cure the defective pleading." *Carlson II*, 2021 IL App (1st) 191961 at ¶62 (quoting *Loyola Academy v. S & S Roof Maintenance, Inc.,* 146 Ill. 2d 263, 273 (1992)). The proposed amendment–"which sought to add a new allegation that Michael Best first represented Carlson in 2008, rather than in 2010, as Carlson alleged in his original and first amended complaints" –contradicted Carlson's

deposition testimony stating that he "[d]id not engage Michael Best in 2008." *Id.* at ¶63. Because Carlson's deposition testimony constituted a judicial admission that could not be contradicted, the trial court did not abuse its discretion in denying leave to amend. *Id.* at ¶72.

Next, this Court rejected plaintiffs' contention that this Court abused its discretion in denying their request for additional discovery before responding to Michael Best's motion. *Id.* at ¶77. Finally, this Court affirmed the entry of summary judgment in favor of Michael Best. This Court began by addressing plaintiffs' claims that Michael Best's failure to advise them of the statute of limitations for legal malpractice caused the loss of their claims against Fish/Collins. *Id.* at ¶79. This Court concluded that "Carlson was on inquiry notice of his legal malpractice claims against Collins no later than June 2008" when "Carlson's accountant ... told him that he 'potentially [had] a real problem' regarding the proposed settlement agreement." *Id.* at ¶82.

Next, this Court turned to plaintiffs' alternative argument that Michael Best's failure to advise them that they had viable claims for legal malpractice against Drinker based on *that* firm's failure to advise them regarding the statute of limitations applicable to their claims against Fish/Collins. *Id.* at ¶88. In affirming summary judgment in favor of Michael Best, this Court explained that "Illinois case law is well settled that when a cause of action is viable at the time an attorney is discharged, and a second attorney is

retained with enough time to preserve the plaintiffs cause of action, then the second attorney's failure to preserve that cause of action is a superseding cause of the loss of the action." *Id.* at ¶90. Because any claims plaintiffs had against Drinker "did not expire under the statute of repose until October 2015, [and] were still viable after Michael Best's representation ended in May 2015, and [plaintiffs] retained new counsel in September 2015 ... [,] Michael Best did not cause [plaintiffs] to lose any ... legal malpractice claims [they] may have had against Drinker." *Id.* at ¶93.

B. The Cronin Defendants' Motions for Summary Judgment

The Cronin Defendants then moved for summary judgment. (V2 C4734, V2 C5388.)

1. Motion on Behalf of all Cronin Defendants

First, all of the Cronin Defendants moved collectively for summary judgment. (V2 C4734,) They noted that the trial court, in granting summary judgment for Michael Best, had already concluded that Michael Best could not have caused the loss of any potential action against Fish/Collins because that action was already time-barred before plaintiffs retained Michael Best in August 2010. (V2 C4743.) Consistent with that holding, the Cronin Defendants could not have committed malpractice by failing to advise plaintiffs to pursue meritless claims against Michael Best based on Michael Best's alleged failure to

file malpractice claims against Collins/Fish. (V2 C4743.)

Next, the Cronin Defendants argued that plaintiffs could not establish a legal malpractice claim based on the Cronin Defendants' alleged failure to advise plaintiffs to pursue claims against Drinker because: (1) plaintiffs had no "valid malpractice claim against Drinker based on its failure to advise [plaintiffs] to sue [Fish/]Collins" (V2 C4744-46); and (2) any potential malpractice claim against Drinker did not accrue until January 15, 2014 (when plaintiffs' malpractice claims against Fish/Collins were dismissed as untimely) and remained viable until October 2015, months after plaintiffs discharged Cronin and retained a series of new attorneys (V2 C4746-48).

Finally, the Cronin Defendants argued that plaintiffs' claim for overbilling was barred by the statute of limitations. (V2 C4748-49.) In support, the Cronin Defendants produced three emails sent by Carlson on January 18, 2012 (V2 C5362), April 20, 2012 (V2 C5364), and December 17, 2013 (V2 C5366), all authenticated by Thomas Cronin in his affidavit (C5361)–and all sent more than two years before plaintiffs flied this action in January 2016. The January 18, 2012 email included as an attachment a spreadsheet noting the total legal fees paid to Cronin in 2011 was $545,000. (V2 C5363.) The spreadsheet attached to the April 20 email identifies an additional $40,000 in fees in the first two months of 2012. (V2 C5365.) Finally, the December 17, 2013 email noted a

total of $735,000 in fees paid to Cronin from 2010 through 2013. (C5366.)

2. Motion on Behalf of Davis, Hutchinson, and Kelley

In addition to the motion on behalf of all Cronin Defendants collectively, defendants Davis, Hutchinson, and Kelley (the Individual Lawyers) filed a separate motion for summary judgment addressing the plaintiffs' inclusion of them as individual defendants. Even if plaintiffs could establish a legal malpractice claim against Thomas Cronin and the Cronin Firm, the Individual lawyers never formed an individual attorney-client relationship with plaintiffs.

William Carlson, on his own behalf and on behalf of Willis Capital, signed the letter of engagement retaining the Cronin Firm on November 22, 2010. (V2 C5356-58.) The engagement letter acknowledges: "At all times, Thomas C. Cronin and the Firm remain primarily responsible for the prosecution of the litigation." (V2 C5356.) The engagement letter makes no mention of any of the Individual Lawyers. Indeed, none of the Individual Lawyers were working for the Cronin Firm in November 2010, Davis was first admitted to practice in November 2010 and began working as an associate for the Cronin Firm in March 2011 (V2 C5380); Hutchinson began working as "Of Counsel" to the Cronin Firm in May 2011 (V2 C5383); Kelley began working for the Cronin Firm as "Of Counsel" sometime in 2012 (V2 C5386).

3. The Trial Court's Ruling

On December 6, 2019, the trial court entered its written order granting the Cronin Defendants' summary judgment motions. (C6804-09.) On April 24, 2020, the court denied plaintiffs' Motion to Reconsider, but granted (in part) plaintiffs' Motion to Clarify in a written opinion and order. (V3 C140-48.) The court again held that the Cronin Defendants cannot be deemed the proximate cause of the loss of any legal malpractice claims plaintiffs may have had against either Almeida/Drinker or Michael Best, based on their advice regarding potential legal malpractice claims or the timeliness of such alleged claims. (C7140.)

First, the trial court noted it had already held, in granting Michael Best's motion for summary judgment, that plaintiffs' "malpractice claims against Fish & Collins accrued no later than June 2008 and therefore became time-barred by June 2010." (C7145-46, citing *Roberts v. Heilgeist*, 124 Ill. App. 3d 1082 (1984) (attorney owes no duty to file claim which is already tune-barred at time of retention).) Because the malpractice claims against Fish/Collins were already time-barred before plaintiffs retained Michael Best in August 2010, Michael Best could not have been negligent in failing to bring malpractice claims against Fish/Collins. Thus, the Cronin Defendants could not have been negligent in failing to bring malpractice claims against Michael Best for failing to bring time-barred malpractice claims against Fish/Collins. (C7145.)

The trial court further explained: "[elven assuming *arguendo* that [plaintiffs] had malpractice claims against Almeida and Drinker, any such claims did not accrue until the dismissal of [plaintiffs] malpractice claims against Fish & Collins ... on January 15, 2014, at the earliest, pursuant to Illinois adverse judgment rule."(C7146.) Any potential malpractice claims against Almeida and Drinker would have therefore remained viable when plaintiffs discharged Cronin no later than June 2015 (shortly after this Court affirmed the dismissal of the Fish/Collins claims), and throughout the following months when plaintiffs retained a series of new attorneys to investigate and review potential claims. (V3 7146.)

The trial court also granted summary judgment in favor of the Individual Lawyers finding no attorney-client relationship between plaintiffs and Davis, Hutchinson, or Kelley individually. (C7147.)

Finally, the trial court granted summary judgment in favor of the Cronin Defendants as to plaintiffs' overbilling claim, finding that claim accrued "no later than December 2013, more than two years before Plaintiffs commenced this action on January 13, 2016." (C7148.)

ARGUMENT

I. The trial court properly granted summary judgment in favor of the Cronin Defendants.

A. Plaintiffs' potential claims against Almeida/Drinker remained viable after plaintiffs discharged Cronin and retained new counsel.

On appeal, plaintiffs rightly abandon the argument charging the Cronin Defendants with professional negligence for failing to pursue malpractice claims against Michael Best, Michael Best had no duty to file claims against Fish/Collins that were time-barred before plaintiffs retained Michael Best (*Roberts*, 124 Ill. App. 3d at 1086); plaintiffs' purported claims against Almeida/Drinker remained viable after Michael Best was discharged (*Nettleton*, 387 Ill. App. 3d at 755-56; and Michael Best owed no duty to advise plaintiffs of any potential claims against Michael Best itself (*Lamet v. Levin,* 2015 IL App (1st) 143105, ¶32).

Plaintiffs do, however, persist in their position that the Cronin Defendants were negligent for failing to pursue malpractice claims against Drinker and Almeida. (PL Br. at 21-34.) The trial court's grant of summary judgment as to this claim rested on two simple principles long-established in the law of legal malpractice. First, if the plaintiff's cause of action remained viable at the time of the defendants discharge, the plaintiff cannot, as a matter of law, establish that the defendant caused the loss of the plaintiffs cause of action. *Nettleton*, 387 Ill. App. 3d at 755-56; *Mitchell v. Schain*, *Fursel* & *Burney, Ltd.*, 332 Ill. App. 3d 618, 620-21 (1st Dist. 2002) (collecting cases). Second, under Illinois' adverse judgment rule,

"a cause of action for legal malpractice will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which plaintiff has become entangled due to the purportedly negligent advice of his attorney." *Warnock v. Karm Winand* & *Patterson,* 376 Ill. App. 3d 364, 3 70 (1st Dist. 2007) (quoting *Lucey v. Law Offices of Pretzel* & *Stouffer,* 301 Ill. App. 3d 349, 356 (1st Dist. 1998)). *See also, Suburban Real Estate Services v. Carlson,* 2022 IL 126935, ¶21-26 (discussing *Warnock* and *Lucey* with approval).

In this case, the trial court concluded any potential malpractice claim against Almeida/Drinker did not accrue under the adverse judgment rule until January 15, 2014, when the malpractice claims against Fish/Collins were dismissed as untimely. (C7146.) Although such a claim against Almeida/Drinker would remain viable for two years under the statute of limitations, the statute of repose barred any claim against Almeida/Drinker filed more than six years after the act or omission upon which the claim is based. 735 ILCS 5/13-214.3 (b) and ©. Thus, any claim plaintiffs might have had against Almeida/Drinker remained viable until October 2015–six years after plaintiffs last consulted with them about potential claims against Fish/Collins. Because any potential malpractice claim against Almeida/Drinker remained viable for months after plaintiffs discharged the Cronin Defendants, plaintiffs (as a matter of law) cannot establish the Cronin Defendants proximately caused the loss of a cause of action against Almeida/Drinker. *Nettleton,* 387 Ill. App. 3d at 755-56.

Plaintiffs offer a variety of theories in an effort to avoid this inescapable conclusion. First, plaintiffs suggest the statute of repose expired in November 2014–six years after plaintiffs' first consultation with Drinker in 2008. (PL Br. at 18.) Plaintiffs contend that Carlson's certification submitted in opposition to summary judgment established that "any later work done by Drinker in 2009 was related to another entity and not the plaintiffs." (Pl. Br. at 25[4].)

But, Carlson either fails to understand or refuses to acknowledge that he made a clear, unequivocal, judicial admission at his deposition in this case when he testified that he met with attorneys at Drinker in October 2009, discussed his concerns regarding legal malpractice related to the Belvedere litigation, and specifically discussed "what claims could be brought against [Fish/Collins]." (V2 C5015.) *Eidson v. Audrey's C T L*, 251 Ill. App. 3d 193, 195 (5th Dist. 1993) ("A judicial admission is a deliberate, clear, unequivocal statement of a party, about a concrete fact, within the party's peculiar knowledge.") It is well-established that a judicial admission made in a party's discovery deposition may not subsequently be contradicted by offering a contradictory affidavit. *Hollenbeck v.* City *of Tuscola,* 2017 IL App (4th) 160266, ¶50.

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[4] Although plaintiffs cite to "C3669p12-18," that page in the record is simply a certificate of service. The Cronin Defendants assume plaintiffs intended to cite to "V3 C5573-74, ¶¶60-62."

Plaintiffs alternatively argue that the statute of repose began to run in 2008 because "the well-established law is that the statute of repose commences once the first act of negligence occurs not the last act." (Pl. Br. at 24.) Unfortunately for plaintiffs, however, the Illinois Supreme Court has explicitly held, "The period of repose in a legal malpractice case begins to run on *the last date* on which the attorney performs the work involved in the alleged negligence." *Snyder v. Heidelberger,* 2011 IL 111052, ¶18 (emphasis added.) Indeed, in holding that the statute of repose begins to run *"on the last date* on which the attorney performs the work involved," this Court explained:

> Although omissions may cause the injury, those omissions must occur in the context of some affirmative acts of representation. When the. acts of representation end, the period of repose must begin, even if the continuing omissions may contribute to injury.

Fricka v. Bauer, 309 Ill. App. 3d 82, 87 (1st Dist. 1999) (emphasis added).

Plaintiffs also conveniently fail to disclose that this Court decided this precise question in *Carlson II*: "The statute of repose would have started running in October 2009, when Drinker failed to advise Carlson of the two-year statute of limitations. And the statute of repose expired six years later in October 2015" months after plaintiffs discharged the Cronin Defendants and

retained subsequent counsel. *Carlson II*, 2021 IL App (1st) 191961, ¶92.

Ironically, while ignoring this Court's express holding as to when the statute of repose commenced regarding alleged claims against Drinker, plaintiffs insist that the law of the case doctrine and collateral estoppel bind the parties to the trial court's supposed holding that "the statute of limitations commenced on plaintiffs' claims against Drinker in 2010 and expired in 2012." (PL Br. at 20-22.) Intentionally or not, plaintiffs misrepresent the trial court's ruling in favor of Michael Best. In granting summary judgment in favor of Michael Best, the trial court did not decide whether the statute of limitations commenced in 2010 (as argued by Michael Best) or in 2014 (as argued by plaintiffs). Rather, the court held that "Michael Best could not have caused the loss of [plaintiffs'] claims against Drinker under *either* accrual date." (C3875-76, emphasis added.)

Finally, plaintiffs suggest that Cronin conceded that the legal work plaintiffs paid them for included an analysis in November 201o "to determine whether or not Drinker committed legal malpractice" and that the payment of these legal foes was sufficient to trigger the statute of limitations even without an adverse judgment. (Pl. Br. at 22-23.) The Illinois Supreme Court's recent opinion in *Suburban,* however, forecloses this argument.

In *Suburban,* the court recognized that a cause of action for legal malpractice can accrue "prior to any

adverse judgment or settlement" where "there was a pecuniary loss directly attributable to an attorney's neglect." *Id.* at ¶35. However, "[m]erely hiring new counsel to defend against a lawsuit challenging the attorney's legal advice and incurring fees, does not, standing alone, trigger a cause of action for malpractice." *Id.* at ¶36. Had plaintiffs' claims against Fish/Collins survived dismissal, then the legal fees they incurred for review of the legal services rendered by Almeida/Drinker and/or Michael Best would not have been the result of attorney neglect. *Lucey,* 301 Ill. App. 3d at 355. Until an adverse judgment was entered against plaintiffs in *Carlson I* in January 2014, the existence of damages remained speculative and no cause of action against Almeida/Drinker existed (accrued): *Id.*

Because any cause of action against Almeida/Drinker remained viable after plaintiffs discharged the Cronin Defendants in approximately April 2015 (no later than June) and after plaintiffs retained several subsequent attorneys over the following months, the trial court correctly granted summary judgment in favor of the Cronin Defendants.

B. No attorney-client relationship existed between plaintiffs and the Individual Lawyers.

Should this Court affirm entry of summary judgment in favor of all Cronin Defendants based on the reasons detailed above, this Court need not address separately the entry of summary judgment in

favor of the Individual Lawyers on the additional ground that no attorney-client relationship existed between plaintiffs and the Individual Lawyers. Should this Court reach this question, the trial court's judgment should be affirmed.

According to plaintiffs, Supreme Court Rule 721(6) "establishes that all attorneys who perform legal work on a matter are personally legally responsible for that work." (PL Br. at 36.) Plaintiffs then reason that "Davis, Hutchinson and Kelley all admit that they performed legal work on behalf of plaintiffs so they are all personally liable for any negligence." (PL Br. at 37.) By this reasoning, an associate assigned to perform research regarding personal jurisdiction at the outset of a case could be held personally liable, based solely on performance of that research, for a partner's subsequent failure to timely file a notice of appeal. To call this argument a stretch would certainly be generous.

First, Rule 721(b) makes clear that the "rule does not diminish or change the obligation of each attorney engaged in the practice of law ... to conduct himself or herself in accordance with the standards of professional conduct." Ill. Sup. Ct. R. 72 1(b). The Supreme Court Rules on Admission and Discipline of Attorneys address the qualifications for admission to practice law in Illinois; they are not a source of independent duties or civil liability. *Nagy v. Beckley,* 218 Ill. App. 3d 875, 881 (1st Dist. 1991) (explaining that Rules of Professional Conduct are "not an independent font of tort liability"); *Khoury v. Niew,*

2021 IL App (2d) 200388, ¶51 (same).

"The confidence reposed in an attorney is of a personal nature and cannot be delegated by the attorney without the client's consent." *Clement v. Prestwich,* 114 Ill. App. 3d 479, 480 (2nd Dist. 1983). "A client's claim for malpractice arises from this personal relationship and is a claim that his attorney has breached a personal duty to the client ..." *Id.* (internal citation omitted). "An attorney-client relationship arises only when both the attorney and the client consent to its formation. *Kensington's Wine Auctioneers & Broken, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 13 (1st Dist. 2009).

The engagement letter signed by Carlson in this case makes clear that plaintiffs entered into an attorney-client relationship with Thomas Cronin and the Cronin Firm, who would "remain primarily responsible for the prosecution of the litigation." (V2 C5356.) While the engagement letter notes that Cronin and the Cronin Firm would enlist the assistance of additional attorneys in carrying out the representation, nothing in the engagement letter suggests that such other attorneys would be assuming responsibility for every aspect of all of Carlson's pending and potential claims.

The Amended Complaint alleges no individual acts of negligence by the Individual Attorneys, but only the same "failure to advise," as alleged against the Cronin Firm. Because plaintiffs never had an agreed upon attorney-client relationship with the Individual

Attorneys, and they never agreed to accept responsibility for advising plaintiffs as to other claims they might have, the trial court properly granted summary judgment to each of them in their individual capacities.

C. Plaintiffs' claim for overbilling is barred by the two-year statute of limitations.

Plaintiffs argue their claim for overbilling was not time-barred. Plaintiffs' alleged in their Amended Complaint that the Cronin Defendants: (1) charged over $750,000 in attorney fees; and (2) never provided itemized fee statements indicating what time was spent on which matter. But, it is undisputed that $735,000 of those fees were paid by December 17, 2013 (V2 C5366). Plaintiffs thus necessarily knew long before that time they had not received any itemized billing. Yet, plaintiffs slumbered on their rights (once again) and did not file this action against the Cronin Defendants until January 2016, years later.

According to plaintiffs, the trial court reached its decision that the overbilling claim was time-barred "because the trial court, on its own, found that Cronin had committed a negligent act by violating a $250,000 fee cap that was in the retainer agreement." Plaintiffs argue that the trial court reasoned that as soon as Carlson knew he paid in excess of $250,000, the statute of limitations on plaintiffs' overbilling claim was triggered. (PL Br. at 30.) Plaintiffs cite nothing in the record supporting their belief as to the trial court's

thought processes. While plaintiffs appear convinced that the fee "cap" was secretly central to the trial court's reasoning on summary judgment, neither the trial court's December 6, 2019 order granting summary judgment (V3 C6804) nor its April 24, 2020 opinion and order granting plaintiffs' motion to clarify (V3 C7140-48) contains any mention of the "cap."

Plaintiffs further contend the statute of limitations could not have commenced until plaintiffs became aware of their injury. (Pl. Br. at 36.) Plaintiffs do not explain, however, at what point the attorney fees became "unreasonable" for the multiple matters the Cronin Defendants were handling on their behalf. Were the fees unreasonable when they reached $545,000 at the end of 2011? When they reached $735,000 by the end of 2013? To the extent plaintiffs' claim is based on the notion that the lack of itemized billing prevented them from determining what hours were being spent on which matter(s), plaintiffs necessarily knew long before the end of 2013 whether they had received itemized billing (and what was reasonable (or not)) over the three-year period that the Cronin Defendants had represented them since November 2010.

Next, plaintiffs cite *Witherell v. Weimer,* 85 Ill. 2d 146, 158-60 (1981) and *Jackson Jordan, Inc. v. Leydig, Voit & Mayer,* 158 Ill. 2d 240, 252-53 (1994), contending their allegations that the Cronin Defendants failed to advise plaintiffs about the alleged overbilling "are sufficient to support a claim that Cronin is equitably estopped from arguing that any

statute of limitations expired." (PL Br. at 34.) However, plaintiffs fail to recognize that both *Witherell* and *Jackson Jordan* dealt with persistent reassurances by the defendant that everything was fine, which was not the situation here. Rather, in this case, plaintiffs' estoppel argument is based on the Cronin Defendants' silence or their alleged failure to advise plaintiffs they may have a potential legal malpractice claim against the Cronin Defendants themselves. Plaintiffs refuse to acknowledge, however, that there is so such duty. *Carlson I,* 2015 IL App (1st) 140526 at ¶45; *Lamet,* 2015 IL App (1st) 143105 at ¶32 ("This court has rejected the notion that a lawyer has an affirmative obligation to advise a client of the grounds to sue him for legal malpractice.")

For estoppel to arise from silence, the party to be estopped must have both a duty and an opportunity to speak. *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 314 (2001). Plaintiffs have not and cannot (once again) identify any Illinois cases or authority for the proposition that an attorney has an affirmative duty to advise a client that he or she has a claim against the attorney for legal malpractice. *See Carlson I,* 2015 IL App (1st) 140526 at ¶45; *Lamet,* 2015 IL App (1st) 143105 at ¶32 ("This court has rejected the notion that a lawyer has an affirmative obligation to advise a client of the grounds to sue him for legal malpractice."); *Fitch v. McDermott,* 401 Ill. App. 3d 1006, 1025 (2nd Dist. 2010) ("We ... find no case that would require an attorney to affirmatively advise his client of his negligence and the statute of limitations for suing him.")

Because plaintiffs knew more than two years before filing suit against the Cronin Defendants that they had never received an itemized invoice and had been billed in excess of $735,000, the trial court correctly concluded that the overbilling claim was barred by the statute of limitations.

II. Plaintiffs' remaining arguments do not warrant reversal.

Plaintiffs raise three additional arguments that require little discussion.

A. Plaintiffs point to nothing in the stricken affidavit that would create a disputed question of material fact.

Plaintiffs argue at length that the trial court erred in striking the affidavit of their expert, Richard Lehman, but they fail entirely to explain why it matters. First, although the trial court granted the Cronin Defendants motion to strike Lehman's affidavit, the court emphasized it had "considered the affidavit in its ruling on summary judgment" and found that the affidavit simply did not overcome the court's prior finding that plaintiffs' cause of action against Fish/Collins accrued no later than June 2008. (VJ C6804.) On appeal, plaintiffs fail to explain what in Lehman's affidavit they believe would overcome the entry of summary judgment.

The question of when a cause of action has accrued is ordinarily a question of fact, but the

question may be decided as a matter of law where the facts are undisputed and only one conclusion is evident *Goran v. Glieberman,* 276 Ill. App. 3d 590, 596 (1st Dist. 1995). Lehman made clear that he was not a fact witness (V3 C6788 at ¶5)–he had no personal knowledge as to when plaintiffs became aware of a wrongfully-caused injury arising out of the Belvedere settlement, and so nothing in his affidavit creates a genuine dispute of material fact as to the accrual of plaintiffs' action against Fish/Collins. Lehman also admitted in his affidavits that any claim against Drinker/Almeida did not accrue until the dismissal of plaintiffs' claims against Fish/Collins in January 2014. (V2 C5339.) As it is well-established that "an expert witness may not render an opinion as to a question of law"(*Tax Objectors v. Pearl City School District No. 200*, 372 111. App. 3d 562, 582 (2nd Dist. 2007)), Lehman's affidavit also does not affect the trial court's legal determination as to the date of accrual.

In any event, the date on which plaintiffs' claims against Fish/Collins accrued does not alter the fact that plaintiffs' potential claims against Drinker and Almeida did not accrue until the adverse judgment was entered on January 15, 2014 (*Suburban Real Estate Services*, 2022 IL 126935, ¶36-37; *Warnock*, 376 Ill. App. 3d at 370), and those potential claims remained viable for months after plaintiffs discharged the Cronin Defendants. Thus, even if this Court were to conclude that it was error to strike Lehman's affidavit, any such error had no effect on the judgment and was therefore harmless.

B. Plaintiffs' challenge to the denial of their motion for leave to file a third amended complaint is baseless.

Plaintiffs also challenge the denial of their motion for leave to file a third amended complaint. As this Court recognized in affirming the denial of plaintiffs' request for leave to file a second amended complaint, "[al circuit court has broad discretion in deciding whether to grant leave to amend a pleading prior to entry of a final judgment and its decision will not be disturbed absent an abuse of that discretion." *Carlson II*, 2021 IL App (1st) 191961 at ¶44.

Plaintiffs' challenge to the denial of their motion for leave to amend is, at this stage, perplexing. In seeking leave to file the proposed third amended complaint, plaintiffs made clear that the amendment was directed at Michael Best, not at the Cronin Defendants. Plaintiffs argued that the "proposed third amended complaint ... adds facts and theories of liability related to Michael Best's representation of the plaintiffs in 2008, 2010 and 2014 and that were discovered during the deposition of David Fish on May 2, 2019. (VZ C3972, emphasis added.) Further, plaintiffs maintained: "[t]he third amended complaint expands upon facts and theories previously alleged pertaining to the fact that Michael Best should be equitably estopped from raising any statute of limitations arguments and that Michael Best is guilty of fraudulent concealment thus invoking a 5 year statute of limitations." (V2 C3972-73, emphasis added.)

Summary judgment had already been entered in favor of Michael Best when this proposed amendment was tendered (V2 C3904) and that judgment–including the trial court's denial of leave to file a second amended complaint–had already been affirmed on appeal when plaintiffs filed their opening brief (*Carlson I*, 2021 IL App (1st) 191961 at ¶109). Michael Best is not a party to the present appeal, and any attempt to amend the allegations pertaining to plaintiffs' claims against Michael Best is moot: once judgment was entered in favor of Michael Best, there was nothing left to amend relating to Michael Best. *Johnson v. Levy Organization Development Co.*, 789 F.2d 601, 611 (7th Cir. 1986).

The Cronin Defendants find nothing in the proposed amendment, the motion for leave to amend plaintiffs' brief on appeal suggesting that the proposed third amended complaint alters the allegations as to the Cronin Defendants in any meaningful way. (Compare V1 C535-40 with VJ C4015-22[5].) Plaintiffs have not explained, and the Cronin Defendants have not been able to ascertain how the proposed amendment could have affected the trial court's ruling on summary judgment. Where the proposed amendment was offered three-and-a-half years after

[5] The only differences counsel for the Cronin Defendants could detect between Count II of the Amended Complaint and Count II of the proposed Third Amended Complaint are in paragraphs 154 and 155, detailing the duties the Cronin Defendants allegedly breached. (Compare V2 C539-40 with V3 C4019-21.)

suit was initially filed, primarily sought to amend allegations directed at a defendant (Michael Best) that had already been granted final judgment, and would not have prevented entry of summary judgment as to the remaining defendants (the Cronin Defendants), the trial court did not abuse its discretion in denying leave to amend.

C. Arguments contingent upon reversal of the summary judgment in favor of Michael Best are moot.

Finally, plaintiffs assert they "have other claims against Cronin that are contingent upon the [Illinois Supreme Court's] reversal of the [judgment on] appeal in 19-1961." Again, unfortunately for plaintiffs, leave to appeal was denied. *Carlson v. Michael Best & Friedrich LLP*, No. 127711, 2021 Ill. LEXIS 1007 (Nov. 24, 2021). Plaintiffs refuse to acknowledge that Illinois (and federal) courts have consistently held that litigation, at some point, must come to an end. See, e.g., *People v. Kirkrand*, 14 Ill. 2d 86, 89 (1958) ("litigation must come to an end"); *Probst v. Reno*, No. 99 C 3897, 2000 U.S. Dist. LEXIS 14147, at 34 (N.D. Ill. Sep. 21, 2000) (same).

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment entering summary judgment in favor of Defendants-Appellees Thomas Cronin, Aaron Davis, Leland W. Hutchison, Jr., Daniel J. Kelley, and Cronin & Co., Ltd.

Respectfully submitted,

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Dated: March 25, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341© certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 29 pages.

CERTIFICATE OF SERVICE

I, Kimberly A. Jansen one of the attorneys for defendant-appellee, certify that I electronically filed the foregoing Appellees' Brief with the Clerk of the Illinois Appellate Court Third District, on March 25, 2022, via Odyssey eFileIL.

I further certify that on March 25, 2022, an electronic copy of the foregoing Appellees' Brief is being served on the following counsel of record via Odyssey eFileIL

Joseph T. Gentleman
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Under penalties as provided by law pursuant to §1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), I certify that the statements set forth in this instrument are true and correct.

/s/_____

APPENDIX P

E-FILED
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Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

Appellate Court No. 1-20-0724

APPEAL NO. 1-20-0724
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM CARLSON and
WILLIS CAPITAL., LLC,
Plaintiffs/Appellants,

v.

THOMAS CRONIN, AARON L. DAVIS,
LELAND W. HUTCHINSON, JR,
DANIEL J. KELLEY,
and CRONIN & CO., LTD,
Defendants/Appellees.

Appellate Court No: 1-20-0724
Trial Court No. 16 L 383
Trial Judge Daniel J. Kubasiak
Notice of Appeal filed on
May 18, 2020

Appeal from the Circuit Court of Cook County,
Illinois – Law Division
Case No. 16 L 383

The Honorable Daniel J. Kubasiak, Judge Presiding

BRIEF OF
PLAINTIFFS-APPELLANTS
WILLIAM CALRSON and
WILLIS CAPITAL., LLC
ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

INTRODUCTORY PARAGRAPH

The instant appeal arises out of the trial court's decision to grant summary judgment to the numerous defendants, the trial court's decision to strike the certification of plaintiffs' expert and the trial court's decision to deny plaintiffs' leave to file a third amended complaint instanter. The trial court committed reversible error for numerous reasons including but not limited to the fact the trial court relied upon inaccurate factual predicates and otherwise misapplied Illinois law to the facts of this case. The plaintiffs ask this Court to reverse the orders of the trial court and remand this matter for a jury trial on the merits of plaintiffs' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when it granted defendants' motion for summary judgment?

2. Whether the trial court erred when it struck the certification of plaintiffs' expert?

3. Whether the trial court erred when it denied plaintiffs leave to file a third amended complaint instanter?

STANDARD OF REVIEW

The standard of review pertaining to the order of the trial court granting defendants' motion for

summary judgment is *de novo. Lavine v. Board of Comm'rs of Cook County,* 275 Ill.App.3d 141, 143(1995). The standard of review pertaining to the order striking the certification of plaintiffs' expert and denying plaintiffs leave to file a third amended complaint instanter is an abuse of discretion standard. *Barille v. Sears Roebuck and Co.,* 289 Ill.App.3d 171, 179(1997).

STATEMENT OF JURISDICTION

On January 13, 2016 plaintiffs filed a complaint for legal malpractice against numerous defendants. (C70-187). On August 31, 2016 the plaintiffs filed an amended complaint. (C526-638). On June 5, 2019 plaintiffs filed a motion for leave to file a third amended complaint instanter. (C3969-4127). On August 23, 2019 defendants Thomas Cronin, Aaron Davis, Leland Hutchinson, Daniel Kelley and Cronin and Co., Ltd.("Cronin") filed motions for summary judgment pertaining to Count II of the amended complaint. (C4734-5411). On December 6, 2019 the trial court granted Cronin's motion for summary judgment. (C6804-09). On January 3, 2020 the plaintiffs filed a motion to reconsider and to clarify. (C6813-6942). On April 24, 2020 the trial court denied plaintiffs' motion to reconsider and to clarify and denied plaintiffs; motion for leave to file a third amended complaint instanter. (C7140-7148). On May 18, 2020 plaintiffs filed a notice of appeal. (C7153-7179). This Court has jurisdiction pursuant to Supreme Court Rule 301 because the trial court entered a final Judgment on the merits of all the

claims and nothing remains in the trial court.

CASES INVOLVING CONSTRUCTION OF STATUTE

735 ILCS 5/2-214.3

STATEMENT OF FACTS

Formation of Belvedere.

In 2002, William Carlson ("Carlson"), the sole owner and member of Willis Capital LLC ("Willis"), founded Belvedere Trading, LLC ("Belvedere") by contributing as initial capital his life savings. (C5554 paragraph "p"3-4). Belvedere was created to trade S & P 500 equity index options. (CS554p3). Carlson made Thomas Hutchinson ("Hutchinson") and Owen O'Neill ("O'Neill") his partners. (C5554p3).

Carlson takes a leave of absence from Belvedere.

In 2005, Carlson took a leave of absence due to health concerns. (C5554p7-8). When he returned in 2006, Hutchinson and O'Neill intended to squeeze Carlson and Willis out of Belvedere. (C5555p9). They refused to allow him to resume equal use of Belvedere assets and claimed that Willis was no longer an equal owner of the company. (C5555p9). Hutchinson and O'Neill also locked Carlson and Willis out of virtually all important business decisions and would not provide them with information about the company's finances.

(C5555p9). As a result of Carlson and Willis' hard work, Belvedere has been tremendously successful and its owners have earned tens of millions of dollars. (C5554p6).

Carlson retained Collins to bring claims against Belvedere.

In around March 2007, Carlson and Willis retained David J. Fish ("Fish"), Shawn M. Collins ("Collins") and The Collins Law Firm, P.C. ("Collins Firm") to represent them in confronting Hutchinson and O'Neill. (C5556p11). Collins, on behalf of Carlson and Willis, initially filed a claim in arbitration for breach of contract, breach of fiduciary duties and other relief on or about May 17, 2007. (C5556p12). Then, on October 12, 2007, Collins filed a complaint seeking dissolution and other relief against Belvedere, Hutchinson and O'Neill in the Circuit Court of Cook County, Illinois, Chancery Division. (C5556p13). In February 2008, the chancery court granted Hutchinson's and O'Neill's motion to compel arbitration in the chancery case. (C5557p15). That same day, Collins arranged an immediate mediation of Carlson's and Willis' claims to occur the next business evening. (C5557p16). Specifically, on Friday evening, February 8, 2008, Collins contacted trader Doug Gerrard and asked him to mediate the dispute with the mediation to occur on Monday, February 11, 2008. (C5557p16). The mediation was postponed two days and occurred on the evening of February 13, 2008. (C5557p16).

On February 12, 2008, Collins met with plaintiffs and informed plaintiffs that their ownership interest in Belvedere was being legally diluted each and every day by Hutchinson and O'Neil. (C5557p17). Collins also falsely informed plaintiffs that they could not obtain current Belvedere financial documents in either the chancery lawsuit or the arbitration that would enable them to establish an accurate valuation of plaintiff's interests in Belvedere. (C5557p17). At this meeting, plaintiffs were also informed by Collins that "[plaintiffs] would be lucky to get $8 ½ million ... your equity is dropping like a stone ... you are being reduced here ... there is nothing we can do about it." (C5557p17). Carlson asked Collins how could the actions of Belvedere be legal and he said "your documents are bad" "we've gone about as far as we can with this." (C5557p17). Collins did not attend the February 13, 2008, mediation; instead Collins advised Carlson that he refused to participate in the mediation and that Carlson had to attend the mediation without legal representation. (C5557-55 58p17-18).

At the mediation, Carlson was told by the mediator he should accept $17.5 million for his interest in Belvedere because the mediator said he had spoken to Collins and "[y]our attorney says this doesn't look good" because he said your documents are bad causing plaintiffs to lose their ownership interest each and every day. (C5558p20). The plaintiffs reached a settlement at the mediation because they felt they had no "other options at all" "based upon the fact they were falsely told that they could not get financial documents from Belvedere including a copy of the capital account,

that the documents governing Belvedere were "bad" meaning that plaintiffs equity was being legally diluted every day and that plaintiffs' attorney told them the night before they would be lucky to get $8 million. (C5558p20,C2780pgl801ines14-24,2781pg183lines8-14).

After the mediation, a written settlement agreement was drafted by Hutchinson and O'Neil. (C5559p21). Collins advised the plaintiffs that the language in the settlement agreement was standard language. (C5559p21). Collins did not contest any of the additional terms offered by Hutchinson and O'Neil and advised plaintiffs to sign the agreement. (C5559p21). After the mediation but before the settlement agreement was signed, Carlson was instructed by Fish to meet with his accountant to discuss the tax consequences of the settlement. (C4187p1). Fish testified that he told Carlson "to get tax advice on this. And I think he was able to structure it. I think he structured it where he didn't have to pay a huge chunk of taxes." (C4255pg.81linesl6-19). Fish admitted in his deposition that he was never advised that Carlson's accountant said Carlson did not receive a fair share for his ownership of Belvedere or that there was a problem with the settlement. (C4256pg.85-86 line 20 to line 16).

Carlson met with John Flaherty ("Flaherty"), his accountant, on February 18, 2008 and they discussed the amount of tax that would be owed as a result of the settlement and that Flaherty should seek an extension of time for Carlson to file his tax returns.

(C4187p1). Flaherty said in jest that Carlson did not get enough money because of the extremely large amount of taxes that Carlson owed as a result of the Belvedere settlement. (C5560p26). Ultimately, Carlson signed the Belvedere settlement on March 4, 2008. (C2900-05, C5559p21).

After the settlement with Belvedere and through at least September of 2008, Carlson believed the amount of the settlement was not insufficient because his attorneys advised him that he would be lucky to get $8 million whereas he received $17.5 million, that he could not get financial documents from Belvedere to conduct a valuation and his ownership interest was being legally reduced based upon badly written documents governing Belvedere. (C5559p2245).

Collins continuously reassures Carlson he received a fair settlement.

After the. case settled in March of 2008, Collins continued to represent Carlson in various matters and Carlson paid Collins legal fees through the Fall of 2008. (C5559p23-45). On May 12, 2008 Fish called Carlson and told him "that's a lot of money and its, you know, more than we were expecting and we did a really good job for you" (C5560p24). On July 30, 2008 Carlson met with Collins and Collins said "we got you a lot of money and you know, and you have to remember, you were really in trouble" because the documents governing Belvedere were bad and plaintiffs were losing equity. (C5563p30). Also, during

this meeting, Collins reassured Carlson that he done a "very good job for you" "you did extremely well" and they had obtained a good result. (C5563p30). After this meeting, the plaintiffs were unaware that the settlement amount was insufficient or that "Collins had done anything wrong" and was instead upset about how the documents governing Belvedere could be so bad. (C5563p30) On September 4, 2008 Carlson wrote an email to Collins that stated that "I would have been much much worse off without your expertise (and your team). All of your help is/was hugely appreciated." (C5564p31). On September 18, 2008 Collins wrote the following:

> Happy to talk whenever/if ever you want You made yourself an excellent deal under the circumstances, Bill. Whenever you are tempted to beat yourself up for not getting a better deal at mediation, remember that it could very easily have been MUCH worse. Ask yourself this question: would you rather feel the way you do now---with $17.5 million in your pocket---or the way you feel if you had gone to arbitration and come away with $10 million, or less. (C5565p34).

On October 9, 2008, Carlson emailed Collins and Fish explicitly to ask about legal options pertaining to the Belvedere settlement. (C5565p35). Collins responded by advising Carlson that it may be possible to pursue a fraud action to undo the settlement with Belvedere. (C5565p36). Carlson and Collins exchanged

a few more emails in November of 2008 and on November 13, 2008 plaintiffs and Collins discussed obtaining co-counsel in a fraud case against Belvedere. (C5566p37 to 5569p45).

Plaintiffs engage Drinker, Biddle & Reath in 2008.

On November 17, 2008 plaintiffs entered into an engagement agreement with attorney David Almeida ("Almeida") and his firm Drinker, Biddle & Reath ("Drinker") which stated that Drinker would provide "an assessment of your rights and potential litigation relating to your separation from Belvedere." (C5569p47, C2939-2940). On November 19, 2008, Carlson met with the attorneys at Drinker and during this meeting, they criticized the legal work performed by the Collins firm. (C5570p50). This was the first time anyone alerted plaintiffs to the fact that Collins and Fish had done something wrong and in fact plaintiffs wanted them to pursue claims against Belvedere. (C5570p50). On November 26, 2008, Drinker submitted a written analysis to plaintiffs and despite the fact that Drinker promised in writing to advise plaintiffs about all claims that arose out of the Belvedere settlement and despite the fact Drinker criticized Collin's work, Drinker's analysis did not discuss any issues related to legal malpractice. (C5571p51). On December 4, 2008 Carlson wrote an email to Almeida asking to pick up his file since the engagement ended and shortly thereafter Carlson picked up the file. (C5572p54-55).

An attorney client relationship arose between plaintiffs and Best in 2008.

On November 7, 2008 Carlson sent an email to Chris Parker ("Parker"), an attorney at Best, who Carlson went to college with, that asked Parker to review the settlement agreement in the Belvedere litigation and said he would "pay as necessary." (C5575p66). In the Fall of 2008, Carlson and Parker met 2 or 3 times to discuss what had happened in the Belvedere litigation. (C5575p68). During these discussions, Carlson informed Parker about all material and relevant facts. (C5575p68). Carlson testified that he contacted Parker in the Fall of2008 to get "a little bit of advice or maybe he could point me in the right direction or something" and he asked Parker "what are the things that I have to consider about how to move forward." (5575p69). Parker stated in his deposition that Carlson sought his "professional analysis. He wanted my input" and that Carlson sought his "legal advice." (C5576p70, C2995pg571lines13-14, C2987pg25lines8-15). On November 10, 2008 Parker wrote an email to Carlson that provided his legal opinion and that stated "I've had a chance to review your settlement agreement. There are two clauses that give me pause and must be considered before you bring any claim for fraud." (C5576p71,C3006). In November of 2008, Parker told Carlson that he thought it was improper for Collins not to attend the mediation and he admitted that Carlson asked him "should he be concerned about his representation." (C5576p73-74,C2988pg30lines8-10). On December 2, 2008 Parker wrote an email to

Carlson that discussed the Drinker memorandum Carlson sent him and Parker stated that "that memo sounds about right. S*#t man, I gave you almost the exact same analysis/advice for free." (C5577p77), On December 2, 2008 Carlson wrote an email to Parker stating "what recourse is there .... malpractice?" (C5577p78). Parker responded by stating "Malpractice is an option" and then Parker explained in detail what was necessary to win a malpractice case but the email did not identify or explain the statute of limitations or the statute of repose related to any claim for legal malpractice. (C5577p78). At no time in 2008 or 2009, did Parker or Best advise plaintiffs about the 2 year statute of limitations or 6 year statute of repose governing legal malpractice claims or that plaintiffs should file any claim for legal malpractice claim within 2 years of the settlement with Belvedere. (C5578p83).

Plaintiffs engage Best in 2010.

In August of 2010, Carlson approached Parker and asked him to provide further legal advice about his situation and on August 18, 2010, plaintiffs entered into a written engagement letter with Best pertaining to a "legal malpractice matter." (C5579p84). During the engagement, Best reviewed all relevant and material documents and met with Carlson. (C5579p85). On September 16, 2010 Best sent Carlson an email ending their representation because Parker testified he "had performed the task that I had been asked to do." (C5579p86, C2992pg.47lines11-12). Despite the fact Parker testified in this case "in my mind there was a good chance that it [the statute of

limitations on claims against Collins] had already expired," Best did not inform plaintiffs that any statute of limitations had expired on any claims against Collins, they never advised plaintiffs that they may have claims against them or Drinker if the statute of limitations had expired on claims against Collins and they never advised plaintiffs that they had a conflict of interest. (C2992pg4 7lines23-24,C5579p87).

Plaintiffs retain the Cronin defendants in 2010 and Cronin forms legal team.

On or around November 11, 2010, plaintiffs retained Defendant Thomas Cronin ("Cronin") to bring a legal malpractice matter against Collins. (C5580p88). The retainer agreement stated that "we anticipate using associate lawyers and perhaps other attorneys to prosecute this litigation." (C604-606). Pursuant to this agreement, Cronin had numerous attorneys work on plaintiffs' matters. Attorney Aaron Davis ("Davis") worked as an associate of Cronin & Co., on plaintiffs' matters from March of 2011 through July 15, 2013. (C5582p95, C5380-81). Davis' name appeared on the legal malpractice complaint filed against Collins, his name appeared on appellate briefs that were filed in Carlson v Collins and his name appears on the reported appellate court opinion in Carlson v Collins. (C5582p96, CS383-84). Attorney Leland Hutchinson ("Hutchinson") began working on Carlson matters in 2012 as "of counsel" to the Cronin firm and he worked on plaintiffs' matters until at least April of 2015. (C5582p96, C5383-84). Hutchinson's

name appeared on appellate briefs that were filed in Carlson v Collins and his name appears on the reported appellate court opinion in Carlson v Collins. (C5582p96, C5383-84). Attorney Daniel Kelley ("Kelley) began working on Carlson's cases in April of 2012, as "of counsel" to the Cronin firm and he worked on plaintiffs' matters until at least April of 2015. (C5583p97, C5386-87). Kelley worked on all the Carlson matters, he attended approximately 17 face to face meetings to discuss the cases, he was involved at the earliest stages of the legal malpractice case Carlson v. Collins, his name appears on plaintiffs' appellate brief filed in Carlson v. Collins and his name appears on the reported appellate court decision in Carlson v Collins. (C5583p97, C5386-87).

Cronin filed a complaint alleging legal malpractice against Collins on November 18, 2010. (C5581p90). On March 15, 2011 Collins filed a motion to dismiss based upon the statute of limitations. (C5581p92). On July 13, 2011, a voluntary dismissal was entered in the Collins matter. (C5581p93). On or about March 26, 2012 Cronin filed a section 5/2-1401 Petition on behalf of plaintiffs against Belvedere and others. (C5581p94). On June 7, 2013, the section 5/2-1401 Petition was dismissed by the trial court was affirmed on appeal on March 16, 2015. (C5581p94). On July 5, 2013, Cronin refiled the complaint against Collins. (C5585p99). On January 15, 2014, Judge Sanjay Tailor granted a motion to dismiss the refiled legal malpractice case because he found that the statute of limitations had expired when he stated "that the plaintiff knew of his injury, which is certainly no

later than September and by November 12th or 13th he had identified his former partners as the wrongful cause of the injury. At that point, he was on inquiry notice ... " (C5585p100, C3080pg44lines10-15). Plaintiffs appealed and the appellate court affirmed on April 22,2015. (C5586p101, C3058-3068).

Plaintiffs engage Best in 2014 to review everything.

On February 27, 2014, about a month after Judge Sanjay Tailor dismissed plaintiffs' case against Collins, plaintiffs entered into a second written engagement with Best so that Best could serve as a "second set of eyes" on all matters. (C5586p103). The plaintiffs hired Best in February of 2014 to "review everything that had happened and to advise [them] if anything was done wrong and if there were any other legal options that [they] had based upon what happened. [Plaintiffs] made it clear that [they] wanted everything reviewed including prior work done by Best." (C5586p103). Parker testified that this engagement involved "help with the appeal process" and that he was to help with "new potential claims." (C5586p103, C2999pg.66lines16-24). Parker admits that he provided legal services that included review of appellate briefs and he "provided input on potential causes of action ... " (C5586p103, C2999pg.67lines5-10). Parker and Carlson continued to communicate after the appellate court affirmed in April of 2015 about the Belvedere litigation and Carlson sought legal advice from him related to all matters arising out of the Belvedere litigation through October 29, 2015.

(C5587p105). These meetings and discussions can be found at C5587pl05. Best never advised plaintiffs between February 27, 2014 through the end of the representation in approximately October 29, 2015 that the statute of limitations or statute of repose on claims against Collins and Fish or Drinker or Best or others was about to expire. (C5588p107). Best also never explained to Carlson that if the statute of limitations had expired before he retained them in August 2010 that he had a case for legal malpractice against Drinker or Best pertaining to the legal advice rendered by them in 2008. (C5588p107). Best also never advised plaintiffs that they had a conflict of interest based upon the fact that Best had previously provided legal advice to plaintiffs or that plaintiffs should seek another attorney to review the above matters. (C5588p107).

W Trading engages Drinker in December 2008 to perform legal work.

After November 26, 2008, plaintiffs did not engage Drinker to perform any legal work related to the Belvedere litigation. (C3669p12). In approximately December of 2008, W Trading, not the plaintiffs, engaged Drinker to perform legal work for some software development issues that arose. (C3669p13). On August 25, 2009 Carlson sent an email to Drinker asking them to correctly identify W Trading as the client on a bill and on September 21, 2009 Drinker sent an updated bill that identified the correct client, W Trading. (C3670p16). On October 5, 2009, Carlson attended a meeting at the Drinker firm so that he

could drop off a check for the legal services provided to W Trading. (C3670p17). During this meeting, Carlson discussed the W Trading situation at length and at the end of the meeting Carlson briefly mentioned that he was still unhappy about the settlement he reached with Belvedere. (C3670p17). At no time during this meeting, did Carlson ask for legal advice about the Belvedere situation or did Drinker render any legal advice about Belvedere, Collins or anything related to Belvedere. (Id.). On October 8, 2009 Carlson received an unsolicited email that stated that the attorney who met with Carlson had asked David Almeida to look at the November 2008 memo and asked Carlson if he wanted a meeting to further discuss the matter. (C3692p18,C3760). There was never any meeting or discussion of this email or the content of the email between anyone at Drinker and Carlson on or after October 8, 2009. (C3692p18).

History of this case.

On January 13, 2016 plaintiffs filed a complaint for legal malpractice against numerous defendants. (C70-187). Count I alleged a claim for legal malpractice against Best and Count II alleged claims against the Cronin defendants. (C70-187). On August 31, 2016 the plaintiffs filed an amended complaint. (C526-638). On July 20, 2018 Best filed a motion for summary judgment (C1954-1970). On December 14, 2018 the Court denied Best's summary judgment except "as to the claim that Best failed to advise plaintiffs of any malpractice claim they may have against Michael Best & Friedrich" and the order also denied plaintiffs leave

to file a SAC. (C3469). On January 16, 2019 Best filed a motion to reconsider. (C3486-3595). On May 3, 2019 the trial court granted Best's motion to reconsider. (C3874-3876). The trial court found that the plaintiffs' claims that Best committed malpractice when they failed to file claims against Drinker had no merit because the statute of limitations commenced upon the retention of Cronin "Carlson's claims became untimely in 2012" when Best was not representing plaintiffs at that time. (C3874-3876). On June 4, 2019 plaintiffs filed a motion to reconsider which was denied on August 29, 2019. (C3908-3936, C5415). The plaintiffs then appealed the decision related to Count I. (C5416-5434). On July 15, 2021 the appellate court issued a ruling on the appeal pertaining to Count I. (A70-104. This Court should take judicial notice of the ruling).

On June 5, 2019 plaintiffs filed a motion for leave to file a third amended complaint instanter. (C3969-4127). On October 2, 2019 Cronin, Davis, Hutchinson and Kelley ("Cronin") filed motions for summary judgment related to Count 11. (C5437-6493). On October 16, 2019 the plaintiffs filed a response to the motions for summary judgment. (6497-6742). On December 6, 2019 the trial court granted the motions for summary judgment. (C6804-6809). On January 3, 2020 plaintiffs filed a motion to reconsider and to clarify. (C6813-6952). On April 24, 2020 the trial court denied plaintiffs' motion to reconsider and denied plaintiffs motion for leave to file a third amended complaint instanter. (C7140-7148). On May 18, 2020 plaintiffs filed a notice of appeal. (C7153-7159).

ARGUMENT

The plaintiffs filed a two count amended complaint alleging legal malpractice. (C526-638), Count I alleged claims for legal malpractice against Michael Best ("Best") and Count II alleged claims for legal malpractice against the Cronin, Davis, Hutchinson and Kelley ("Cronin"), (C526-638). On August 29, 2019 the trial court entered an order granting summary judgment to Michael Best on Count I. (C5415). The plaintiffs appealed and the appellate court affirmed. (A70-104). The plaintiffs have viable claims against Cronin based upon the trial court's decision that plaintiffs have no viable claims against Best and based upon matters unrelated to the final judgment pertaining to Count I.

Cronin moved for summary judgment on Count II which alleged a claim for legal malpractice. The motion for summary judgment should be denied for all the reasons stated herein and for all the reasons set forth in plaintiffs appellate briefs in 19-1961. When addressing a motion for summary judgment, the trial court must construe the evidential material strictly against the movant and liberally in favor of the opponent. *Protective Insurance Co. v. Coleman,* 144 Ill.App.3d 682, 688(1986). The motion should be granted only when the moving party's right to it is so clear and free from doubt. *Id.*

To prevail in a claim for legal malpractice the plaintiff must prove (1) the existence of an attorney client relationship; (2) a duty arising out of that

relationship; (3) breach of the duty; (4) proximate cause; (5) damages. *Palmros v. Barcelona,* 284 Ill.App.3d 642, 650 (1996). To establish proximate cause there must be proof that the injury would not have occurred but for the defendant attorneys negligence. *Carmel v. Clapp & Eisenberg, P.C.*, 960 F.2d 698, 703 (7th Cir. 1992). The case within a case requirement means that the malpractice complaint is dependent on proving the merits of the underlying lawsuit. *Fabricare Equipment Credit Corp., v. Bell, Boyd & Lloyd,* 328 Ill.App.3d 784, 790 (2002). In Illinois, the question of whether a lawyer has exercised a reasonable degree of care and skill in representing and advising his client has always been one of fact." *Brown v. Gitlin,* 19 Ill. App. 3d 1018, 1020 (1974); see also *Keef v. Widuch,* 321 Ill. App. 3d 571, 577-78, (2001) (Whether a duty is owed is a question of law, but "whether an attorney breached a duty of care owed to a client is a question of fact."). Finally, this question of fact must generally be determined through expert testimony and usually cannot be decided as a matter of law. *Gelsomino v. Gorov,* 149 Ill. App. 3d 809, 814, (1986); see also *Barth v. Reagan,* 139 Ill. 2d 399, 407 (1990).

I. The plaintiffs have established a *prima facia* case that Cronin violated the standard of care by failing to file a lawsuit against Drinker before the statute of limitations expired in 2012 or when Cronin failed to obtain a tolling agreement.

The plaintiffs have alleged facts and introduced

evidence that establishes numerous theories of negligence against the Cronin defendants in Count II of the amended complaint. Carlson's certification also lays out all the facts related to Cronin's representation of plaintiffs. (C5580p88-111). It is undisputed that Cronin began representing the plaintiffs in November of 2010 and continued to represent plaintiffs until at least April of 2015. (5580p88-102). This Court found in the appeal related to Count I of the amended complaint appellate court number 19-1961 that Carlson had sufficient knowledge to trigger the statute of limitations on any claims plaintiffs had against Collins in June of 2008 so the statute of limitations on any claims plaintiffs had against Collins expired in June 2010. (A70-104). Cronin admitted in his deposition that when plaintiffs retained him in November of 2010 that plaintiffs "had a serious statute of limitations problem ... [that] was going to be a serious obstacle to overcome" in any lawsuit he was going to file against Collins because more than 2 years had passed since the Belvedere settlement. (C6301p35lines13-14). Cronin also testified that in November of 2010 he "evaluated very thoroughly what Drinker Biddle had done," he "discussed whether he [Carlson] had potential claims against Drinker ..." he analyzed Drinker's legal work to determine whether or not Drinker committed legal malpractice and he provided an official legal opinion about Drinker's performance to plaintiffs. (C6303p44line11p46line17). The plaintiffs' amended complaint alleges that Cronin was negligent when he "failed to advise plaintiffs they had a claim against Almeida and Drinker ... and failing to file such a claim in a timely manner." (C526-

638p62ii). The proposed third amended complaint alleged that Cronin was negligent when he failed to advise the plaintiffs they had claims against Drinker, when he failed to advise the plaintiffs of the time limitations to bring such claims and when he failed to timely file such claims before the statute of limitations expired on those claims. (C6212p155).

Plaintiffs' presented unrebutted expert testimony that opined that each of the Cronin defendants violated the standard of care by not filing such claims or advising plaintiffs about such claims. (C6216-6274p4-21). Plaintiffs' expert opined "It is my opinion that Drinker Biddle's failure to meet the standard of care as discussed above was a proximate cause of Carlson losing his claim for legal malpractice against Collins and Fish. In turn, Cronin's failure to file suit against Drinker Biddle on behalf of Carlson, or to otherwise assist Carlson to preserve his claim for malpractice against Drinker Biddle was a breach of the standard of care by Cronin causing Carlson to lose his right to pursue a claim for malpractice against Drinker Biddle." (C6222p13). Plaintiffs expert testified that in 2010 Cronin "should have advised Carlson that he then should have sued, in the alternative to his claims against Collins and Fish, both Drinker Biddle and Michael Best ... or that he should have sought to enter tolling agreements with Drinker Biddle ... to preserve all claims that Carlson had or might have against others in connection with the harm caused to Carlson by the settlement of the Belvedere dispute." (C6226p17-18). Plaintiffs' expert also testified that Cronin had to file a case against Drinker within 2

years of November 2010 or obtain a tolling agreement because that is when "the statute of limitations would have run in November 2012." (C6223p14-18, 22). Plaintiff's expert also testified that the statute of repose on any claims against Drinker would expire in November of 2014 because that was six years after Drinker's first negligent act in November of 2008. (C6226p19-22).

Based in part upon Cronin's admission that he knew the statute of limitations was going to be a major concern for the plaintiffs, Cronin should have filed a lawsuit against Collins and the other attorneys who provided legal advice to the plaintiffs in 2008, i.e. Best and/or Drinker, for their failure to advise the plaintiffs when any statute of limitations would expire on claims against Collins prior to the expiration of the statute of limitations on those claims. (C6216-6236). In other words, the standard of care required that the Cronin file suit against numerous attorneys based upon contingent theories that hinged on findings of when any statute of limitations would expire or to obtain tolling agreements with Drinker and/or Best. The Cronin defendants should have done exactly what plaintiffs have done in this case by bringing claims against Best and the Cronin defendants that hinged on findings of when any statute of limitations would expire.

The trial court found that "the alleged negligence of the Cronin defendants in failing to file malpractice claims against Almeida and Drinker cannot be deemed to be the proximate cause of any loss

to Carlson ... [because] any such claims did not accrue until the dismissal of Carlson's malpractice claims against Fish and Collins by the trial court (Judge Sanjay Tailor) on January 15, 2014 at the earliest, pursuant to the adverse judgment rule ..." (C7177). The trial court concluded that the statute of limitations expired on plaintiff claims against Drinker after Cronin ceased representing plaintiffs in approximately April of 2015 therefore they were not the proximate cause of any injury. (C7176-7177). The trial court's decision is erroneous for numerous reasons.

First, the trial court and Cronin are barred by doctrine of "law of the case" or collateral estoppel from contradicting a prior final judgment entered in this matter that found that the statute of limitations expired on plaintiffs' claims against Drinker in 2012. Best filed a motion for summary judgment related to Count I and in support of that motion Best argued that the claims of negligence in Count I that alleged that Best was negligent when they failed to advise plaintiffs that they had claims against Drinker had no merit because the statute of limitations on plaintiffs' claims against Drinker commenced in 2010, after plaintiffs retained and paid attorneys and expired in 2012. (C3362). Best argued that "Carlson was injured by any Drinker malpractice years before the trial court dismissed his compliant in the underlying lawsuit in January 2014." (C3362). Best also argued that "the claims accrued in 2010 when Carlson paid legal fees to other law firms concerning the February 2008 settlement and the claims became barred by the

statute of limitations two years later in 2012." (C3491-3493). Best concluded that they were not the proximate cause of any loss of plaintiffs' claims against Drinker because those claims expired in 2012 when Cronin was representing plaintiffs and Best was not plaintiffs' attorney in 2012. The trial court accepted Best's arguments and granted Best's motion for summary judgment and stated "the law requires dismissal of Carlson's claims ... [because] Carlson's claims became untimely in 2012." (C5423). Thus, the trial court rendered a final decision in this case that found that the statute of limitations on any claims plaintiffs had against Drinker expired in 2012. The appellate court affirmed the decision so the trial court decision is final.

Cronin and plaintiffs spent much of their briefs in the trial court arguing over how preclusion issues i.e "law of the case" or collateral estoppel etc, applied based upon the entry of the final judgment related to Count I. In response to Cronin's motion for summary judgment, which argued that "law of the case" and collateral estoppel applied in numerous respects, plaintiffs argued that "until the ruling related to Best is overturned in the appellate court, all the parties to this case are stuck with the fact that this Court already found that the statute of limitations on claims plaintiffs had against Best or Drinker began to run in late 2012" and "Cronin should not be able to take a position contrary to Best because it would lead to absurd and unfair results." (C6497p22-23, C6982p9-11respectively). The "law of the case" doctrine provides that where an issue has been litigated and decided, a

court's unreversed decision on a question of law or fact settles that question for all subsequent stages of the suit. *Stickler v. American Augers, Inc.,* 325 Ill.App.3d 506, 510(2001). The rule of the "law of the case" doctrine is a rule of practice based upon sound policy that once a trial court decides an issue that the issue is settled for all aspects of that case. *Id.* This authority establishes that once the trial court entered a final judgment finding that Best was not liable for malpractice because the statute of limitations commenced on plaintiffs' claims against Drinker in 2010 and expired in 2012, that the trial court cannot do an about face and find that the statute of limitations commenced in January 2014.

Furthermore the doctrine of collateral estoppel prohibits the trial court from contradicting the previous finding. The doctrine of collateral estoppel bars re-litigation of issues that have been determined by a valid and final judgment. *People v. Terrell,* 185 Ill.2d 467, 475(1998). For collateral estoppel to apply (1) the issues must be identical; (2) a final judgment on the merits must have been obtained in the previous adjudication and (3) the party against whom estoppel is asserted must have been the party or in privity with a party to the prior adjudication. *Cree Development v. Mid America Advertising,* 324 Ill.App.3d 534, 539(2001). There is no generally prevailing definition of privity that applies to all cases rather determining privily requires careful consideration of the circumstances of each case. *Hayes v. State Teacher Certification Bd.,* 359 Ill.App.3d 1153, 1159(2005). Privity exists when a non party has the same legal

interest as a party. *In re Marriage of Mesecher,* 272 Ill.App.3d 73, 76(2005).

Collateral estoppel applies to the decision of the trial court that the statute of limitations on any claims plaintiffs had against Drinker commenced in 2010 and expired in 2012. The issues involved are identical because Best claimed the statute of limitations commenced on claims plaintiffs had against Drinker in 2010 and Cronin argues that the statute of limitations commenced in January of 2014. The trial court granted Best's motion for summary judgment so there was a final judgment. Cronin is in privity with Best because they are both attorneys who represented the plaintiffs and they both raised arguments about when the statute of limitations commenced on claims plaintiffs had against Drinker. Best and Cronin have the same exact interest in a determination of when the statute of limitations commenced on claims plaintiffs had against Drinker thus there are in "privity." It would also be fundamentally unfair for the trial court to find that Best should obtain a judgment in its favor because the statute of limitations commenced in 2010 and then for the very same trial judge to then find that Cronin should obtain a judgment in his favor because the statute of limitations commenced in January of 2014. All the parties to this case are stuck with the fact that the trial court already found that the statute of limitations on claims plaintiffs had against Best or Drinker commenced in 2010.

Even if this Court finds that it is not bound by the prior decision, Cronin is legally prohibited from

asserting that the statute of limitations commenced on plaintiffs' claims against Drinker in January of 2014. Cronin's swore under oath in his deposition that he "evaluated very thoroughly what Drinker Biddle had done," he "discussed whether he[Carlson] had potential claims against Drinker ..." he analyzed Drinker's legal work to determine whether or not Drinker committed legal malpractice and he provided an official legal opinion about Drinker's performance to plaintiff. (C6303p44line11p46line17). This testimony is a judicial admission by Cronin that in November of 2010 plaintiffs paid for his legal opinion about whether or not Drinker committed malpractice. A judicial admission is a deliberate, clear and unequivocal statement made by a party in a deposition about a concrete fact within the party's knowledge. *Installco, Inc. v. Whiting Corp.,* 336 Ill.App.3d 776, 788 (2003). This judicial admission by Cronin that plaintiffs paid Cronin monies so that he could provide an opinion about whether or not Drinker breached the standard of care in 2010 satisfies the legal requirements to commence the statute of limitations in 2010 because it admits plaintiffs suffered damage by paying attorney fees and any person who pays an attorney to review the legal work of another attorney establishes that the person reasonably knows of any wrongful injury. This is especially true in the instant case when this Court previously found in the appeal of Carlson v Collins that the statute of limitations commenced when plaintiffs met with Drinker to review the Belvedere settlement despite the fact Drinker did not advise plaintiffs in writing about any malpractice of Collins. Now we have an attorney admitting he was

paid to provide a legal opinion about Drinker's performance to plaintiffs in November 2010 so that must commence the statute of limitations on any claim for malpractice against Drinker. Certainly, Cronin, the attorney who received monies from the client to opine about the malpractice of another attorney cannot argue in good faith that the statute of limitations did not commence at that time but instead commenced over three years later in January of 2014. Cronin is barred from presenting any argument that contradicts his judicial admission in his deposition.

Based upon the record related to Count II, which includes the judicial admission of Cronin, the statute of limitations pertaining to plaintiffs' claims against Drinker commenced in 2010. The statute of limitations governing legal malpractice cases can be found in 735 ILCS 214.3 and it states that the statute of limitations commences when the plaintiff knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused. *Jackson Jordan v. Leydig,* 158 Ill.2d 240, 249 (1994). A legal malpractice action may accrue prior to the trial court entry of an adverse judgment if it is "plainly obvious that the plaintiff has been injured as a result of professional negligence and where an attorney's neglect is a direct cause of the legal expense incurred by the plaintiff." *Nelson v. Padgitt,* 2016 ILApp(I") 160571, para. 14; *Construction Systems, Inc. v. FagelHaber,* LLC, 2019 IL App(1st) 172430. The undisputed evidence and Cronin's judicial admission establish as a matter of law in this case that that the statute of limitations commenced on plaintiffs' claims

against Drinker in 2012 because Cronin judicially admits that plaintiffs retained and paid him in November of 2010 to provide legal advice about Drinker's representation. This is sufficient to commence the running of the statute of limitations because the plaintiffs paid an attorney to review Drinker's performance. In addition, the plaintiffs presented unrebutted expert testimony that plaintiffs' claims against Drinker commenced in 2010 and expired in 2012. (C6216-6236).

Cronin also argued that he was entitled to summary judgment because the statute of repose on plaintiffs' claims against Drinker did not commence in November of 2008, but instead commenced in October of 2009 and thus expired in October 2015. This argument has no merit. First, the entire argument is irrelevant because the trial court already found that plaintiffs' claims had expired based upon the statute of limitations in 2012 so any analysis that the statute of repose barred claims in 2015 is unnecessary. Second, the statute of repose commenced in November of 2008 not October of 2009 because the well-established law is that the statute of repose commences once the first act of negligence occurs not the last act as Cronin argues. "The statute of repose in a legal malpractice case begins to run as soon as an event giving rise to the malpractice claim occurs, regardless of whether plaintiffs injury has yet been realized." *Lamet v. Levin,* 2015 IL App (1st) 143105, ¶120. In *Frika v. Bauer,* 309 Ill. App. 3d 82, 86-87 (1999), the court stated "when the acts of representation end, the period of repose must begin, even if the continuing omissions may

contribute to injury." Drinker's first act of malpractice occurred in November of 2008 thus the statute of repose commenced in November of 2008 and expired in November of 2014. Moreover, in the statement of facts above on pages 12 and 13, the plaintiffs have submitted evidence to establish that Drinker's representation of them ended in December of 2008 when they picked up their file from Drinker and that any later work done. by Drinker in 2009 was related to another entity and riot the plaintiffs. (C3669p12-18).

Cronin also argued that plaintiffs have no viable claim against Drinker because Cronin alleges that Illinois does not permit legal malpractice claims to be based upon something the client already knew. Cronin argued that, "the Carlson court already held that Carlson knew of his cause of action against Collins "no later than September 13, 2008 (and more likely sooner)." (C4744). Cronin then argues that "according to Carlson, Drinker was negligent at that time in failing to "single out" for Carlson that he had a malpractice claim against Collins." (C4744). Cronin concludes that since "Carlson already knew in June 2008 that he was wrongfully injured and had a malpractice case against Collins, Drinker owed no duty to inform Carlson months later, "that which he already knew." (C4744). Cronin then cites two non legal malpractice cases to support this argument and two cases from other states. The trial court properly rejected this argument for numerous reasons.

First, the cases by Cronin are not applicable to attorneys. Second, the entire argument makes zero

sense. Third, Cronin has failed to establish the factual predicate of the argument because Cronin has not established when Carlson knew anything. A court finding that Carlson had sufficient knowledge to trigger the statute of limitations is not evidence that Carlson knew there was malpractice. Fourth, if this Court assumes that plaintiffs knew that they had a claim for malpractice against Collins in June of 2008, that does not relieve Drinker from its duty to provide adequate legal advice because Drinker was hired to analyze the situation and to provide legal advice to its client about all aspects of a claim for legal malpractice. In *Lopez v. Clifford,* 1121 Ill.App.3d (1999)., the court stated it is axiomatic that the duty of an attorney is to protect a client "from self-inflicted harm" which is exactly what Drinker had a duty to do. Sixth, the cases cited by Cronin are inopposite. The *Seeger* v. *Canale,* 241 Ill.App.3d 177(1993). case cited by Cronin is inapplicable because it involves car crash negligence case that is in no way applicable to professional negligence actions where a person is relying upon expert advice from an attorney about complex legal matters. The *Thornton v. Hamilton Sundstrand Corp.,* 54 F.Supp.3d 929(N.D. 2014) case cited by Cronin does not contain the quote Cronin claims instead it states: "Illinois does not require manufacturers to warn consumers about facts they already know. *Todd v. Societe BIC. S.A.,* 9 F.3d 1216, 1219 (7th Cir.1993)." The *Thornton* case obviously does not apply to cases involving attorneys and clients and has absolutely no application to this case. The other out of state cases do not apply because there are from different states, do not address the factual scenario involved in this case

and the logic is unsound. Cronin has not established any facts to support the fact that plaintiffs knew the intricacies of it claim for legal malpractice or that he needed to file a claim within 2 years of the settlement before they met with Drinker in November of2008 probably because no such facts exist. For all the above reasons, the trial court properly rejected Cronin's argument.

Cronin also argued that "Carlson's failure to file his claims by June 2010 constitute an independent intervening cause of his alleged loss of his malpractice claims against Collins, thus, "Drinker's prior alleged negligence in 2008-09 was not the proximate cause of Carlson's loss of the Collins claim." (C1234p12). This argument was correctly rejected by the trial court.

Proximate cause consists of two elements: (1) actual cause; and (2) legal cause. *Mengelson v. Ingalls Health Ventures,* 323 Ill. App. 3d 69, 75 (1st Dist. 2001). When determining whether a defendant's conduct is the actual cause of an injury, a "but for" analysis is applied. *Id.* The question is whether the injury would have occurred "but for" the defendant's conduct. *Id.* at 269. If the injury would have occurred even absent the defendant's conduct, then there is no actual causation and, accordingly, no proximate causation. *Id.* Proximate cause is not established where the causal connection is contingent, speculative, or merely possible. *Id* at 75. There can be more than one proximate cause of any injury. *Watson v. Enter. Leasing Co.,* 325 Ill. App. 3d 914 (2001); *Countryman v. County of Winnebago,* 135 Ill. App. 3d 384, 392

(1985). When there is more than one proximate cause of an injury, one who is negligent cannot avoid liability merely because another person negligently contributed to cause the same injury. This is true even though the injury would not have occurred but for the negligence of the other person. *Sears v. Kais Bros. Equipment, Inc.,* 110 Ill. App. 3d 884, 889 (1st Dist. 1982). A negligent defendant can, however, avoid liability for a plaintiff's injury if another's conduct breaks the causal connection between the injury and the defendant's original negligence. *Quintana v. City of Chicago,* 230 Ill. App. 3d 1032, 1034 (1st Dist. 1992), The causal connection between a defendant's negligence and a plaintiff's injury is broken if a third party causes the injury and the third party's conduct is unforeseeable. *Oakley Transport, Inc. v. Zurich Ins. Co.,* 271 Ill. App. 3d 716, 725 (1st Dist. 1995). For example, a criminal act committed by a third party which causes a plaintiff's injury is unforeseeable and is ordinarily a superseding cause which breaks the causal connection between the injury and any original negligence. *Rowe v. Stale Bank of Lombard,* 125 Ill. 2d 203, 224 (Ill. 1988). Subsumed within the legal cause analysis is the concept of intervening cause, which asks whether an intervening act by a third party caused the injury despite a prior contributing action by a defendant. This inquiry is encompassed by the "foreseeability" analysis of whether legal cause exists. See *Jinkins v. Evangelical Hosps. Corp.,* 783 N.E.2d 123, 127 (Ill. App. Ct. 2002) ("Where there is an intervening act by a third person, the test we apply is whether the first wrongdoer reasonably might have anticipated the intervening cause as a natural and probable result of

the first party's own negligence."). If the intervening act was not foreseeable, it breaks the causal chain such that the first wrongdoer is not considered the proximate cause of the injury. See, e.g., *Billman v. Frenzel Const. Co.,* 635 N.E.2d 435, 439 (Ill. App. Ct. 1993).

Cronin's argument has no merit for numerous reasons. First, Cronin's argument that plaintiffs were an intervening cause is not supported by any authority. The above authority establishes that the concept of intervening cause involves the unforeseeable actions of a third party. The plaintiffs are parties to this case so they are not third parties. Cronin has not cited any cases where the concept of intervening cause was applied to the unforeseeable actions of a plaintiff. Second, even if this Court could apply the concept of intervening cause, the plaintiffs conduct was not unforeseeable. Actually, Cronin has not even bothered to present evidence to establish or argue that plaintiffs conduct was unforeseeable so the argument is waived. It is certainly foreseeable for a client to wait too long to file a lawsuit especially one a complex as plaintiffs' lawsuit. It is even more likely when the statute of limitations is as complex as it is in legal malpractice cases. At a minimum, there is evidence to suggest that plaintiffs were not a superceding cause which precludes summary judgment.

Cronin then cites numerous cases on page 12 in support of his argument (C4745). These cases do not apply because the first two involve successor counsel

liability which is not present here and the last one found that there was nothing the attorney could do to help the client at the time based upon the documents involved with the business. These cases are not applicable to the instant case. For all the above reasons, the trial court erred when it granted summary judgment to Cronin.

II. The plaintiffs have a viable claim related to overbilling and it is not barred by the statute of limitations.

The plaintiffs have a viable claim that plaintiffs paid Cronin attorney's fees that were unreasonable and unnecessary. The allegations of plaintiffs' complaints and the evidence presented by plaintiffs establish that plaintiffs and Cronin had an attorney client relationship from November 2010 through at least April 22, 2015 and that plaintiffs paid Cronin over $750,000 in attorney fees with the first payment occurring in November of 2010 and the last payment occurring on or about May 23, 2014. (C6166-6172p48-66, C6207-6214p126-159, C5580p88-102, 111). The amended complaint, the proposed third amended complaint and Carlson's certification establish that plaintiffs retained Cronin in November 2010 pursuant to a written retainer agreement that stated that it only covered Carlson v. Collins, 10 L 13175, that Cronin decided to voluntary dismiss 10 L 13175 on July 13, 2011, that Cronin then filed a section 5/2-1401 Petition in Willis Capital v. Belvedere, 07 CH 29207 on March 26, 2012 and when that case was dismissed by the trial court Cronin refiled 10 L 13175 on July 5, 2013.

(C6166p49-56, C6207p127-135, C604-606). The plaintiffs presented sworn testimony that he paid in excess of $750,000 in attorney fees to Cronin and that he never received an invoice or any breakdown of the time spent or expenses incurred. (C5590p111). The plaintiffs also presented unrebutted expert testimony that the attorney's fees charged by Cronin were unreasonable and unnecessary because in part Cronin never provided an invoice or breakdown of the time. (C6230-6236p25-34). The above establishes that plaintiffs have presented a *prima facie* case for overbilling and that Cronin breached the standard of care when he charged plaintiffs over $750,000 in attorney fees with absolutely no record of the time spent on the various matters.

The trial court found the attorney's fee claim was barred by the statute of limitations "because the record shows that Plaintiffs knew or reasonably should have known they suffered wrongfully caused injuries related to fees and expenses paid to Cronin by the end of 2011 and certainly no later than December 2013 ..." (C7148). The trial court's reached this decision because the trial court, on its own, found that Cronin had committed a negligent act by violating a $250,000 fee cap that was in the retainer agreement executed in November of 2010. The trial court reasoned that as soon as Carlson knew he paid in excess of $250,000 that he became aware of Cronin's negligence in violating the fee cap which triggered the statute of limitations on any claims based upon overpaying attorney's fees. The trial court decision has no merit for numerous reasons.

First, the trial court's decision is based upon a misunderstanding of plaintiffs' attorney's fee claim asserted against Cronin. The plaintiffs' attorney's fee claim does not and has never mentioned any allegations of negligence related to a violation of a $250,000 fee cap in attorney fees. The plaintiffs' amended complaint and proposed third amended complaint do not even mention the $250,000 fee cap and they contain no allegations of negligence based on a violation of the fee cap. (C6157-6172,C6174-6214). In addition, plaintiffs' expert does not state that Cronin violated the standard of care by violating some $250,000 fee cap nor does he base any of his opinions on a violation of any $250,000 fee cap. (C6216-6274). The plaintiffs have not alleged any negligent acts nor have they brought any claims based upon the violation of a $250,000 fee cap so the trial court cannot find that the statute of limitations commenced based upon negligent acts that are not and have never been part of this case. The trial court cannot draft plaintiffs' complaint and cannot add allegations of negligence to this case. Since the trial court's decision is based upon a negligent act that does not exist, it must be vacated.

Second, the statute of limitations could not commence at "the end of2011" because the plaintiffs need to be aware of a negligent act or an injury before the statute of limitations can commence. The statute of limitations governing legal malpractice cases can be found in 735 IL CS 214.3 and it states that the statute of limitations commences when the plaintiff knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully

caused. *Jackson Jordan v. Leydig,* 158 Ill.2d 240, 249 (1994). The evidence presented establishes that as a matter of law that there was no negligent act that arose out of any $250,000 fee cap therefore it would be impossible for the statute of limitations to commence when the plaintiffs paid in excess of $250,000 in attorney's fees.

It is true that the retainer executed in November of 2010 contained an attorney's fee cap regarding Carlson v. Collins, 10 L 13175 but it is undisputed that the attorney's fee cap did not cover any other matters filed by Cronin. It is undisputed that, as the cases progressed, Carlson asked Cronin about the $250,000 attorney's fee cap in the initial retainer agreement and Cronin explained to Carlson that the attorney's fee cap did not apply because there were numerous cases in addition to the initial case for legal malpractice. (C5590p111). Cronin explained that the cap only applied to fees incurred in the legal malpractice case in the trial court and it did not apply to CBOE case, the fraud case filed against Belvedere, the appeal of the fraud case or the appeal involved with the legal malpractice case. (C5590p111). In fact, on or about May 20, 2014, Cronin and Carlson exchanged emails and Cronin explained that the 250,000 attorney fee cap did not apply because it only applied to the legal malpractice case and Cronin stated "those three actions–malpractice, CBOE and section 1401–were distinct and separate and, most respectfully, pursuing these three actions is what took so much time and why the 250k multiplied." (C6125-6126). Even though plaintiff paid in excess of $750,000

in fees, he did not believe any contract term capping fees was violated because Cronin explained to him orally and in writing that the cap only applied to the trial court proceedings in the legal malpractice case 10 L 13175. In addition, Cronin never sent plaintiffs any bills or time sheets so there was no way plaintiffs could discern what time was spent on any specific case. (C5590p111). To this day, plaintiffs have not seen any time sheets from Cronin identifying what time was spent on what case. To this day, plaintiffs have no idea how much money was paid for legal fees pertaining to the legal malpractice case or to determine if any contractual cap had been violated.

Third, the trial court's decision defies logic and common sense. It is undisputed that plaintiffs paid attorney's fees to Cronin starting in November of 2010 and the last payment was May 23, 2014. (C6166-6172p48-66, C6207-6214p126-159, C5580p88-102, 111). In fact, Cronin's affidavit attaches documents that establish that he received $30,000 on August 27, 2013. (C5367). The trial court found that the statute of limitations commenced at "end of 2011" because at that time the $250,000 fee cap had been exceeded. Thus, the trial court found that the statute of limitations on plaintiffs' claims that he overpaid fees including paying fees in excess of $200,000 in 2012, 2013 and 2014 commenced in 2011 before plaintiffs even incurred attorney fees. Obviously, the statute of limitations cannot commence in 2011 on claims that plaintiffs were overcharged for fees in 2012, 2013 or 2014.

Fourth, at a minimum, a question of facts exists as to whether the statute of limitations expired on any claim for overbilling. The trial court's ruling does not mention one exact date because it says that the statute of limitations commenced "at the end of 2011" or "no later than December 2013." (C7148). The Illinois Supreme Court has made it clear that a case can only be decided by a trial court when only one conclusion can be reached and the conclusion must be reasonable. *Jackson Jordan, Inc. v. Leydig,* 158 Ill.2d 240, 250-51(1994). Since the trial court's decision has not identified one conclusion as to when the statute of limitations commenced, it should be left to a jury to decide.

Fifth, Cronin should not be able to argue that the statute of limitations expired because Cronin was still plaintiffs' attorney when the statute of limitations allegedly expired in 2013. It is undisputed that Cronin represented plaintiffs until at least April of 2015. (C5580p88-102). Cronin certainly cannot take advantage of his failure to advise plaintiffs about the fee claims. The amended complaint and proposed third amended complaint allege that Cronin was negligent when he did not advise them about the overbilling and "failed to advise them that they had claims against them ..." (C6170-71p63-67). These allegations are sufficient to support a claim that Cronin is equitably estopped from arguing that any statute of limitations expired. This Court has found that equitable estoppel would apply even if the defendant did not intentionally mislead or deceive the plaintiff or even intend by its conduct to induce delay. *Witherall v. Weimar,* 85 Ill.2d

146, 158-60 (1981). Rather, all that is necessary for invocation of the doctrine of equitable estoppel is that the plaintiff reasonably rely upon the defendant's conduct or representations in forbearing suit. *Id.* In *Witherall,* 85 Ill.2d at 158-60 (1981)., this Court stated "no man may take advantage of his own wrong." Furthermore, this Court has previously found that attorneys are equitably estopped from asserting time-based defenses when they cause the client to delay filing suit. *Jackson, Jordon, Inc v. Leydig, Voit & Mayer,* 158 III.2d 240, 252-53(1994). Carlson's certification supports the allegations of the complaints and establishes that Cronin did not advise Carlson about any attorney fee claims they had and he relied upon the advice of Cronin. (C5590p111).

Finally, the plaintiff has presented unrebutted evidence that he was unaware of any claims of negligence related to overbilling until after Cronin ceased representing him in 2015. (C5590p111). This unrebutted testimony, at a minimum, creates a question of fact.

III. Plaintiffs have viable claims against Davis, Hutchinson and Kelley.

The plaintiffs have viable claims of legal malpractice against attorneys Davis, Hutchinson and Kelley. The plaintiffs presented Cronin's retainer agreement that stated that "we anticipate using associate lawyers and perhaps other attorneys to prosecute this litigation." (C604-606). The plaintiffs also presented evidence to establish that pursuant to

the retainer with Cronin that attorneys Davis, Hutchinson and Kelley attended numerous meetings with plaintiffs, they each provided legal advice to plaintiffs, that their names were on documents filed in Carlson v Collins, that they owed a duty of care to plaintiffs and that they breached the duties they owed to the plaintiffs. (C5553-5593p88-98). The plaintiffs even produced unrebutted expert testimony establishing that Davis, Hutchinson and Kelley violated the standard of care and were individually liable. (C6216-6236p23-24). Carlson's affidavit and the affidavit from Davis confirm that Davis worked as an associate of Cronin & Co., on plaintiffs' matters from March of 2011 through July 15, 2013. (C5582p95, C5380-81). Carlson's affidavit and the affidavit from Hutchinson confirm that Hutchinson began working on Carlson matters in 2012 as "of counsel" to the Cronin firm, that his name appeared on the legal malpractice complaint filed against Collins, his name appeared on appellate briefs that were filed in Carlson v Collins and his name appears on the reported appellate court opinion in Carlson v Collins. (C5582p96, C5383-84). Carlson's affidavit and the affidavit from Kelley confirm that Kelley began working on Carlson's cases in April of 2012, as "of counsel" to the Cronin firm, that he worked on all the Carlson matters through the last appeal, that Kelley attended approximately 17 face to face meetings to discuss the cases, that Kelley was involved at the earliest stages of the legal malpractice case Carlson v. Collins, Kelley's name appears on plaintiffs' appellate brief filed in Carlson v. Collins and his name appears on the reported appellate court decision in Carlson v

Collins. (C5583p97, C5386-87). The above evidence establishes that Davis, Hutchinson and Kelley provided legal advice to plaintiffs, appeared in his lawsuits and therefore owed plaintiffs a duty of care.

The trial court found that, despite the fact it is undisputed that Davis, Hutchinson and Kelley worked on plaintiffs' cases and provided legal advice to plaintiffs, that "Davis, Hutchinson or Kelley cannot be held liable for any failure to advise ... because on November 11, 2010 Carlson retained the Cronin Finn, and not the individual defendants ... yet at that time, Davis, Hutchinson and Kelley were not part of the Cronin Firm and did not work for the Cronin Firm. Davis first started working at Cronin Firm on March 21, 2011, Hutchinson first started in May 2011...lastly Kelley first started in 2012 but never had any involvement with any legal malpractice claims." (C7147). To be frank, it is hard to comprehend the reasoning used by trial court. The issue of who was employed at the Cronin firm or by the Cronin firm at the time it was formally retained by plaintiffs in 2010 is immaterial. The plaintiffs' certification and the affidavits of Davis, Hutchinson and Kelley all establish that they provided legal advice to the plaintiffs and appeared in plaintiffs' lawsuits including the Carlson v. Collins matter. Under Illinois law, all the attorneys who provided legal advice to plaintiffs and worked on plaintiffs' lawsuits case owe duties to the plaintiffs and are responsible for any breaches no matter their employment status.

Supreme Court Rule 721 states, "any attorney

who by act or omission causes the corporation, association, limited liability company or registered limited liability partnership to act in a way which violates standards of professional conduct, including any provisions of this rule, is personally responsible for such act or omission and is subject to discipline therefor." Supreme Court Rule 721(b). This rule establishes that all attorneys who perform legal work on a matter are personally legally responsible for that work no matter what organization that they may be an employee of or "of counsel." In the instant, Davis, Hutchinson and Kelley all admit that they performed legal work on behalf of plaintiffs so they are all personally liable for any negligence.

Davis, Hutchinson and Kelley argued that plaintiffs directly retained Cronin and his law firm and that "Carlson never personally retained" them so they cannot be liable for any malpractice. (C5388p8). They argue that Carlson never retained them individually and "they never agreed to represent Carlson individually." (C5388p9). They concluded that they were agents of a disclosed principal, so they were "not bound by the retention agreement individually, nor liable for its. alleged non-performance." (C4734-4749p9). They then cited the Restatement of Agency section 328 and 102 Ill.App.3d. 300 and the motion for summary judgment goes on to argue that since they were not parties to the initial retainer executed by Cronin and plaintiffs that they cannot be liable for any negligent legal work they did. This argument has no merit because, as stated above, pursuant to Supreme Court Rule 721 attorneys are treated differently than

others. In other words, the authority provided by Cronin does not apply to attorneys. If an attorney admits that he provided legal advice to a client and admits he appeared in the plaintiffs' lawsuits, he is personally liable for any negligence ho matter what his employment status.

Davis, Hutchinson and Kelley also argue that they did not owe any duties to the plaintiffs because they had no formal contract. This argument has no merit because they admit that they provided legal advice to the plaintiffs and they appeared in Carlson v. Collins. The attorney's duty to his client is not always limited to the terms of the attorney-client contract. *Keef v. Widuch,* 312 Ill.App.3d 571, 577 (2001). Independent of any written attorney-client contract, an attorney has duties to exercise competence, provide advice to the client about legal remedies, and inform the client about the scope of the attorney's representation. *Id.* Whether a duty is owed is a question of law. *Id.* The relevant factors in determining the existence of a duty include: (1) reasonable foreseeability; (2) the likelihood of injury; (3) the magnitude of the burden on the defendant in guarding against the injury; and (4) the consequences of placing the burden on the defendant. *Id.* Moreover, the requirement of competence is a duty traditionally imposed in the attorney-client relationship that exists without regard to the terms of a contract of employment. *Collins,* 154 Ill. 2d at 55-56. In *Wildey* v. *Paulsen,* 385 Ill. App. 3d 305, 312(2008) the client met with an attorney on several occasions and discussed issues related to a legal matter. The parties never

executed a retainer agreement and the attorney was not paid any monies. The attorney provided advice to the client in order to formulate a strategy which included providing advice about a letter the plaintiff sent to a third party. The appellate court found that an attorney client relationship was formed and that the attorney owed duties to the client. In *Meriturn Partners, LLC,* 2015 IL App (1st) 131883 (2015) the appellate court found that the attorney owed a duty despite the fact the attorney never knew the identity of some of the plaintiffs. The appellate court reasoned that since the attorney provided advice to a group of people on a conference call that relied upon the advice that the attorney owed them a duty. Id. at paras. 13 and 14. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311(7th Cir. 1978) the 7th Circuit interpreting Illinois law stated "A professional relationship is not dependent upon the payment of fees nor, as we have noted, upon the execution of a formal contract."

This authority establishes that Davis, Hutchinson and Kelley owed plaintiffs a duty of care even if there was no written retainer agreement between them because they admit they worked on plaintiffs' cases and gave plaintiffs legal advice.

Davis, Hutchinson and Kelley also owed a duty to advise plaintiffs about the fact they had claims against third parties that arose out of the same facts as the cases they were representing the plaintiffs. The attorney's duty to his client is not always limited to the terms of the attorney-client contract. *Keef v. Widuch,*

312 Ill.App.3d 571, 577 (2001). In *Keef,* the court determined that it was reasonably foreseeable that the typical injured worker would be uniformed about the possibility of a third-party tort action. *Id.* at 578. The court found that any worker's compensation attorney would know or should know about the possibility of a third party action since such actions are references in the statute governing worker's compensation claims. *Id.* The court found that the burden requiring the attorney to advise the client about such would be minimal. *Id.* See also *Metrick,* 266 Ill. App. 3d at 653 (1999)(case involving allegations that the attorney did not disclose to the clients the advantages of different types of bankruptcy proceedings, the court stated that it is the duty of every attorney to inform a client of the available options for alternative legal solutions as well as to explain the foreseeable risks and benefits of each). This authority makes it clear that Davis, Hutchinson and Kelley owed a duty of care to advise plaintiffs about any claims they had against Drinker or Best because these causes of actions arose out of the same set of core facts as Carlson v. Collins.

IV. Plaintiffs provided admissible expert testimony.

The plaintiffs submitted the affidavit of attorney Richard Lehman ("Lehman") to provide expert testimony in this case. (C6216-6274). The opinion of an expert is permitted on the basis that the witness has peculiar knowledge or experience not common to the world which renders his opinion on such knowledge and experience an aid to the trier of fact. *Cannell v.*

State Farm Fire & Casualty Co., 25 Ill.App.3d 907, 912(1975). To qualify as an expert a witness in Illinois, a proposed expert must establish expertise in a certain area, a proposed expert must identify the underlying facts or data used by an expert to arrive at the conclusions that form the bases of the opinions to be rendered and a proposed expert must provide the opinions and explain them. Illinois Supreme Court Rule 213; Ill. R. Evid. 702. Illinois allows expert to base their opinions on facts not in evidence and Illinois has adopted Federal Rules of Evidence 703 and 705 when dealing with experts. *Wilson v Clark,* 84 Ill.2d 186, 193-196(1981). An expert may offer opinions on ultimate issues of a case which essentially involves providing conclusions as to certain matters. *Clifford-Jacobs Forging Co., v. Industrial Commission,* 19 Ill.2d 166, 180 (1960). A trial court will strike an expert's opinion and find it is based upon speculation, conjecture and conclusory when the opinion is not properly based upon evidence or facts involved in the case.

Lehman provided two very detailed affidavits in this case. The first affidavit was submitted in opposition to the motion for summary judgment filed by Best. (C6244- 6274). Best did not move to strike the affidavit and the trial court found no problems with the affidavit. Lehman provided a second affidavit in opposition to the Cronin motions for summary judgment. (C6216-6274). In Lehman's second affidavit, he incorporates his prior affidavit submitted to this court when he stated "I hereby adopt and incorporate by reference my statements in that affidavit

concerning the underlying facts ... as if those facts were set forth fully herein. I attach to this affidavit as Exhibit C my affidavit submitted in connection with Michael Best's motion for summary judgment." (C6217p3). In the prior affidavit, Lehman restated his understanding of some of the facts in paragraphs 6-11. (C6246-6249). In addition, in his second affidavit submitted in opposition to Cronin's motion for summary judgment, Lehman states that he has reviewed and incorporates "all of the materials" submitted by the parties related to all the motions for summary judgment. (C6217p2-4). Lehman also attached a list of documents he reviewed and that were incorporated into his opinions. (C6241).

The above establishes that Lehman's affidavits have met the criteria to allow him to provide opinions in the matter. Lehman's affidavits set forth his qualifications to offer expert testimony (C6216p1), he set forth a summary of some facts relied upon by him(C6216p2-4,6244p2-11), he also incorporated by reference all the facts and evidence presented in the motions for summary judgment filed by Best and Cronin as well as plaintiffs responses(C6217p3-4) and he then provides his opinions and explains them in great detail. (C6218p5-34). Just in case there is any confusion about what facts were relied upon by Lehman in forming his opinions, he submitted a supplemental affidavit that makes it crystal clear that he incorporates all facts from all parties' motions for summary judgment as part of his affidavit including that he incorporates all facts submitted through all of Carlson's affidavits. (C6785-6970). In addition,

Lehman's entire file was made available for inspection and copying and he made himself available for any deposition. (6497-6523). Cronin has never asked for Lehman's file nor has he ever asked for his deposition prior to filing the motion to strike. Under the circumstances of this case, Lehman's affidavit(s) are sufficient and should not be stricken.

The trial court struck Lehman's affidavit when it stated "the affidavit is essentially a litany of conclusions and inadmissible evidence of the affiant's theory of how the matter should have been addressed. Additionally, if not stricken, the affidavit simply fails to overcome the court's prior findings." (C6804-6809p5-6). The trial court's conclusion is erroneous for a couple of reasons. First, expert opinions are permitted to be based upon inadmissible evidence so the trial court conclusion that the affidavit was inadequate because it allegedly relied upon inadmissible evidence is wrong as a matter of law. The Illinois Supreme Court in *Wilson v. Clark,* 84 Ill.2d 186,193-94(1981) said that "the facts or data in the particular case upon which an expert bases his opinion or inference may be those perceived by or made known to him at or before hearing" and that opinions can be based upon "facts not in evidence." Furthermore, the trial court and Cronin never identified specifically what "inadmissible evidence" Lehman was supposedly relying upon so there is no foundation for the trial court's conclusion that. Lehman relied upon "inadmissible evidence." Second, the trial court's conclusion is based upon a faulty premise that expert opinions cannot involve conclusions. In Illinois, expert opinions can involve

conclusions and actually experts are permitted to provide opinions on ultimate issues involved in the case which are essentially conclusions. In *Protective Insurance Co. v. Coleman,* 144 Ill.App.3d 682, 687-88(1986)., the plaintiff submitted the uncontradicted affidavit of an expert who reviewed all the relevant documents, had vast experience as an insurance analyst and who provided his opinion as an expert witness. *Id.* at 687. The defendant moved to strike the testimony arguing that it involved conclusions. The appellate court found that since the witness was an expert witness whose opinions were based upon certain facts that he was permitted to provide conclusions in his affidavit because the role of expert is to provide opinions and conclusions. *Id* at 687-688. For all the above reasons, Lehman's affidavit was improperly stricken by the trail court.

Cronin moved to strike Lehman's affidavit because he claimed the documents referred to in the affidavit must be physically attached to the affidavit. The trial court properly rejected the argument. The documents reviewed by Lehman are identified by him and incorporated by reference into his affidavit. (C6216p2-4, C6785-6790). The legal doctrine of "incorporation by reference" is a method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary document. Black's law Dictionary 126(9th ed. 2009). Illinois has recognized the doctrine of incorporation by reference in several contexts including wills, trusts, estates, contract law

and even in legislation. *In Re Estate of Meskimen,* 39 Ill.2d 415(1968); 5 ILCS 100/5-75. The doctrine of incorporation by reference necessitates that the court treat two documents as one. *International Star Registry of Illinois v. Omnipoint Marketing, LLC,* 2006 WL 2598056(N.D. Ill. 2006). Lehman incorporated these documents by reference by specifically identifying the documents in his affidavit thus they should be considered attached to the affidavit. In case there was any confusion, Lehman submitted a supplemental affidavit that made it clear that he incorporated all the documents and facts by reference. (C6785-6790).

Furthermore, even if the documents were not attached, it is harmless error The failure to attach documents "is a technical defect that will be overlooked where the affidavits otherwise show that, if called as a witness at trial, the affiant had sufficient memory, perception and knowledge to be a competent witness." *Vavadakis v. Commercial National Bank,* I 78 Ill.App.3d 278, 280(1989), "Further, where the affidavit refers to an exhibit that was relied upon, the failure to attach the exhibit to the affidavit is harmless defect as long as affiant has personal knowledge of the contents of the exhibit." *Id.* Lehman identifies numerous documents he relied upon including all the summary judgment materials and he has demonstrated he has personal knowledge of all the facts established therein so the affidavit is sufficient. Furthermore, Cronin has not presented a counteraffidavit or any evidence to contradict the testimony of Lehman. In *Beattie v. Lindelof,* 262

Ill.App.3d 372, 382(1994). the court found that the failure to attach a document relied upon was not fatal "because nothing in the affidavit was contradicted by plaintiff. See also *Lindahl v. City of Desplaines,* 210 Ill.App.3d 281, 299(stating courts must accept affidavit as true if uncontradicted by counteraffidavit or other evidentiary materials).)" Finally, where improper averments in an affidavit exist, only the tainted portion should be excised as opposed to the entire affidavit. *Wiszowaty v. Baumgard,* 257 Ill.App.3d 812, 820(1994). Moreover, an appellate court can consider all the averments that were properly included in the affidavit. *Id.*

V. Plaintiffs should have been granted leave to file a third amended complaint.

On June 5, 2019, long before Cronin filed his motion for summary judgment on August 23, 2019, the plaintiffs filed a motion for leave to file a third amended complaint instanter. (C3969-4127). The trial court refused to address the motion for leave to file a third amended complaint for almost a year and then denied plaintiffs' motion without conducting any oral argument or providing any explanation whatsoever on April 24, 2020. (C7179).

Section 5/2-616 states "a pleading may be amended at anytime, before or after judgment, to conform the pleadings to the proofs ..." 735 ILCS 5/2-616. The factors a court will consider when deciding to permit the filing of an amended complaint include: (1) whether the proposed amendment would cure a

defective pleading; (2) whether other parties would sustain prejudice or surprise; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend were provided. *Loyola Academy v. S&S Roof Maintenance, Inc.,* 146 Ill.2d 263, 273(1992). Furthermore, it is well established that a court is to "freely" allow amendments and the only reason a court should not permit a plaintiff to file an amended complaint is when there is some bad faith on part of the plaintiff. *Nelson v. Quarles & Brady, LLP,* 2013 IL App (1st) 123122, para. 69 (2013). In *Clemons v. Mechanical Devices Co.,* 202 Ill.2d 344, 356 (2002) the Illinois Supreme Court found "that the first factor is not relevant to our analysis. Plaintiff did not move to amend his complaint to cure a defective pleading." Furthermore, in *Jones v. O'Brien Tire & Battery Service Center, Inc*., 374 Ill.App.3d 918, 927, 937(2007)., the appellate court stated "the proposed amendment added a cause of action rather than cured a defect in the pleadings. The first factor is thus inapplicable." *Id.*

Plaintiffs should have been given leave to file a third amended complaint because no dispositive motions were pending, no trial date was set, only 5 of almost 40 fact depositions were taken, the third amended complaint added almost more 25 pages of facts including facts elicited from the deposition of David Almeida (C6187p54-58), facts elicited from emails and the deposition of Parker (C6188p58-66)facts and theories of liability related to Best's representation of plaintiffs in 2008 representation (C6192p86-104), facts and theories of liability related

to Best's representation of plaintiffs in 2010 (C6197p105-114), facts and theories of liability related to Best's representation of plaintiffs in 2014 (C6202p115-124) and facts and theories of liability related to Count II were added. (C6207p126-159).

In addition, there was no prejudice suffered by any party when the motion for leave to file a third amended complaint was filed, the case was ln the early stages of discovery, no oral fact discovery other than depositions of some of the parties had occurred so all the parties had the opportunity to present and develop any defenses. The amendment was timely because Cronin had time to conduct any discovery needed and this was the second time the claims were amended against Cronin so there was absolutely no reason Carlson should be denied leave to amend. Finally, the trial court made no findings that plaintiffs acted in bad faith so there was absolutely no reason the trial court should have denied plaintiffs leave to file a third amended complaint.

VI. Plaintiffs have other viable claims against Cronin when the Illinois Supreme Court reverses appeal number 19-1961.

The plaintiffs have other claims against Cronin that are contingent upon the reversal of the appeal in 19-1961 and some of the arguments herein may be in the alternative based upon the outcome of 19-1961. The plaintiffs filed a Petition for Leave to Appeal in appeal number 19-1961 and the plaintiffs believe that the Illinois Supreme Court will reverse the rulings of

the trial court and the appellate court. The plaintiffs adopt all their arguments made in the trial court pertaining to these claims and also adopt all the filings in appeal number 19-1961 as if set forth fully herein. The plaintiffs are not waiving their right of review of these issues. The plaintiffs merely wish to protect the record in this in the event the Illinois Supreme Court grants the Petition for Leave to Appeal in 19-1961.

WHEREFORE, plaintiffs pray that this Court enter an order vacating the ruling by the trial court and remanding this matter for a jury trial on the merits and for further relief that is just and equitable in the circumstances.

Respectfully Submitted,

WILLIAM CARSON and
WILLIS CAPITAL, LLC,

By: /s/_____
Their Attorney

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Suite 1600
Chicago, Illinois 60601
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CERTIFICATE OF COMPLIANCE

I certify that to the best of my knowledge and information this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authority, the Rule 341 © certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages or less than 15,000 words.

/s/
Joseph T. Gentleman

CERTIF1CATE OF SERVICE

Under penalties as provided by law, the undersigned certifies that the foregoing, BRIEF AND ARGUMENT OF PLAINTIFFS-APPELLANTS and SEPARATE APPENDIX, were caused to be served by electronic mail to the attorneys listed below by Odyssey File & Serve on this 21st day of October 2021.

/s/

Peter D. Sullivan
Terrence P. McAvoy
151 N. Franklin St., # 2500
Chicago, IL 60606
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tmcavoy@hinshawlaw.com

APPENDIX Q

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

[DATE STAMP ILLEGIBLE]

WILLIAM CARLSON and
WILLIS CAPITAL., LLC
Plaintiffs,

v.

MICHAEL BEST & FRIEDRICH, LLP.
THOMAS CRONIN, AARON L. DAVIS,
LELAND W. HUTCHINSON, JR,
DANIEL J. KELLEY, and CRONIN & CO., LTD,
Defendants.

No: 16 L 383
JURY IS DEMANDED

AMENDED COMPLAINT

NOW COMES Plaintiffs by and through their attorney and for their amended complaint states as follows:

Preliminary Statement

Michael Best & Friedrich, LLP, Thomas C.

Cronin, Aaron L. Davis, Leland W. Hutchinson, Jr., Daniel J. Kelley, and Cronin & Co., Ltd, (Defendants) have breached their duties to their clients, William Carlson and Willis Capital, LLC (collectively "Plaintiffs") and have committed professional negligence. As a result, the plaintiffs file this suit to recover the damages they suffered as the proximate cause of the defendants' misconduct.

Parties and Venue

1. Plaintiff William Carlson ("Carlson") is an individual who resides m Chicago, Illinois.

2. Plaintiff Willis Capital, LLC ("Willis"), is an Illinois limited liability company with its principal place of business in Chicago, Illinois.

3. Defendant Michael Best & Friedrich, LLP ("Best") is, upon information and belief, is a Limited Liability Partnership operating eight offices in five states including an office in Chicago, Illinois. Best is a law film that represents clients in Cook County, Illinois.

4. Defendant Thomas C. Cronin ("Cronin") is an Illinois licensed attorney who, on information and belief, practices law in Cook County, Illinois.

5. Defendant Aaron L. Davis ("Davis") is an Illinois licensed attorney who, from 2011-2013 practiced law in Cook County, Illinois.

6. Defendant Leland W. Hutchinson, Jr. ("Hutchinson") is an Illinois licensed attorney who, on information and belief, practices law in Cook County, Illinois.

7. Defendant Daniel J. Kelley ("Kelley") is an Illinois licensed attorney who, on information and belief, practices law in Cook County, Illinois.

8, Defendant Cronin & Co., Ltd ("CLTD") is, upon information and belief, an Illinois Limited Liability Corporation with its principal place of business in Chicago, Illinois, CLTD is a law firm that represents clients in Cook County, Illinois.

9. Venue is proper because one or more of the parties reside in Cook County, Illinois and because a substantial part of the events giving rise to claims set forth in this complaint occurred in Cook County.

Background

10. In 2002, Carlson, the sole owner and member of Willis, founded Belvedere Trading, LLC ("Belvedere") by contributing as initial capital his life sayings. Belvedere was created to trade S & P 500 equity index options through the Chicago Board of Options Exchange ("CBOE") and later other index options as well.

11. Carlson made Thomas Hutchinson ("Hutchinson"), and Owen O'Neill ("O'Neill") (who were both in their twenties) his partners and allowed

them to earn equality with respect fo decision making, compensation, equity, and use of Belvedere assets.

12. In 2005, Carlson took a leave of absence from the company due to health concerns. When he returned in 2006, Hutchinson and O'Neill intended to squeeze Carlson and Willis out of Belvedere. They refused to allow him to resume equal use of Belvedere assets (such as its capital, its technology, its employees, and its trading spots) and claimed that Willis was no longer an equal owner of the company. Hutchinson and O'Neill also locked Carlson and Willis out of virtually all important business decisions and would not provide them with information about the company needed to enjoy the benefits of Belvedere ownership.

13. Carlson's and Willis' contributions to Belvedere were invaluable:

- They acted as Belvedere's Managing Member since its inception;

- They obtained nearly $1 million in additional start-up capital for Belvedere from an outside investor;

- They obtained Belvedere's two primary trading spots, without which Belvedere could not have traded the S&P 500 actively;

- They brought to Belvedere an

additional financial backing arrangement that provided Belvedere with revenue and enhanced its presence at the CBOE and the Chicago-Mercantile Exchange ("CME");

- They taught Hutchinson and O'Neill the trading business necessary for Belvedere to succeed and arranged for a smooth transition from their previous employer (Tim McGugan) to Belvedere;

- They over saw the relationship with Belvedere's clearing firm, Goldman Sachs Execution & Clearing.

14. As a result of Carlson and Willis' hard work, Belvedere has been tremendously successful and its owners have earned millions of dollars.

15. In around March 2007, Carlson and Willis retained David J. Fish ("Fish"), Shawn M. Collins ("Collins") and The Collins Law Firm, P.C. ("Collins Firm") to represent them in confronting Hutchinson and O'Neill.

16. Fish, Collins, and Collins Firm (collectively "FCCF"), on behalf of Carlson and Willis, initially filed a claim in arbitration for breach of contract, breach of fiduciary duties, and other relief on or about May 17, 2007.

17. Then, despite that filing, FCCF, on October

12, 2007, filed a complaint for dissolution of Belvedere Trading and other relief against Belvedere, Hutchinson and O'Neill In the Circuit Court of Cook County, Illinois, Chancery Division.

18. Some months later – in or around February 2008, the Court granted Hutchinson's and O'Neill's motion to compel arbitration. That same day, FCCF arranged an immediate mediation of Carlson's and Willis' claims to occur the next business evening. Specifically, on Friday evening, February 8, 2008, Collins contacted Doug Gerrard and asked him to mediate the dispute – with the mediation to occur on Monday, February 11, 2008. The mediation was postponed two days at the request of the mediator and occurred on the evening of February 13, 2008.

19. Prior to February 2008 Fish left the Collins Firm and formed a separate firm, The Fish Law Firm, P.C. ("Fish Firm"). Neither Collins nor Fish nor any representative of the Fish Firm or the Collins Firm attended the February 13, 2008, mediation; they advised Carlson to represent his interests and those of Willis alone without legal representation. As a result of the mediation, an agreement between Carlson and Willis on the one hand and Belvedere, Hutchinson and O'Neill on the other was reached in which, among other things, Carlson and Willis surrendered all rights, titles and interests in Belvedere and any of its holdings for 17.5 million dollars, including Plaintiff's capital accounts.

20. Prior to the February 13, 2008 mediation

Fish, Collins, Fish Firm and Collins Firm ("FCFFCF") met with Plaintiffs and informed Plaintiffs that their interest in Belvedere was being diluted by Hutchinson and O'Neil. FCFFCF indicated that there was nothing they could do to protect Plaintiff's interests and that Plaintiffs "would be lucky to get 8.5 million" for his interests. Carlson's capital account alone was in excess of this amount.

21. Prior to the February 13, 2008 mediation, FCFFCF informed Plaintiffs that they could not obtain current Belvedere financial documents that would enable them to establish an accurate valuation of Plaintiffs interests.

22. After the mediation, a written settlement agreement was drafted by Hutchinson and O'Neil. FCFFCF advised the plaintiffs that the language in the settlement agreement was standard language. This was incorrect as the draft settlement agreement contained numerous terms that had not been agreed to in the mediation and which were not in the Plaintiff's interests. FCFFCF did not contest any of the additional terms offered by Hutchinson and O'Neil and advised Plaintiffs to sign the agreement.

23, The consideration settlement figure represents a gross underpayment for the value and rights that were surrendered in the settlement agreement with Belvedere, Hutchinson and O'Neill. A December 2012 valuation of Willis and Carlson's stake in Belvedere concluded that the 17.5 million dollar settlement left Willis and Carlson uncompensated for

49 million dollars of value. In other words, Willis and Carlson's ownership interest and capital account was reasonably worth 66.5. million dollars.

24. FCFFCF received $333,000 from Plaintiffs for legal services, including a bonus payment of $150,000 after the settlement agreement was signed. The last $72,000 FCFFCF billed Plaintiffs for services in January and February 2008 did not include an itemization.

25. FCFFCF breaced their duties to Carlson and Willis by failing to protect their interests. Specifically, FCFFCF committed professional negligence by:

> (i) Failing to pursue any discovery to demonstrate the eno1mous value of Carlson's and Willis' interest in Belvedere. Indeed, the defendants never even obtained an appraisal or valuation of Belvedere's worth- and thereby permitted their clients to settle without any appropriate advice and counsel as to what was being surrendered.
>
> (ii) Failing to prepare the clients for the mediation. Indeed, the defendants did not submit **any** materials or any mediation statement to the mediator and failed to provide **any** substantive or meaningful counsel whatsoever regarding mediation or settlement strategy. Instead, the defendants merely

told Carlson and Willis that their equity interest in Belvedere was "dropping like a stone" and Carlson should end the dispute.

(iii) Failing properly and fully to advise the clients in connection with the mediation itself and the resulting settlement agreement. Indeed, none of the defendants even attended the mediation at which their clients were persuaded to surrender all ownership interests in Belvedere, a company that Carlson and Willis founded.

(iv) Failing to disclose their own negligence and by misleading the clients about the nature and reasons for why the clients were denied a more equitable price for the value of their interests in Belvedere.

(v) Advising the clients that their ownership interest was being diluted when that was inaccurate.

(vi) Advising the clients that they cannot obtain current financial documents of Belvedere when Carlson owned one-third of the company and was still considered its managing partner.

(vii) Permitting terms to be included in

the settlement agreement that were not agreed to by the Plaintiffs and were not in the interests of the Plaintiffs.

(viii) Overbilling for their services and not accounting for the services rendered between January and February 2008 and beyond.

26. As a result of FCFFCF's negligence the Plaintiffs entered an agreement with his partners that was tens of millions of dollars less than what he was entitled to.

27. But for FCFFCF's negligent advice the Plaintiffs would not have entered into the settlement agreement and would have obtained all of the financial information necessary to obtain a fair valuation of his interests in Belvedere.

28. But for the negligence of FCFFCF, the Plaintiffs would not have agreed to the terms of the written settlement agreement.

29. On or around November 17, 2008 Plaintiffs entered into an engagement agreement with attorney David Almeida ("Almeida") and his firm Drinker, Biddle & Reath ("Drinker") in order to analyze the Belvedere settlement agreement and all circumstances surrounding the agreement.

30. On November 26, 2008, Almeida and Drinker submitted their analysis to Plaintiffs. The

analysis, entitled "Issues related to fraudulent inducement to enter settlement agreement", did not single out a legal malpractice claim against FCFFCF.

31. At no time did Almeida or Drinker advise Plaintiffs when the Statute of Limitations would expire on their claim against FCFFCF.

32. But for the negligence of Almeida and Drinker, Plaintiffs would have initiated their claim of legal malpractice against FCFFCF within the allowed statutory period.

33. The Plaintiffs did not discover that he had any claim against Best until the appellate court decision on April 22, 2015.

Count I

Best's Negligent Representation

34. The Plaintiffs reallege paragraphs 1-33 as it set forth fully herein.

35. On August 18, 2010, Plaintiff entered into an engagement letter with Defendant Best for consultation in the legal malpractice matter against FCFFCF. For valuable consideration Best agreed to provide advice, counsel, review of documents and possible preparation, or assistance with preparing, documents or pleadings. (Exhibit 1).

36. The Best engagement letter, Best attorney

Christopher R. Parker specifically notes, "I will have primary responsibility for your representation and will coordinate the use of other attorneys and legal assistants on this matter in the exercise of my reasonable professional judgment." (Exhibit 1).

37. On September 16, 2010 Best sent Plaintiffs an e-mail ending their representation.

38. Plaintiffs hired counsel for representation in the legal malpractice matter against FCFFCF and the case was dismissed with prejudice on January 15, 2014. (Exhibit 2).

39. On February 27, 2014, Plaintiff entered into a second engagement letter with defendant Best. (Exhibit 3).

40. The scope of the February 27, 2014 engagement letter was for Best to serve as a "second set of eyes" on three matters, including the pending appeal of the case against FCFFCF. (Exhibit 3).

41. At no time did Best indicate Plaintiff had a cause of action against them.

42. On April 22, 2015, the Appellate Court affirmed the dismissal of the case with prejudice noting that the Plaintiff had knowledge of a wrongful cause of his injury no later than September 13, 2008 and, therefore, the November 18, 2010 filing of his complaint was not timely. (Exhibit 4).

43. Best never informed Plaintiffs the Statute of Limitations expired between the commencement of their engagement on August 18, 2010 and September 13, 2010, the date the appellate court found the Statute of Limitations on the claim against FCFFCF expired.

44. In short, the defendant abdicated their obligations to the clients and failed to satisfy the standard of care for attorneys practicing in and around Cook County and who regularly represent and advise clients regarding legal malpractice matters.

45. Best breached the standard of care in at least the following ways:

(i) Failed to advise Plaintiffs when the Statute of Limitations would expire.

(ii) Failed to advise Plaintiffs they had a claim against FCFFCF for overbilling and not accounting for billed time.

(iii) Failed to advise Plaintiffs that they had a claim against them.

(iv) Failed to advise Plaintiffs that they had a claim against Almeida and Drinker.

46. But for the negligent advice of Best, the Plaintiffs would have brought suit against FCFFCF before the Statute of Limitations expired.

47. But for the negligent advice of Best, the Plaintiffs would have brought suit against Almeida and Drinker before the Statute of Repose expired.

Count II

Cronin, Davis, Hutchinson, Kelley, & CLTD's Negligent Representation

48. The Plaintiffs reallege paragraphs 1-33 as it set forth fully herein.

49. On or around November 11, 2010, Plaintiffs retained Defendant Cronin and CLTD in the legal malpractice matter against FCFFCF.

50. After the plaintiffs retained Cronin, a fee agreement was executed on or about November 19, 2010. (See Exhibit 9). The fee agreement stated that it was for a legal malpractice case. The fee agreement also stated "In addition, we anticipate using associate lawyers and perhaps other attorneys to prosecute this litigation."

51. Defendant Cronin and CLTD filed a complaint against FCFFCF on November 18, 2010. (Exhibit 5).

52. On February 23, 2011, Defendant Cronin and CLTD filed an amended complaint in the matter. (Exhibit 6).

53. On March 15, 2011 Collins, the Collins Firm

and the Fish Firm filed a motion to dismiss the amended complaint.

54. On July 13, 2011, a voluntary dismissal with leave to refile was entered on the FCFFCF matter. (Exhibit 7).

55. On or about March 26, 2012 plaintiffs filed a section 5/2-1401 Petition. (See Exhibit 8). There was no written fee agreement executed by the parties related to the filing of this case.

56. On June 7, 2013 the section 5/2-1401 Petition was dismissed by the trial court. (See Exhibit 8).

57. The plaintiffs appealed and the order of the trial court was affirmed on March 16, 2015. (See Exhibit 8).

58. On July *5,* 2013, defendant Cronin and CLTD refiled the complaint against FCFFCF. (Exhibit 2).

59. On August 28, 2013 Fish filed a motion to dismiss. (Exhibit 2).

60. On January 15, 2014, Fish's motion to dismiss with prejudice was granted. (Exhibit 2).

61. Plaintiffs, via Cronin and CLTD, appealed the dismissal and the appellate court affirmed. (Exhibit 4).

62. On April 22, 2015, the Appellate Court affirmed the dismissal of the case with prejudice noting that the Plaintiff had knowledge of a wrongful cause of his injury no later than September 13, 2008 and, therefore, the November 18, 2010 filing of his complaint was not timely. (Exhibit 4).

63. Illinois Supreme Court Rule 721 states that "any attorney who by act or omission causes the corporation, association, limited liability company, or registered limited liability partnership to act in a way which violates standards of professional conduct, including any provision of this rule, is personally responsible for such act or omission ..."

62. Cronin and CLTD provided legal advice to plaintiffs and acted as their attorney at all relevant times in all the above legal proceedings.

62. Davis provided legal advice to plaintiffs and acted as one of his attorneys between at least approximately February/March of2011 and through at least March 14, 2013.

62. Hutchinson provided legal advice to plaintiffs and acted as one of his attorneys between at least approximately February/March of 2011 and through at least March 14, 2013.

63. Kelley provided legal advice to plaintiffs and acted as one of his attorneys between at least approximately February/March of 2011 and through at least March 14, 2013.

65. The plaintiffs are unaware of the exact relationship between Cronin, CLTD, Davis, Hutchinson and Kelley or how the monies paid by plaintiffs were shared but it is believed, upon information and belief, based upon the prior professional experience of at least Kelley, that the monies plaintiffs paid they were shared by the attorneys. Actually, based upon Rule 721, it does not matter what the legal relationship between these defendants was because they all are personally liable for their own actions as attorneys who provided negligent legal advice to plaintiffs and they were all involved in the matter at the relevant and material times.

64. Cronin, CLTD, Davis, Hutchinson and Kelley had the opportunity to review and did review all the documents related to the first malpractice case, all the documents related to the fraud case and all other relevant documents. Thus, all the defendants had an intimate knowledge of all facts and circumstances related to the plaintiffs' legal situation and they all provided legal advice to plaintiffs at all times material and relevant set forth above. As a result of the above, Cronin, CLTD, Davis, Hutchinson and Kelley had sufficient knowledge to understand all plaintiffs' claims including but not limited to the fact that plaintiffs may have claims against Best or other attorneys, the statute of limitations for such claims and when such claims needed to be filed.

65. Defendant Best has filed affirmative defenses that argue in part that the statute of

limitations expired on the claims made by plaintiffs against Best. Best alleges in part that "Plaintiffs knew, or should have known, that they had been injured as a result of wrongful conduct no later than March 14, 2011 when Plaintiffs incurred attorneys' fees and costs to respond to motions filed by the Fish Lawyers seeking to dismiss the malpractice claims against the Fish Lawyers. As of no later than March 14, 2011, Plaintiffs were on notice of their injury and that it had been wrongfully caused." (See Best affirmative defenses and counterclaim attached as Exhibit 10).

66. Cronin, Davis, Hutchinson, Kelley and/or CLTD (Cronin, et. al) owed a duty and/or provided legal advice to plaintiffs regarding the Fish lawsuit, all relevant legal matters discussed above including but not limited to who were all the parties culpable to plaintiffs, the statute of limitations regarding all claims as a result of the above facts and to timely file all claims plaintiffs had.

57. At no time did Cronin, Davis, Hutchinson, Kelley, or CLTD (Cronin, et. al) advise Plaintiffs that they had any claims against Best or any other lawyers other than the lawyers named in Fish lawsuit. At no time did Cronin, Davis, Hutchinson, Kelley, or CLTD (Cronin, et. al) advise the plaintiffs about the statute of limitations regarding any claims against Best or any other attorneys other than those named in the Fish lawsuit. At no time did Cronin, Davis, Hutchinson, Kelley, or CLTD (Cronin, et. al) advise the plaintiffs to file a lawsuit regarding any claims against Best or any

other attorneys or any other than those named in the Fish lawsuit.

58. At no time did Cronin et. al. indicate plaintiffs had a claim against Almeida and Drinker.

59. Cronin et. al. billed Plaintiff in excess of $750,000 and never provided a bill to plaintiffs. The last payment made by plaintiffs was on or about May 23, 2014. The plaintiffs really have no way to know what legal fees were incurred in the malpractice case and what legal fees were incurred in the fraud case or other matters because no bill or detailed statement of work performed was ever sent to plaintiffs. The amount of attorney fees charged was unreasonable, unnecessary or otherwise unfair because under no circumstance would it cost in excess of $750,000 to work on two motions to dismiss, two appeals and initiate three legal proceedings. There was no extensive discovery or trial of any matter so there is no doubt that the fees charged were excessive. The plaintiffs did not discover that they had any claims related to the reasonableness of the attorney fees until after the representation of plaintiffs ceased on or around June 25, 2015.

60. In short, the defendants abdicated their obligations to the clients and breached the standard of care for attorneys practicing in and around Cook County and who regularly represent and advise clients regarding legal malpractice matters.

62. If it is found that the Statute of Limitations

has expired in the claim against Best, in the alternative, Cronin, et. al. breached the standard of care in at least the following ways:

> (i) Failed to advise Plaintiffs they had a claim against Best, failing to inform plaintiffs about the statute of limitations for any claims and failing to file such a claim in a timely manner;
>
> (ii) Failed to advise Plaintiffs they had a claim against Almeida and Drinker failing to inform plaintiffs about the statute of limitations for any claims and failing to file such a claim in a timely manner.
>
> (ii) Failed to advise Plaintiffs they had a claim against FCFFCF for overbilling and not accounting for billed time.

63. Cronin, et. al. breached the standard of care in at least the following ways:

> (i) Overbilled Plaintiffs for their representation and charged fees that were unnecessary, unreasonable or otherwise, unfair;
>
> (ii) Failed to advise plaintiff that they were overbilling him and that if plaintiffs wanted to file a claim based on any overbilling,

(iii) Failed to advise plaintiffs that they had claims against them after they discovered such claims or should have discovered such claims if they exercised reasonable care and skill.

64. But for the negligent advice of Cronin, et. al., Plaintiffs would have brought suit in a timely manner against Best or other attorneys who were culpable and would have recovered substantial monies including but not limited to tens of millions of dollars.

65. But for the negligent advice of Cronin, et. al., the Plaintiffs would have brought suit against Almeida and Drinker or others before the Statute of Repose expired and would have recovered substantial monies.

66. But for the negligent actions of Cronin, et al the plaintiffs would not have paid the amount of attorney fees paid because they were unreasonable and unnecessary.

67. The plaintiffs could not and did not discover any claims they had against the defendants until after the defendants ceased representing them in or around June 25, 2015 and the defendants did not advise plaintiffs of such claims. Thus, any statute of limitations could not begin to run against these defendants until sometime after June 25, 2015.

WHEREFORE, the Plaintiffs respectfully request the following relief:

A. That this court award monetary damages, in an amount to be determined by a jury in excess of the jurisdictional limit, *as* a direct result of the Defendants' negligence; and

B. That this Court award another reasonable and just relief.

Jury Trial

66. The Plaintiffs requests a trial by jury.

Respectfully submitted,

William Carlson and Willis Capital, LLC,

By: /s/
Attorney for Plaintiffs

Joseph T. Gentleman (36153)
33 N. Dearborn Street
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Chicago, Illinois 60602
(312) 220-0020

APPENDIX R

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

WILLIAM CARLSON and WILLIS CAPITAL, LLC,
Plaintiff,

vs.

MICHAEL BEST & FRIEDRICH LLP, THOMAS CRONIN, AARON L. DAVIS, LELAND W. HUTCHINSON, JR., DANIEL J. KELLEY, and CRONIN & CO., LTD.

Case No. 16 L 00383
Commercial Calendar T

AFFIDAVIT OF RICHARD H. LEHMAN REGARDING CLAIMS AGAINST THE CRONIN & CO. DEFENDANTS

Affiant, Richard H. Lehman, under penalties as provided by law pursuant to the provisions set forth in 735 ILCS 5/1-109, states and deposes as follows:

1. I am an attorney, duly licensed to practice law in the State of Illinois and I have been licensed to practice law in Illinois since 1990. A copy of my current *curriculum vitae* is attached hereto as Exhibit A.

2. I was previously asked by the attorney for the Plaintiffs to review certain materials in the captioned case, including materials from the underlying matters involving the Plaintiffs' claims against their former business partners, Owen O'Neill and Thomas Hutchinson (collectively, "O'Neill and Hutchinson"), Plaintiffs' claims against their former lawyers, Shawn Collins and the Collins Law Firm and David Fish and the Fish Law Firm (collectively, "Collins and Fish"), as well as material related to the representation they received from Michael Best & Friedrich LLP ("Michael Best"), Drinker Biddle & Reath (" Drinker Biddle") and from Thomas Cronin and other lawyers with whom he worked on Plaintiffs' matters ("Cronin"). A list of the materials I previously reviewed is attached hereto as Exhibit B. I have recently re-reviewed some of those materials, including the depositions taken of the Cronin parties.

3. I also previously submitted an affidavit in this case in connection with Michael Best's Motion for summary judgment and in connection with my review of the factual record and my understanding of the facts underlying the issues in this litigation. I have re-reviewed that affidavit. Rather than unnecessarily restate my understanding of the underlying facts and rather than unnecessarily restate each of my opinions concerning the various attorneys and law firms that represented William Carlson and Willis Capital, LLC (collectively, "Carlson") in connection with the underlying litigation, I hereby adopt and incorporate by reference my statements in that affidavit concerning the underlying facts and concerning my

earlier stated opinions, as if those facts and opinions were set forth fully herein. I attach to this affidavit as Exhibit C my affidavit submitted in connection with Michael Best's Motion for Summary Judgment.

4. I now have also been asked to review the Motions for Summary Judgment filed in this lawsuit by the Cronin parties and to provide any opinions that I have formed, based upon my review of all of the materials, regarding the standard of care applicable to the various attorneys who represented the Plaintiffs in the various matters at hand, regarding the conduct of the various attorneys, including that of Cronin, and whether that conduct fell below the standard of care, and regarding the issues raised by the Cronin parties in the Motions. In this affidavit, when I use the term standard of care, I mean the degree of care, skill, caution, and competence that a reasonably well qualified attorney, practicing law under the same or similar circumstances as those circumstances presented to the attorneys at issue, would be expected to exercise.

5. Cronin makes several arguments in the recently filed motions for summary judgment. I have been asked to offer my opinions in connection with some of the arguments made. First, Cronin argues that the remaining part of the suit against Michael Best – that based upon its August 2010 representation of Carlson – has been dismissed on Michael Best's motion for reconsideration of its motion for summary judgment. Cronin notes that the court recently determined in its May 3, 2019 and May 7, 2019 orders

that Carlson's malpractice cause of action against Collins and Fish accrued in June of 2008 and that the statute of limitations thus ran on Carlson bringing a malpractice claim against Collins and Fish in June 2010. The Court thus determined that the statute of limitations ran on claims for malpractice against Collins and Fish prior to the start of Michael Best's August 2010 representation of Carlson.

6. The Court then determined that Carlson no longer had a viable claim against Collins and Fish when Michael Best - for the second time - became Carlson's counsel in August 2010, and that Michael Best thus could not have caused Carlson to lose a claim against Collins and Fish. Cronin argues that the Court's recent rulings now are law of the case in this case and entitle Cronin to summary judgment as to the claims against it. Cronin argues that if Michael Best could not be liable to Carlson because it was not a proximate cause of Carlson's claimed loss of a malpractice claim against Collins and Fish, then Cronin too cannot be liable for having failed to bring suit against Michael Best – because it could not have been liable. Cronin argues that failing to file suit for malpractice against Michael Best or failing to advise Carlson to bring suit against Michael Best could not be the cause of any damage to Carlson.

7. This conclusion, however, ignores two important facts. First, Carlson now has appealed the Court's ruling with respect to when the statute of limitations ran on the malpractice claim against Collins and Fish. It is the final appellate ruling on the

issues that will be law of the case, not the Court rulings that now are on appeal. If the appellate court reverses the trial Court's May 3, 2019 and May 7, 2019 orders and finds that the statute of limitations on claims against Collins and Fish ran after Michael Best began its August 2010 representation, then Michael Best still could have been liable for failing to file or to advise Carlson to retain other lawyers to file suit timely against Collins and Fish, and Cronin then can be liable to Carlson should his suit against Michael Best be found untimely due to Cronin not bringing suit on behalf of Carlson against Michael Best. It is my opinion that the standard of care did require Michael Best in August 2010 to either immediately file suit for Carlson against Collins and Fish or to at least advise him to immediately file that suit through other counsel, and to plead and argue both the discovery rule and fraudulent concealment/equitable estoppel in order to toll the time Carlson had to file suit against Collins and Fish. Michael Best did none of that and thus deviated from the standard of care, causing Carlson to lose his action against Collins and Fish.

8. Second, Cronin ignores the fact that Michael Best did represent Carlson in late 2008 and that the only reason that part of Carlson's claim against Michael Best was dismissed by the Court on summary judgment was because the six-year legal malpractice statute of repose ran on claims against Michael Best for that representation in late 2014, and suit was not brought with respect to that representation until early 2016. But the statute of repose ran on those claims against Michael Best during Cronin's representation

of Carlson. Cronin represented Carlson from November 2010 through June 2015. As I stated in my previous affidavit, it is my opinion that Chris Parker and Michael Best owed duties to Carlson based upon that earlier – late 2008 – representation, breached those duties, and caused Carlson to lose his suit against Collins and Fish as a result of its breaches of its duties to Carlson at that time. Thus, by Cronin failing to advise Carlson of his claims against Michael Best in connection with its 2008 representation, and in failing to sue Michael Best for Carlson or to advise Carlson of the earliest date that the statute of limitations might run on a claim against Michael Best, and in failing to otherwise preserve the claim against Michael Best, such as by entering a tolling agreement with Michael Best, it is my opinion that Cronin breached its duty to Carlson and caused Carlson to lose that claim against Michael Best.

9. Cronin next argues that it cannot be liable to Carlson for failing to bring suit or to otherwise preserve claims against Drinker Biddle on behalf of Carlson, based on Drinker Biddle's own failure to timely sue or to advise Carlson to timely sue or to otherwise preserve his claims against Collins and Fish, such as through a tolling agreement. Cronin asserts that Carlson cannot establish that he had a valid malpractice claim against Drinker Biddle because Drinker Biddle advised Carlson that Collins and Fish had been negligent in their representation of him, and Carlson was on inquiry notice of his claim of malpractice against Collins and Fish in June of 2008 (according to the Court here) and no later than

September 13, 2008 (according to the appellate court that decided the case Cronin filed against Collins and Fish). Thus, according to Cronin, Drinker Biddle owed no further duty to Carlson because Carlson already knew from Drinker Biddle everything Drinker Biddle was required to disclose to Carlson.

10. It is my opinion that the standard of care required Drinker Biddle to advise Carlson during its November/December 2008 representation not only that Carlson had a claim for legal malpractice against Collins and Fish, but also that Carlson had two years to bring that suit against Collins and Fish and that to avoid any possibility of the claim being barred by the statute of limitations, Carlson should bring that suit within two years of the date of the underlying February 13, 2008 Belvedere settlement. While the Court here determined that Carlson was on inquiry notice of a possible claim against Collins and Fish in June 2008, no one ever advised Carlson that he did not need to await the result of his effort to set aside the Belvedere settlement before filing a suit for malpractice against Collins and Fish and no one ever advised Carlson that if he did not sue Collins and Fish within two years of the date of that settlement (to be safe), Carlson may very well be barred by the statute of limitations from bringing a claim for malpractice against Collins and Fish.

11. It is my opinion that the standard of care requires a lawyer to so advise a client so that the client understands his rights and understands that he may waive his right to pursue a claim if he does not timely

file a lawsuit. The facts here demonstrate that Drinker Biddle never advised Carlson that a statute of limitations applied to his malpractice claim against Collins and Fish and that Carlson may be barred from bringing suit against Collins and Fish if he did not sue them as early as February 13,2010. The facts here demonstrate that Drinker Biddle advised Carlson only that he had to seek to vacate/set aside the settlement of the Belvedere litigation and the judgment following therefrom between 30 days after the date of the judgment and two years after the date of the judgment, pursuant 735 ILCS 5/2-1401. That information conveyed nothing to Carlson about when he could or should sue Collins and Fish for malpractice. In my opinion, the standard of care required Drinker Biddle to advise Carlson that he needed to either then sue Collins and Fish for malpractice, or at a minimum to advise Carlson of what he needed to do to preserve that claim (file suit then, enter a tolling agreement with Collins and Fish, or file suit against Collins and Fish within two years of the date of the settlement, to be on the safe side).

12. Having advised Carlson that Collins and Fish appeared to have been negligent, but having said nothing to Carlson about the need to file suit by a certain date or to otherwise be sure to preserve the claim for malpractice, Drinker Biddle in reality misled Carlson into believing that he first should go through the process of trying to vacate or set aside the settlement before he had any need to address anything with respect to Collins and Fish. See e.g *Lopez v. Clifford Law Offices,* 362 Ill. App 3d 969 (1*Dist.

2005), discussing how a lawyer's advice can mislead a client to forgo filing a suit timely. And the facts show that Drinker Biddle even understood at the time that setting aside or vacating the settlement and judgment was a long shot and that preserving the claim for malpractice should have been the number one priority. To have said nothing of this to Carlson was very misleading, and in my opinion a breach of the standard of care owed by a lawyer to its client.

13. Following this representation, while Carlson did seek out other counsel, Carlson was not represented by other counsel until Cronin began representing Carlson, which the Court here found to be after the statute of limitations had run on Carlson's claim of malpractice against Collins and Fish. In other words, Carlson was never advised before the statute of limitations ran of the date by which he ought to file his suit for malpractice against Collins and Fish to avoid having that suit become barred by the statute of limitations. It is my opinion that the standard of care required, at a minimum, that Drinker Biddle advise Carlson of the statute of limitations, when it might run at earliest, and that if Drinker Biddle did not intend to file suit on behalf of Carlson, that Carlson should retain other counsel to do so long before the statute of limitations would run, or that he at least should enter a tolling agreement with Drinker Biddle, tolling the time to bring suit against Drinker Biddle. It is my opinion that Drinker Biddle's failure to meet the standard of care as discussed above was a proximate cause of Carlson losing his claim for legal malpractice against Collins and Fish. In turn, Cronin's failure to

file suit against Drinker Biddle on behalf of Carlson, or to otherwise assist Carlson to preserve his claim for malpractice against Drinker Biddle, was a breach of the standard of care by Cronin, causing Carlson to lose his right to pursue a claim for malpractice against Drinker Biddle.

14. Cronin next argues that even if Carlson did have a claim for malpractice against Drinker Biddle, that claim did not accrue until the adverse judgment was entered against Carlson in the suit Cronin filed for Carlson against Collins and Fish, which judgment was entered was on January 15, 2014. Cronin then argues that Carlson would have had two years to file suit after that judgment, but for the fact that the statute of repose on actions against Drinker Biddle ran prior to the two years. Cronin asserts that the six-year statute of repose period would have run on the claim against Drinker Biddle in October of 2015, based upon Drinker Biddle providing legal advice to Carlson in October of 2009. Cronin does not address the fact that the statute of repose instead should have run on a claim of malpractice against Drinker Biddle, in my opinion, in December 2014, based upon Drinker Biddle concluding a representation of Carlson in December of 2008 (six years earlier), in which Drinker Biddle had advised Carlson that Collins and Fish had been negligent, but then failed to provide any information to Carlson concerning the limitations period applicable to an action against Collins and Fish. Picking a later statute of repose date (October 2015) than the one I believe is the prober repose date (December 2014), Cronin argues that the repose period ran after he

concluded his representation of Carlson in June 2015, and he argues that by that point other counsel was representing Carlson, acting as an intervening, superseding cause of Carlson's loss of an action against Drinker Biddle.

15. I have a few opinions that relate to this point. First, Cronin himself testified that during his first meeting with Carlson – before he even filed the first malpractice complaint against Collins and Fish on November 18, 2010 – he had concluded that Collins and Fish would assert the statute of limitations as a bar to Carlson's malpractice suit against them and he even testified that surviving the statute of limitations defense was going to be a real long shot and would not likely happen. He even explained that he told Carlson that getting past the statute of limitations defense was going to be a real long shot. Cronin further testified that during his first encounter with Carlson he discussed Carlson's representation by Drinker Biddle in November/December 2008 and the memo that Drinker Biddle had prepared. He even discussed Drinker Biddle's statement to Carlson that Collins and Fish had been negligent in their handling of the Belvedere litigation and settlement. And he testified that Drinker Biddle did not inform Carlson of the statute of limitations applicable to a malpractice suit against Collins and Fish, but only advised Carlson in a memo concerning an action to vacate or set aside the Belvedere judgment and the settlement of the Belvedere litigation under 735 ILCS 5/2-1401, and that such a 2-1401 petition would have to be brought between 30 days after the judgment based upon the

settlement of the Belvedere litigation, but no longer than two years after the judgment based upon that settlement.

16. Having all of this information before him, Cronin testified that he actually considered, before filing suit against Collins and Fish, whether their were parties other than Collins and Fish (including Drinker Biddle) who Carlson ought to sue, and he testified that even though Drinker Biddle never made Carlson aware of the limitations period for filing a malpractice suit against Collins and Fish, or when that limitations period would run, he determined that Drinker Biddle had done a good job representing Carlson and that Drinker Biddle was not negligent. Cronin even testified that he advised Carlson that he had been "well represented" by Drinker Biddle.

17. It is my opinion, as previously stated, that Drinker Biddle committed malpractice in its representation of Carlson and that, Cronin, having determined at that time that Carlson was likely to lose his malpractice case against Collins and Fish because the statute of limitations on that claim had run, should not have advised Carlson that he had been "well represented" by Drinker Biddle. Cronin instead should have advised Carlson that he then should have sued, in the alternative to his claims against Collins and Fish, both Drinker Biddle and Michael Best, who had represented Carlson concurrently in November/December 2008, for failing to properly advise Carlson in order to avoid having the statute of limitations run on his claim against Collins and Fish,

or that he then should have sought to enter tolling agreements with Drinker Biddle and Michael Best, tolling the time to bring suit against them in the event Collins and Fish prevailed on the statute of limitations issue. That was the safe and proper course at the time to preserve all claims that Carlson had or might have against others in connection with the harm caused to Carlson by the settlement of the Belvedere dispute. That course of action imposed little burden on Cronin, and in my opinion that is what was required by the standard of care.

18. Not only did Cronin not do those things, but he, in my opinion, Cronin misadvised Carlson by telling him he had been "well represented" by Drinker Biddle and frankly misled Carlson to believe he did not have recourse against anyone should the suit against Collins and Fish be found time barred by 735 ILCS 5/13-214.3. As stated above, misadvising a client in this fashion so that rights are not timely asserted and causes of action are not properly protected, is itself a breach of the standard of care and of the lawyer's duty to his client and can be the cause of a client's loss of a claim or suit. See e.g. *Lopez v. Clifford Law Offices,* 362 Ill, App. 3d 969(1st Dist. 2005). I believe that is the case here.

19. It is also my opinion that the statute of repose on Carlson's claim against Drinker Biddle did not run six years from an October 2009 consultation between Carlson and Drinker Biddle, but six years from Carlson's November/December 2015 representation by Drinker Biddle. That representation

concluded in December 2008, and as of that time, but for the injury resulting from Drinker Biddle's negligence, which had not yet occurred, Carlson would then have had a claim for malpractice against Drinker Biddle. First, as I understand the facts, the 2009 Drinker Biddle email consultation of which Cronin speaks concerned matters unrelated to Carlson's potential claim for malpractice against Collins and Fish. That, however, was addressed during Carlson's Drinker Biddle representation in November/December 2008, and it was then that Drinker Biddle failed to fully and properly advise and represent Carlson concerning a potential claim against Collins and Fish.

20. The law relevant to this statute of repose issue is found in cases such as *Terra Foundation for American Art v. DLA Piper LLP,* 2016 IL App (1st)153285*,* and *Lamet v. Levin*, 2015 IL App (1st) 143105. The statute of repose does not, as is suggested by Cronin, run from the last date of representation by the attorney regarding the matter. The statute of repose begins to run on a legal malpractice claim as soon as an event giving rise to malpractice occurs (in my opinion, the failure in the November/December 2008 representation to even advise Carlson of the relevant date by which Carlson had to file a malpractice claim against Collins and Fish to preserve that claim). For statute of repose purposes, a cause of action need not have accrued for the repose period to begin running. The repose period is not tolled by a continuation of the attorney/client relationship and, as stated in *Terra Foundation*, the running of the repose period does not depend upon the "completion of the

last affirmative act of representation in the matter that included the attorney's negligence..." It begins to run as soon as an event occurs that gives rise to malpractice, regardless of whether an injury has yet occurred, and regardless of whether there still is an opportunity to correct the mistake (the malpractice) by continued representation.

21. It was Drinker Biddle's late 2008 failure to advise Carlson of the date by which his malpractice suit against Collins and Fish needed to be filed and its failure to either file for Carlson or to advise Carlson to retain other counsel to file for him, or to otherwise assist Carlson in preserving the malpractice suit that gave rise to a claim of malpractice against Drinker Biddle. And this representation then ended with the malpractice complete, but for the injury that would result therefrom. Drinker Biddle had been retained by Carlson to assist Carlson in undoing the harm caused by the Belvedere settlement, it was clearly aware of the issues related to Collins and Fish's negligent representation of Carlson, and its representation of Carlson was not a limited scope representation such as what is described in RPC 1.2©. And under *Keef v. Widuch*, 312 Ill App.3d 571 (1st Dist. 2001), for example, Drinker Biddle owed a duty to Carlson to advise Carlson to sue Collins and Fish for malpractice and to tell him the date by which he needed to do so. Carlson did not timely file suit against Collins and Fish because Carlson did not know the date by which that suit needed to be filed or whether it even could be filed before first seeking to set aside the Belvedere settlement and judgment, which was going to be near

impossible, due in no small part to the neglect of Collins and Fish in that very matter. The November/December 2008 Drinker Biddle representation started the running of the statute of repose, and the statute of repose ran on Carlson's claim of malpractice against Drinker Biddle in November 2014, while Cronin still was representing Carlson.

22. And the Court here determined in its May 3, 2019 and May 7, 2019 orders that the claims against Drinker Biddle accrued either "(i) in 2010 when Carlson paid legal fees to other law firms [Cronin] concerning the February 2008 settlement, or (ii) in January 2014 when the trial court dismissed Carlson's claims against the Collins Law Firm..." As to the letter date, the statute of repose, which I discussed above, would have expired before the statute of limitations ran – in my opinion in November 2014 – during Cronin's representation of Carlson. And as to the earlier date, when fees were incurred in 2010 (beginning in November 2010 to be more precise), which is when Cronin began representing Carlson, the statute of limitations would have run in November 2012. This again was while Cronin was representing Carlson. In both instances, in my opinion, Cronin had an obligation under the standard of care to take the actions, which I described above, to preserve Carlson's claim against Drinker Biddle. Cronin failed to try to preserve Carlson's claim against Drinker Biddle (or against Michael Best). This resulted in Carlson losing claims for malpractice against Drinker Biddle (and Michael Best).

23. With regard to Aaron Davis', Leland Hutchinson, Jr's, and Daniel Kelley's assertions that they were not partners, shareholders, etc. of the Cronin firm and thus cannot be liable, the law provides (see Supreme Court Rules 721 and 722 and the commentary following those Rules) that when a lawyer actually participates in the representation and performs professional services on a matter, that lawyer is liable for the breaches of that lawyer's duties in carrying out the representation. It is my understanding of the facts in this matter that each of the above identified defendants actually participated in the very matters at issue in the Cronin firm's representation of Carlson (even in connection with the drafting of the complaint against Collins and Fish) and it is my opinion that if this is true (and there are emails that were produced in discovery that suggest that it is), despite what each of these defendants has said in his affidavit, each of these defendants is subject to liability for failing to meet the standard of care in carrying out the representation of Carlson to the same extant that Thomas Cronin and his firm are subject to liability. Each of these defendants had an attorney/client relationship with Carlson. Each of them communicated with Carlson at various times in connection with their work on the representation and each of them attended meetings with Carlson. Carlson agreed to permit them to work on the representation and they agreed to perform work in connection with the representation, and each of them actually did perform work in connection with the representation.

24. Not one of them ever advised Carlson that

Drinker Biddle and Michael Best might be responsible for Carlson's claim against Collins and Fish being found to be time-barred, not one of them advised Carlson that he ought to file suit against Drinker Biddle and Michael best for malpractice, and not one of them ever advised Carlson of when the limitations or repose periods would run on claims against Michael Best and Drinker Biddle, or that to preserve claims against Michael Best and Drinker Biddle, Carlson ought to seek a tolling agreement with each. These defendants each represented Carlson, they each had an attorney/client relationship with Carlson, and they each performed work on Carlson's behalf during a time when Carlson had valid, still viable claims of malpractice against Michael Best and Drinker Biddle, and not one of them, in my opinion, met his obligation – the standard of care – by assisting Carlson in preserving his claims for legal malpractice against Michael Best and Drinker Biddle.

25. Lastly, Cronin asserts that it is entitled to summary judgment with respect to Carlson's claim that Cronin's fees for the representations were unreasonable. Cronin argues that the claim that the fees were unreasonable is time barred because it was filed more than two years after Carlson was admittedly aware that the total fees charged to him had climbed to roughly three times the amount of a fee cap the parties had agreed to in a written engagement agreement. The written engagement agreement for the malpractice suit Cronin filed to Carlson against Collins and Fish stated that the fees for that representation would be capped at $250,000 and the

amount of the fees incurred for all representations exceeded $750,000.

26. However, as Cronin himself explained to Carlson, that cap applied only to the malpractice trial court representation, and Cronin also ended up representing Carlson in connection with a CBOE matter, in connection with a separate 2-1401 petition to set aside and vacate the judgment pursuant to settlement entered in the Belvedere matter, and in connection with an appeal of the judgment entered against Carlson in the malpractice case against Collins and Fish, none of which were subject to the engagement agreement and its fee cap. So there really were four representations, only one of which was subject to the written engagement agreement and its fee cap, and this was explained to Carlson. I understand that what is in dispute concerning the fees charged by Cronin is not that they exceeded a fee cap in a written engagement agreement, but that the fees charged were not reasonable and that Cronin has never explained to Carlson – certainly not in a billing statement – how the fees were calculated, what specific work was performed, and by whom and at what billing rates it was performed, such that Carlson should have become liable to pay such a large sum of fees.

27. The representation for which Carlson paid fees to Cronin, and for which Cronin would from time-to-time request payment of large sums of money from Carlson, were all hourly fee matters. And this is in part where the problem lies with the fees charged by

Cronin. The fees were supposed to be incurred on an hourly basis and Cronin had other lawyers and paralegals assist with the representations. And yet Carlson was never provided with any type of breakdown of the fees he was charged, and that is because no breakdown or recordation of the time spent on the various matters and on the various tasks was ever kept. Mr. Cronin testified in his deposition that he did not record his time on any of the matters and he testified that he did not provide Mr. Carlson with billing statements identifying any of the tasks performed, the number of hours spent on those tasks, the rates at which the time was billed, or which lawyer's time or paralegal's time was being charged.

28. Generally speaking, the Rules of Professional Conduct, a lawyer's fiduciary duties to his client, and the standard of care require that a lawyer charging a client on an hourly fee basis not only track the time spent on matters and the tasks undertaken, but that the lawyer provide the client with a detailed breakdown and description (an itemized bill) of the time spent, the tasks undertaken, and by whom the tasks were performed. None of that was done here and in my opinion that renders all of Cronin's fees suspect and unreasonable until demonstrated otherwise. It is the lawyer's obligation to demonstrate that the fees charged to his client are fair and reasonable. RPC 1.5 itself requires the lawyer's fees to be fair and reasonable and places the burden on the lawyer to demonstrate the fairness and reasonableness of his fees.

29. Here, Cronin charged Carlson more than $750,000 without ever providing Carlson with any details about what was done – on an hourly basis no less – to warrant such charges. Now, years later, Cronin can offer nothing to demonstrate that he fairly charged Carlson for his time and for that of the other lawyers and paralegals who worked on Carlson's matters. No record was kept. Time was not tracked or recorded anywhere. It does not even appear that what was charged by Cronin to Carlson was based upon any particular number of hours worked. And the evidence I have seen indicates that there was no heavy discovery undertaken in any of the matters Cronin handled for Carlson. While research was done and pleadings and briefs were written, it is difficult to imagine a scenario in which enough time was legitimately spent on reasonable and necessary tasks to warrant, on an hourly basis, fees and expenses totaling more than $750,000.

30. Cronin also was not free to simply change his billing arrangement with Carlson, midstream during the representations, to some sort of "pay as I demand" fee arrangement. In my opinion that would violate both RPC 1.5 and RPC 1.8(a) Under RPC 1.5, the lawyer's fees have to be fair and reasonable to the client. And RPC 1.8(a), while not applicable to an initial fee arrangement between a lawyer and a client, does prohibit a lawyer from entering into transactions with his clients during a representation. Such transactions are presumed to be the product of undue influence. Changing the fee structure during a representation is considered such a prohibited

transaction. A lawyer has a conflict of interest when he tries to change his fee arrangement with his client. A lawyer may enter such a transaction (change of fee arrangement) with an existing client during the course of representation only if the lawyer first advised the client in writing of the terms of the proposed change of fee arrangement, the proposed arrangement is fair and reasonable to the client and is understood by the client, the client is encouraged in writing to seek the advice of independent counsel as to the fairness to the client of the proposed change of fee arrangement and is given time to consult with independent counsel, and the client then gives informed consent in writing regarding the proposed change in fee arrangement.

31. The facts presented to me indicate that none of this was done. Rather, Cronin would simply make a demand of Carlson for a large lump sum of money from time-to-time (like $75,000) and suggest that it was due for the work he had performed, but he would never provide a bill for that work and would never indicate how much time had been dedicated to Carlson's matters to justify the amount of money requested and then paid. What is worse, Carlson would have been in a position where he really could not afford to reject the demand for money, because he needed his lawyer, Cronin, to continue representing him. He was in the middle various pieces of litigation and had been turned down when he sought representation from other lawyers in the past. This put him in a position of not being able to say "no" to Cronin even if he had wanted to, and Cronin knew this. Cronin had Carlson in a position where he could exercise undue influence and

demand whatever fee he wanted at any given time, and it is my opinion that he did exactly that.

32. It is also my opinion that a client, such as Carlson, would not necessarily understand that he was entitled to receive an itemized billing statement, itemizing the amount of time spent on various tasks by various lawyers and paralegals, and describing those tasks. It is my opinion, based upon the facts that I have reviewed, that Carlson did not understand, until he retained attorney Joseph Gentleman in late 2015, a few months before suit was filed against Cronin, that in an hourly fee matter, an attorney is obligated to provide a client with essentially an accounting of the fees and expenses being charged, detailing the number of hours the attorney has charged for various tasks and stating who performed the task and at what hourly billing rates. Indeed, the record reveals that no such recordation of hours and tasks was even kept by Cronin, much less presented to Carlson, and Carlson never learned that Cronin had not even tracked attorney time and tasks performed during the time Cronin represented him, such that the fees he was charged could not have been on an hourly basis, as had been agreed in the parties engagement agreement.

33. While Cronin now argues that Carlson's unreasonable fee claim against him is time-barred by the two year statute of limitations set forth in 735 ILCS 5/13-214.3, because Carlson should have realized more than two years before filing suit that the fees Cronin charged exceeded a fee cap stated in the parties' engagement agreement, that is not what

Carlson is claiming. Cronin had long before explained to Carlson that the fee cap only applied to the trial court legal malpractice case and Cronin explained in writing that he was representing Carlson in four (4) separate matters a CBOE matter, a 2-1401 petition, the trial court legal malpractice case, and an appeal of the dismissal of the malpractice case) and that the cap did not apply to three of the four matters, and thus did not come into play. Exceeding the fee cap is not the basis for Carlson's unreasonable fee claim against Cronin.

34. The basis for that claim is that the fees charged were not fair and reasonable and that to the extent that Cronin did not even bill Carlson on an hourly basis, which we now know must be the case, since he did not even track and record hours worked on the various Carlson matters. Cronin's fees thus were charged on some other basis, not agreed to by Carlson, that was never explained to Carlson, that Carlson was never advised to have vetted by independent counsel, and to which Carlson never could have given written informed consent, as there is no way to understand how he was being charged. The fees charged cannot be considered reasonable under these circumstances, but should be presumed to have been the product of a new and unstated fee arrangement known only to Cronin, and the payment of the fees was the result of undue influence. Since none of this was known or should have been known to a lay person such as Carlson, who thought he was paying fees billed on an hourly basis until he retained other counsel to look into the representation, which was just a few months

before he filed suit against Cronin, the claim is not untimely. In fact, some portion of the fees Cronin charged was for work performed on an appeal, the briefing of which took place less than two years before Cronin was sued. The appeal spanned the time between the January 2014 trial court judgment and the March 2015 appellate court opinion. Carlson sued Cronin at the beginning of 2016. It is my opinion that the unreasonable fee claim was not filed outside of the limitation period.

FURTHER AFFIANT SAYETH NOT.

/s/_____
Richard H. Lehman

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters stated to be on information and belief, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/_____
Richard H. Lehman