THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,
Plaintiff,

v.

THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. and HANS MAST,
Defendants.

No.: 17 LA 377

PLAINTIFF'S RESPONSE TO DEFENDANTS' COMBINED MOTION TO DISMISS

NOW COMES, your Plaintiff, PAUL DULBERG, (hereinafter referred to as "DULBERG") by and through his attorneys, THE GOOCH FIRM, and for his Response to Defendants' THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. and HANS MAST (hereinafter collectively referred to as "POPOVICH" or "Defendants") Combined Motion to Dismiss states to the Court the following:

INTRODUCTION

Defendants brought this Combined Motion to Dismiss DULBERG's Complaint. (See Defendants' Memorandum in Support of Defendants' Combined Motion to Dismiss attached hereto without exhibits as Exhibit A.) In their Motion, Defendants argue that DULBERG failed to state a claim for legal malpractice, that DULBERG's claims are barred by judicial estoppel, and that the claims are time barred. However, after review of the facts in the Complaint, this Honorable Court will determine that DULBERG's Complaint is sufficient to survive this Motion to Dismiss.

STANDARD OF REVIEW FOR SECTION 2-615

1. A Motion to Dismiss pursuant to section 2-615 attacks the legal sufficiency of the Complaint by alleging defects on its face. *Weisblatt v. Colky*, 265 Ill.App.3d 622, 625, 637

N.E.2d 1198, 1200 (1st Dist. 1994). Section 2–615 motions "raise but a single issue: whether, when taken as true, the facts alleged in the Complaint set forth a good and sufficient cause of action." *Visvardis v. Ferleger* 375 Ill.App.3d 719, 723, 873 N.E.2d 436, 440 (Ill.App.1 Dist. 2007), quoting *Scott Wetzel Services v. Regard,* 271 Ill.App.3d 478, 480, 208 Ill. Dec. 98, 648 N.E.2d 1020 (1995).

2. When the legal sufficiency of a Complaint is challenged by a section 2–615 Motion to Dismiss, all well-pleaded facts in the Complaint are taken as true and a reviewing court must determine whether the allegations of the Complaint, construed in a light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81, 806 N.E.2d 632, 634 (2004); *King v. First Capital Financial Services Corp.* 215 Ill.2d 1, 12, 828 N.E.2d 1155, 1161 (2005). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitled the plaintiff to recover. *Zedella v. Gibson*, 165 Ill.2d 181, 185, 650 N.E.2d 1000 (1995).

STANDARD OF REVIEW FOR SECTION 2-619

3. A section 2-619 motion should be denied unless a Plaintiff cannot prove a set of facts that would entitle him to relief sought. *Safeway Ins. Co. v. Daddono*, 334 Ill. App 3d 215, 218 (1st Dist. 2002). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitle the plaintiff to recover. *Zedella v. Gibson*, 165 Ill.2d 181, 185, 650 N.E.2d 1000 (1995).

4. The Court must view all the factual allegations in the light most favorable to the plaintiff. *Lloyd v. County of DuPage*, 303 Ill.App.3d 544, 688 707 N.E.2d 1252, 1258 (2d Dist. 1999). Also the court must construe the facts liberally in favor of the plaintiff. *Id.* In ruling on a

2-619 motion, the court may consider pleadings, affidavits and depositions. *Weisblatt v. Colky,* 265 Ill.App.3d 622, 625, 637 N.E.2d 1198, 1200 (1st Dist. 1994). The purpose of a Motion to Dismiss under section 2–619 of the Code of Civil Procedure is to afford litigants a means to dispose of issues of law and easily proved issues of fact at the outset of a case, reserving disputed questions of fact for a jury trial. *Zedella,* at 185, 650 N.E.2d 1000.

ARGUMENT
(under 2-615)

I. Dulberg sufficiently states a cause of action for legal malpractice.

1. In his Complaint, DULBERG sufficiently set forth the necessary elements of legal malpractice. "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, 306-307 (Ill. 2005).

2. First, when DULBERG agreed to retain POPOVICH and POPOVICH agreed to represent DULBERG, a duty of due care was established based on the attorney-client relationship between DULBERG and POPOVICH. (See Complaint attached hereto without exhibits as Exhibit B, ¶ 8-10.) Thereafter, POPOVICH owed DULBERG a duty of due care as his attorney and POPOVICH breached that duty.

3. DULBERG's malpractice action is proper because DULBERG properly established that due to POPOVICH's malpractice, the case was settled for an amount much lower than what DULBERG expected. "Attorney malpractice action should be allowed where it can be shown that the plaintiff had to settle for a lesser amount than she could reasonably expect without the malpractice." *Brooks v. Brennan*, 255 Ill.App. 3d 260, 270 (5th Dist., 1994).

4. In his Complaint, DULBERG specifically alleges that he was essentially forced to settle his case for $5,000.00 against the McGuires and the Auto-Owners Insurance Company. (See Complaint attached hereto as Exhibit B, ¶13, 21(j).) Thereafter at the binding arbitration DULBERG's gross award of $660,000.00 was cut to only $300,000.00 due to a "high-low agreement" that was executed as part of the McGuire settlement. DULBERG further pleads that had the McGuires not been dismissed from the case, he would have recovered more. (See Complaint attached hereto as Exhibit B, ¶16, 22.)

5. DULBERG properly plead proximate cause and damages in his Complaint. (See Complaint attached hereto as Exhibit B, ¶21, 22.)

6. *Fox v. Seiden*, 382 Ill.App. 3d 288, 294 (1st Dist. 2008) is analogous to this case because the *Fox* Plaintiff similarly pled proximate cause and the Appellate Court held that this was sufficient, "the plaintiff alleged, 'But for [the law firm's] negligence and malfeasance, [Miriam] would not have had judgment entered against her for attorney's fees under the [Act].' We find the alleged facts, liberally construed, taken as true, and viewed in the light most favorable to the plaintiff, sufficiently plead the element of proximate cause." *Id.*, at 299.

7. Specifically, DULBERG properly established that "but for" the acts of the Defendants in urging DULBERG to release the McGuires, DULBERG suffered substantial damages. (See Complaint attached hereto as Exhibit B, ¶ 22.)

8. More importantly, the issues of proximate cause and damages must be determined by a jury or trier of fact after all proper evidence and testimony is presented at trial. Proximate cause is a **question of fact** to be decided by a jury. (internal citation omitted) (Emphasis added) *Hooper v. County of Cook*, 366 Ill.App.3d 1, 7 (1st Dist., 2006). "The determination of damages is a **question of fact** that is within the discretion of the jury and is

entitled to substantial deference." (Emphasis added.) *Linhart v. Bridgeview Creek Development, Inc.*, 391 Ill.App.3d 630, 636 (1st Dist., 2009).

9. POPOVICH states in his Motion that DULBERG's pleading and theory is confusing. (See Defendants' Memorandum attached hereto as Exhibit A, pg.4). However, there is nothing confusing about the issues at hand. DULBERG clearly and sufficiently pled in his Complaint that the wrongful acts, i.e. POPOVICH urging settlement and release of the McGuires in the case caused DULBERG to lose out on over $300,000.00.

10. Defendants, in their Motion to Dismiss, are requiring of DULBERG to plead his entire case in a single Complaint.

11. "Plaintiff is not required to prove his case at this stage of the pleadings and the damages as alleged are sufficient to show he was damaged by Defendants' actions and cause of action for legal malpractice. *Fox v. Seiden*, *supra*, at 294; *Platson v. NSM America*, Inc., 322 Ill.App. 3d 138, 143 (2nd Dist., 2001) ('Cases are not to be tried at the pleadings stage, so a claimant need only show a possibility of recovery, not an absolute right to recover, to survive a 2-615 Motion.'). Here, DULBERG has shown at least a possibility of recovery based on the malpractice of POPOVICH, thus should survive Defendants' 2-615 Motion.

12. The allegations set forth by DULBERG are not conclusions and are sufficient to withstand a Section 2-615 dismissal. By looking at the Complaint, DULBERG has clearly set forth each of the elements of legal malpractice.

13. Further, because this instant case is filled with factual questions, dismissing the Complaint at this stage of the pleadings is improper and this Honorable Court should deny Defendants' Motion in order to allow the case to be fully and properly litigated.

(Under 2-619)

II. Dulberg's claims are not barred by judicial estoppel.

14. Next, Defendants argue that DULBERG's claim is barred by judicial estoppel. (See Defendants' Memorandum attached hereto as Exhibit A, pg. 6). This is not factually accurate.

15. Judicial estoppel is an equitable doctrine evoked only at the Courts' discretion and designed to protect the integrity of the judicial system by preventing parties from taking inconsistent positions. *Seymour v. Collins*, 39 N.E. 3d 961 (Ill., 2015). The *Seymour* Court held five elements were required for judicial estoppel to apply; there must be two positions which are factually inconsistent in separate proceedings where there is an intent that the trier of fact accept as true all the allegations and the person who the doctrine is asserted against must have received a benefit. *Id.*

16. In this case, there have not been two factually inconsistent positions because DULBERG never held the position that he understood and was informed of all the terms of the settlement. The issue of whether Defendants properly informed DULBERG has never been dealt with in a previous proceeding.

17. Defendants argue that "like all adults" DULBERG is presumed to know the contents and meaning of the settlement agreement he signed. (See Defendants' Memorandum attached hereto as Exhibit A, pg. 7). However, the Defendants had a fiduciary duty to DULBERG to explain to him the contents of the settlement agreement and to explain the meaning of said agreement. That is part of the thrust of the malpractice, which of course is a factual question.

18. In his Complaint, DULBERG alleges that MAST told DULBERG that "he had no choice but to execute a release" and that "there was no possibility of any liability" against the McGuires or the Insurance Company. (See Complaint attached hereto as Exhibit B, ¶ 13, 15.)

19. Based on these representations, DULBERG reluctantly signed the settlement agreement, as he had no choice and was relying on the representations of his attorneys.

20. Defendants argue that because the Court in the underlying case entered a good faith finding Order, Plaintiff should be judicially estopped. (See Defendants' Memorandum attached hereto as Exhibit A pg. 6). This is not the case. Although a good faith finding was entered in the underlying case, the Order did not contemplate whether there was any malpractice by the attorneys. The Court clearly did not know what the Defendants told or failed to tell DULBERG to urge him to sign the agreement. Therefore the good faith finding Order has no bearing on DULBERG's legal malpractice suit.

21. Defendants rely on the case of *Larson v. O'Donnell*, 361 Ill.App.3d 388 (1st Dist., 2005) in support of their argument that judicial estoppel is applicable, however this instant case is factually distinguishable from the *Larson* case, which was a divorce case.

22. The Court in *Larson*, *supra*, found that judicial estoppel applied to the Plaintiff's legal malpractice claims because at the dissolution prove up hearing, record clearly states that the Plaintiff testified that he understood all of the terms of the settlement, that knew when he signed the agreement that he had an obligation to pay a specific dollar amount in child support and maintenance. The *Larson* Court found that the Plaintiff was estopped from bringing the legal malpractice Complaint that alleged that he did not know the terms of the settlement. Larson even interrupted the divorce prove up to supply additional facts and information as to his correct

income. *Larson v. O'Donnell, supra*, generally. Further, *Larson* has been distinguished and not followed. See *Wolfe v. Wolf*, 375 Ill.App.3d 702 (1st Dist., 2007).

23. In this case, there is no record of DULBERG specifically testifying to knowing exactly what the terms of the settlement agreement. Unlike the *Larson* Plaintiff, DULBERG is not claiming that he does not understand the $5,000.00 settlement, but instead, DULBERG was never informed by his attorneys that a "high-low" agreement would limit his recovery against the remaining Defendants. DULBERG was never informed by the Defendants how the terms of the settlement would affect the future of his case. More importantly, DULBERG was trusting his attorneys when signing the settlement agreement. At no time did DULBERG interject in any proceedings to state that he understood all of the terms of the settlement or provided additional facts as the *Larson* Plaintiff.

24. Based on Defendants' fiduciary duty, the Defendants had a duty to properly inform DULBERG of all of the risks of entering the settlement agreement. "The fiduciary duty owed by an attorney to a client encompasses the obligations of fidelity, honesty, and good faith." *Metrick v. Chatz,* 266 Ill.App.3d 649, 656 (1st Dist.,1994).

25. In the case of *Wolfe v. Wolf*, 375 Ill.App.3d 702 (1st Dist., 2007) the Defendant argued that the Plaintiff was judicially estopped from bringing a claim for legal malpractice when she testified that she understood and agreed to all the terms of the marital settlement agreement and subsequently filed a legal malpractice complaint alleging that she did not understand and agree to the marital settlement agreement. However the Court held that the Plaintiff was not judicially estopped from bringing her legal malpractice action because the testimony at the dissolution proceeding was based on negligent acts and misrepresentations made

to the Plaintiff by the Defendant, and that she did not discover those negligent acts and misrepresentations until after the settlement agreement had been entered. *Id.*, generally.

26. This instant case is more factually similar to the *Wolfe* case than the *Larson* Case because DULBERG is not alleging that he misunderstood the obligations under the settlement agreement as in *Larson*, instead he is alleging that the negligence of POPOVICH did not permit DULBERG to make an informed decision about accepting the settlement, as in *Wolfe*. POPOVICH continuously represented to DULBERG that there was no possibility of any liability against the McGuires and/or the Insurance Company.

27. Therefore by following the Court in *Wolfe v. Wolf*, 375 Ill.App.3d 702 (1st Dist., 2007) this Honorable Court must find that DULBERG is not judicially estopped from bringing his claims against POPOVICH.

III. Dulberg's claims are not time barred.

28. Lastly in their Motion to Dismiss, Defendants argue that DULBERG's claims are barred by the statute of limitations. (See Defendants' Memorandum attached hereto as Exhibit A, pg. 7). This is incorrect because after review of the allegation of the Complaint this Court should find that the Complaint has been timely filed based on the discovery rule.

29. The discovery rule tolls the limitations period to the time the plaintiff knew or reasonably should have known of the injury. *Snyder v. Heidelberger,* 953 N.E.2d 415, 419 (Ill. 2011).

30. The Illinois Supreme Court held that the discovery rule applies to legal malpractice claims. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer,* 158 Ill.2d 240, 249 (Ill. 1994). The Supreme Court has made this issue quite clear, finding as such and further finding the

limitations period begins to run when a plaintiff knows or reasonably should know of his injury AND that the injury was wrongfully caused. (Emphasis added) *Id.*

31. The time at which a party has or should have the requisite knowledge under the discovery rule to maintain a cause of action is ordinarily a **question of fact.** (Emphasis added) *Jackson Jordan, Inc. v. Leydig, Voit & Mayer, at 250;* see also *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 416-417 (Ill, 1981).

32. Due to the attorney client relationship with the Defendants, DULBERG is presumed unable to distinguish any misapplication or negligence by the Defendants, on his own. "The relationship between an attorney and the client is one in which the attorney is charged with a duty to act skillfully and diligently on the client's behalf. Given the duty, the client is presumed unable to discern any misapplication of legal expertise." *Goodman v. Harbor Market, Ltd.,* 278 Ill.App.3d 684, 659-690 (1st Dist., 1995).

33. There would be a constant destruction of the attorney-client relationship if clients were required to determine their attorney's malpractice at the exact time of incident. "If the client must ascertain malpractice at the moment of its incidence, the client must hire a second professional to observe the work of the first, an expensive and impractical duplication, clearly destructive of the confidential relationship between the practitioner and his client. Therefore, it is the realized injury to the client, not the attorney's misapplication of the expertise, which marks the point in time for measuring compliance with a statute of limitations period." (internal citations omitted) *Goodman v. Harbor Market, Ltd.,* 278 Ill.App.3d 684, 689-690 (1st Dist., 1995).

34. DULBERG's Complaint was filed on November 28, 2017. The Complaint clearly sets forth when DULBERG became aware of the negligence of the Defendants as argued below. (See Complaint attached hereto as Exhibit B, ¶19, 20).

35. As pled in the Complaint, it was not until December 16, 2016 that DULBERG was informed by outside counsel that he may have a claim for legal malpractice:

> "19. Until the time of the mediation award, DULBURG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH'S and MAST'S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuire's would only complicate the case.
>
> 20. Following the execution of the mediation agreement with the "high-low agreement" contained therein, and the final mediation award, DULBURG realized for the first time that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuire's was a serious and substantial mistake. Following the mediation, DULBERG was advised to seek an independent opinion from an attorney handling Legal Malpractice matters, and received that opinion on or about December 16, 2016."
> (See Complaint attached hereto as Exhibit B, ¶19, 20).

36. DULBERG would have had until December 16, 2018 to bring his claims, or at the earliest by December 8, 2018, two years after DULBERG received the binding mediation award. Thus, the Complaint filed on November 28, 2017 is timely filed.

37. Defendants incorrectly pled that DULBERG did not provide any other explanation about why he was unaware of a claim until December 16, 2016. (See Defendants' Memorandum attached hereto as Exhibit A, pg. 8). This is incorrect because DULBERG's Complaint specifically alleges why DULBERG for the first time realized that the information Defendants gave DULBERG was false or misleading—after the mediation on December 8, 2016. (See Complaint attached hereto as Exhibit B, ¶19-20). DULBERG did not discover that the settlement with the McGuires would limit his recovery until the mediation award was entered and had no reason to believe he could not recover the full amount of his injuries.

38. DULBERG's Complaint is also timely filed based on Defendants' fraudulent concealment. (See Complaint attached hereto as Exhibit B, ¶15, 19, 20, 21(g)(i)(j)).

39. Fraudulent concealment stops the running of the limitations period until the cause of action is discovered. *Henderson Square Condominium Ass'n v. LAB Townhomes, L.L.C.,* 2014 IL App (1st) 130764, ¶94 (1st Dist., 2014).

40. To state a claim of fraudulent concealment, a Plaintiff must allege that "the defendant concealed a material fact when he was under a duty to disclose that fact to plaintiff." (internal citation omitted) *DeLuna v. Burciaga*, 223 Ill.2d 49, 77 (Ill, 2006).

The *DeLuna* Court discussed certain situations where there is a duty to disclose a material fact. First, if plaintiff and defendant are in a fiduciary or confidential relationship, then defendant is under a duty to disclose all material facts. Second, a duty to disclose material facts may arise out of a situation where plaintiff places trust and confidence in defendant, thereby placing defendant in a position of influence and superiority over plaintiff. (internal citations omitted) *DeLuna v. Burciaga, supra.*

41. Moreover, Defendants' silence gives rise to DULBERG's claim for fraudulent concealment, because DULBERG trusted his attorneys. "Silence by a person in a position of trust concerning the facts giving rise to a cause of action amounts to fraudulent concealment." See *Doe v. Boy Scouts of America*, 66 N.E.3d 433, 456 (1st Dist., 2016),

42. DULBERG and Defendants were clearly in a fiduciary and confidential relationship: the attorney-client relationship. Defendants were under a duty to disclose all material facts and information to DULBERG. Defendants failed to do so.

43. "Whether an injured party justifiably relied upon defendants' words or silence depends on the surrounding circumstances and is a **question of fact** that is best left to the trier of

fact." *(Emphasis added)* (citation omitted) *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶37 (2nd Dist., 2015).

44. DULBERG would have had 5 years from the date of discovery to bring his cause of action under fraudulent concealment. "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." *See* 735 ILCS 5/13-215.

45. DULBERG's Complaint states that DULBERG discovery the negligence of the Defendants on December 16, 2016 when he was informed by outside counsel of his claim for malpractice, or at the earliest by December 8, 2016 when DULBERG learned that he was limited in recovering his damages under the binding mediation.

46. Therefore DULBERG would have until December 2021 to file his claims under fraudulent concealment. DULBERG filed his claims well within the five-year fraudulent concealment statute.

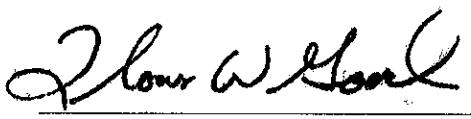
CONCLUSION

After review of the allegations in the Complaint, this Honorable Court must find that DULBERG properly filed his claim for legal malpractice and is not judicially estopped from bringing those claims. Also, the claims are not time barred based on the discovery rule and fraudulent concealment. More importantly, due to the factual questions in this case, granting the Motion to Dismiss would be inappropriate. However, in the event this Court grants the Motion, DULBERG requests a reasonable time to file a First Amended Complaint.

WHEREFORE your Plaintiff PAUL DULBERG prays this Honorable Court denies and Dismiss Defendants' Combined Motion to Dismiss, and for all other relief this Honorable Court

deems equitable and just. If this Court grants Defendants' Motion to Dismiss, PAUL DULBERG prays for a reasonable amount of time to file a First Amended Complaint.

Respectfully submitted by
THE GOOCH FIRM, on behalf of
PAUL DULBERG, Plaintiff,



Thomas W. Gooch, III

THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
847-526-0110
gooch@goochfirm.com
office@goochfirm.com
ARDC: 3123355

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IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

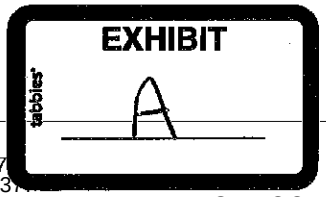
PAUL DULBERG, Plaintiff, vs. THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, Defendants.	)	No. 17LA000377

MEMORANDUM IN SUPPORT OF DEFENDANTS' COMBINED MOTION TO DISMISS

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, 735 ILCS 5/2-619(a)(5) and 735 ILCS 5/2-619.1, submit this Memorandum in Support of Defendants' Combined Motion to Dismiss Plaintiff's Complaint with prejudice, and state as follows:

I. INTRODUCTION

The Plaintiff Paul Dulberg ("Dulberg") retained defendants The Law Offices of Thomas J. Popovich P.C. ("Popovich") to prosecute a personal injury claim on his behalf against his next door neighbors, Carolyn and Bill McGuire and their adult son (Dulberg's lifelong friend), David Gagnon ("Gagnon")). Hans Mast ("Mast") handled the case for the firm. Dulberg was on the McGuires' property, assisting Gagnon trim some tree branches with a chainsaw, when Dulberg's right arm was lacerated by the chainsaw. Dulberg agreed to a settlement with



the McGuires. Thereafter, he and Mast reached an impasse. Mast and the firm withdrew, and successor counsel continued to prosecute the case against Gagnon.

Dulberg now has a case of "buyer's remorse," admitting that he agreed to accept the McGuires' settlement offer. He has not plead the requisite elements of a legal malpractice case against Popovich and Mast, or the requisite elements of the underlying case (the "case within the case"). Moreover, his agreement to settle the case with the McGuires, approved by the court along with a good faith finding of settlement, estops him from now taking a contrary position. Finally, his legal malpractice claim is barred by the applicable two-year statute of limitations.

II. STATEMENT OF FACTS

A. The Following Facts Can Be Gleaned From The Complaint (Exhibit 1) and Its Exhibits

On June 28, 2011, Dulberg was assisting David Gagnon in the cutting down of a tree on the property of Carolyn and Bill McGuire. (Exhibit 1, ¶ 6). Gagnon lost control of the chainsaw and caused personal injury to Dulberg. (Exhibit 1, ¶ 7). In May of 2012, Dulberg retained Popovich. (Exhibit 1, ¶8). On May 15, 2012, Mast filed a Complaint on behalf of Dulberg against Gagnon and McGuires in the Circuit Court of McHenry County, Illinois, Case No, 12 LA 178. (Exhibit 1, ¶ 9, and Exhibit 1B)[1]. In late 2013, Dulberg settled with the McGuires and executed a Release in their favor in exchange for the payment of $5,000.00. The McGuires and their insurance carrier, Auto Owners Insurance Company, were released. (Exhibit 1, ¶ 13 and Exhibit 1C). Defendants continued to represent Dulberg until March 2015. Dulberg retained successor counsel and proceeded to a binding mediation at which time he apparently executed a High-Low Agreement and received a mediation award (Exhibit 1, ¶ 16 and Exhibit 1D). After

[1] The exhibits to the underlying complaint in Case No. 12 LA 178 will be referenced as Exhibits 1A, 1B, 1C and 1D.

the mediation, Dulberg allegedly realized for the first time that the information Mast and Popovich had given him was false and misleading and that the dismissal of the McGuires was a serious and substantial mistake. He was advised to seek an independent opinion from an attorney handling legal malpractice matters and received that opinion on or about December 16, 2016. (Exhibit 1, ¶ 20).

B. Alleged Acts of Negligence

In Exhibit 1, ¶ 21, Dulberg alleges that Defendants failed to take actions as were necessary to fix liability against the property owners of the subject property (the McGuires), alleging that they employed Gagnon and sought the assistance of Dulberg. It is alleged that they failed to thoroughly investigate liability issues against the property owners, failed to conduct necessary discovery, failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property, and improperly urged Dulberg to accept a "non-sensical" settlement from the property owners. It is also alleged that Defendants concealed necessary facts from Dulberg preventing him from making an informed decision as to the McGuires and "coercing" him in signing a Release and Settlement Agreement.

III. DULBERG FAILS TO STATE A CLAIM FOR LEGAL MALPRACTICE UNDER 735 ILCS 5/2-615

A. Legal Standard

It is clearly established that Illinois is a fact pleading jurisdiction, requiring the plaintiff to present a legally and factually sufficient complaint. *Winfrey v. Chicago Park Dist.*, 274 Ill. App. 3d 939, 942 (1st Dist. 1995). A plaintiff must allege facts sufficient to bring his or her claim within the cause of action asserted. *Jackson vs. South Holland Dodge,* 197 Ill. 2d 39 (2001). To pass muster a complaint must state a cause of action in two ways: first, it must be legally sufficient -- it must set forth a legally recognized claim as its avenue of recovery, and

second, the complaint must be factually sufficient -- it must plead facts, which bring the claim within a legally recognized cause of action as alleged. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981). Dismissal of a complaint is mandatory if one fails to meet both requirements. *Misselhorn v. Doyle*, 257 Ill. App. 3d 983, 985 (5th Dist. 1994). In ruling on a Section 2-615 motion, "only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Mount Zion State Bank and Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995).

In Illinois, to establish a legal malpractice claim, a plaintiff must plead and prove the existence of an attorney client relationship; a duty arising from that relationship; a breach of that duty, the proximate causal relationship between the breach of duty and the damage sustained; and actual damages. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1st Dist. 1995). The injuries resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests. *Glass* at 349. Damages must be incurred and are not presumed. *Glass* at 349. It is the plaintiff's burden to establish that "but for" the attorney's negligence, the client would not have suffered the damages alleged. *Glass* at 349. "The proximate cause element of legal malpractice claim requires that the plaintiff show that but for the attorney's malpractice, the client would have been successful in the undertaking the attorney was retained to perform. *Green v. Papa*, 2014 IL App. (5th) 1330029 (2014), quoting *Owens v. McDermott Will & Emery*, 316 Ill. App. 340 (2000), at 351. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1995).

B. <u>Dulberg Fails to Plead Facts in Support of His Conclusory Allegations</u>

Dulberg's pleading and theory of recovery is confusing. Presumably, since Dulberg retained successor counsel in the underlying case, he is only complaining here about the

McGuires' underlying liability, and nothing with respect to case against David Gagnon (when an attorney is discharged and transfers a then viable matter to a successor attorney, the first lawyer cannot be held to have proximately caused the client's lost claim, see *Mitchell v. Shain, Fursel, and Burney, Ltd.*, 332 Ill. App 3d 618 (1st. Dist. 2002), and *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169 (1st Dist. 2004)).

Setting aside the Estoppel and Statute of Limitations issues which will be discussed below, Dulberg's complaint for legal malpractice is rife with unsupported conclusory allegations. Dulberg fails to allege requisite facts in support of each and every element of the "underlying" case or "case within the case" against the McGuires. Simply put, Dulberg fails to plead any facts in support of his conclusions that there was some liability against the McGuires. In ¶ 21 of his complaint, Dulberg alleges negligence against Popovich and Mast, but fails to identify what actions should have been taken and were not. In ¶ 21 (a), Dulberg fails to identify what investigation and discovery should have been undertaken. In ¶¶ 21 (b) and (c), Dulberg fails to identify or discuss the law that "defendants failed to understand." In ¶ 21 (d), Dulberg fails to plead any facts about why the settlement with the McGuires was improper or "non-sensical."

Under Illinois fact pleading requirements, much more is needed. In a case of alleged professional liability, the plaintiff cannot simply allege in conclusory terms that the defendants were negligent, and that the Plaintiff could have proved up liability against the underlying defendants. He must allege why and how. Dulberg's complaint must be dismissed pursuant to 735 ILCS 5/2-615.

IV. DULBERG'S SETTLEMENT WITH THE MCGUIRES AND THE DOCTRINE OF JUDICIAL ESTOPPEL BAR HIS LEGAL MALPRACTICE CLAIM

Dulberg admits in ¶13 of his Complaint, that he agreed to a $5,000.00 settlement with the McGuires. Attached to this Complaint, is an unsigned copy of the Settlement Agreement, Exhibit 1C.[2] Because Dulberg agreed to the settlement with the McGuires, waived and released all claims against them and their insurance carrier, and allowed the Court to enter an Order on a Good Faith Finding of Settlement (a joint tortfeasor Gagnon remained in the case), he is now estopped from taking a contrary position that the settlement was appropriate, fair, knowing and voluntary.[3]

The doctrine of judicial estoppel provides that a party who assumes a particular position in a proceeding is estopped from assuming a contrary position in a subsequent proceeding. *Larson vs. O'Donnell*, 361 Ill. App. 3d 388, 398 (1st Dist. 2005), *rev'd on other grounds*. In *Larson*, a plaintiff became unemployed during the pendency of his divorce. At settlement, he agreed to pay a specified dollar amount for child support and specified dollar amount for maintenance, based on the income he earned prior to his having become unemployed. *Larson* at 391. The parties and their attorneys appeared before the court to present the marital settlement agreement for approval at a "prove up". *Larson* at 392. At the prove up hearing, the plaintiff gave unequivocal testimony that he understood the terms and conditions of the agreement and acknowledged the amounts he was required to pay under the agreement. *Larson* at 392. After entry of the judgment for dissolution of marriage, the plaintiff began paying support based on a

[2] It does not appear that Dulberg is denying the authenticity of the Settlement Agreement, despite the fact that his signature is not attached. Mast is in possession of a signed copy of the Settlement Agreement, which Dulberg executed on January 29, 2014.

[3] For the Court's convenience, attached as Exhibits 2 and 3 are the Motion for the Good Faith Finding and Court's Order granting the Good Faith Finding of Settlement. The Court may take judicial notice of its own court docket see *All Purpose Nursing Service v. Human Rights Com.*, 205 Ill. App. 3d 816, 823 (1st Dist. 1990). Notably, the McGuires also filed a counterclaim for contribution against Gagnon in the underlying case.

percentage of his unemployment income rather than the amounts required by the judgement for dissolution. He was later held in contempt for failure to pay the amounts prescribed in the judgment of dissolution and attorney's fees were assessed against him in the divorce court. He sued his former attorneys for breach of fiduciary duty and legal malpractice. *Larson* at 393. The court held that the plaintiff in *Larson* was judicially estopped from attempting to create a question of fact regarding his "actual" understanding for purposes of summary judgment by later contradicting his previous position. *Larson* at 398.

Like Larson, Dulberg cannot now claim that he did not knowingly and voluntarily settle and release his claims against the McGuires. Moreover, Dulberg, like all adults, is "presumed to know the contents and meaning of the obligations he undertakes when he signs a written agreement." *Premier Elec. Const. Co. vs. Ragnar Benson, Inc.* 111 Ill. App. 3d 855, 865 (1st Dist. 1982). Accordingly, Dulberg is estopped from claiming that his agreement to settle the underlying case with the McGuires was not "knowing and voluntary," and he cannot claim that he was coerced. The final decision was his alone. Dulberg is estopped from now asserting a claim for legal malpractice against his former counsel. His Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(9).

V. DULBERG'S CLAIM IS BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS FOR CLAIMS AGAINST ATTORNEYS

Dulberg has failed to file his legal malpractice complaint against Popovich and Mast within the two year statute of limitations for claims against attorneys. 735 ILCS 5/13-214.3 provides for a two year statute of limitations period which shall begin to run at "the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought. *Ogle v. Hotto*, 273 Ill. App. 3d 313, 318 (5th Dist. 1995). 735 ILCS 5/13-214.3(b) reads as follows:

> (b) 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 two years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

Dulberg's Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5) because on its face, his claims are untimely.

Dulberg admits in ¶ 14 of Exhibit 1 that Popovich's and Mast's representation ceased in March of 2015. Without some exception to the rule, a claim for legal malpractice would have been required to be filed by March 2017. Here, the Plaintiff did not file his Legal Malpractice Complaint against Defendants until November 28, 2017 (Exhibit 1), at least seven (7) months too late. Apparently realizing that his claims are untimely, Dulberg attempts to rely on the "discovery rule." He alleges in ¶ 20, without any factual support, that the information regarding the McGuires' liability as a property owner, was "false and misleading." As discussed above, Dulberg fails to allege any specific facts about any false and misleading information or other specifics as to Mast and Popovich's negligent conduct. Dulberg fails to plead facts in support of the case within the case, i.e. the McGuires' liability in the underlying cause of action. Dulberg alleges that he was advised to seek an independent opinion from an attorney handling legal malpractice matters on or about December 16, 2016, but provides no other explanation about why he was unaware of a claim until December 16, 2016. What happened after he signed the agreement on January 29, 2014?

While there was nothing preventing Dulberg at the time of the McGuire settlement from seeking a second opinion concerning the propriety or "sense" in settling, Illinois law requires a plaintiff relying on the discovery rule to plead facts in support of reliance on the discovery rule.

In other words, the plaintiff must explain why he did not discover the cause of action until December 16, 2016. The plaintiff has the burden of proving the date of discovery. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill.2d 72, 85 (1995). Moreover, under Illinois law, *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 (1st Dist. 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." *Bluewater Partners v. Mason*, 2012 IL App (1st 102165 at *p. 50).

Here, Dulberg fails to allege any facts to support a delay or tolling of the statute. He retained subsequent counsel after the defendants withdrew, and could have requested a legal opinion regarding the McGuires' liability then, why did he wait? His claim must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

V. CONCLUSION

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(5), and 735 ILCS 5/2-619.1, respectfully request this Honorable Court dismiss Plaintiff's Complaint with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

GEORGE K. FLYNN
CLAUSEN MILLER P.C.
ARDC No. 6239349
10 South LaSalle Street
Chicago, Illinois 60603-1098
312/855-1010
Attorneys for Defendants
gflynn@clausen.com

THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

v.

THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST,

Defendant.

No. 17LA000377

NOTICE

THIS CASE IS HEREBY SET FOR A SCHEDULING CONFERENCE IN COURTROOM 201 ON 02/27/2018, AT 9:00 AM. FAILURE TO APPEAR MAY RESULT IN THE CASE BEING DISMISSED OR AN ORDER OF DEFAULT BEING ENTERED.

COMPLAINT AT LAW
(Legal Malpractice)

COMES NOW your Plaintiff, PAUL DULBERG (hereinafter also referred to as "DULBERG"), by and through his attorneys, THE GOOCH FIRM, and as and for his Complaint against THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter also referred to as "POPOVICH"), and HANS MAST (hereinafter also referred to as "MAST"), states the following:

1. Your Plaintiff, PAUL DULBERG, is a resident of McHenry County, Illinois, and was such a resident at all times complained of herein.

2. Your Defendant, THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., is a law firm operating in McHenry County, Illinois, and transacting business on a regular and daily basis in McHenry County, Illinois.

3. Your Defendant, HANS MAST, is either an agent, employee, or partner of THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. MAST is a licensed attorney in the State of Illinois, and was so licensed at all times relevant to this Complaint.

EXHIBIT
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4. That due to the actions and status of MAST in relation to POPOVICH, the actions and inactions of MAST are directly attributable to his employer, partnership, or principal, being THE LAW OFFICES OF THOMAS J. POPVICH, P.C.

5. Venue is therefore claimed proper in McHenry County, Illinois, as the Defendants transact substantial and regular business in and about McHenry County in the practice of law, where their office is located.

6. On or about June 28, 2011, your Plaintiff, DULBERG was involved in a horrendous accident, having been asked by his neighbors Caroline McGuire and William McGuire, in assisting a David Gagnon in the cutting down of a tree on the McGuire property. DULBERG lived in the neighborhood.

7. At this time, Gaguon lost control of the chainsaw he was using causing it to strike DULBERG. This caused substantial and catastrophic injuries to DULBERG, including but not limited to great pain and suffering, current as well as future medical expenses, in an amount in excess of $260,000.00, along with lost wages in excess of $250,000.00, and various other damages.

8. In May of 2012, DULBERG retained THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., pursuant to a written retainer agreement attached hereto as **Exhibit A**.

9. A copy of the Complaint filed by MAST on his own behalf, and on behalf of DULBERG, is attached hereto as **Exhibit B**, and the allegations of that Complaint are fully incorporated into this Complaint as if fully set forth herein.

10. An implied term of the retainer agreement attached hereto as **Exhibit A**, was that at all times, the Defendants would exercise their duty of due care towards their client and conform their acts and actions within the standard of care every attorney owes his client.

11. That as **Exhibit B** reveals, Defendants property filed suit against not only the operator of the chain saw, but also his principals, Caroline McGuire and William McGuire, who purportedly were supervising him in his work on the premises.

12. At the time of filing of the aforesaid Complaint, MAST certified pursuant to Supreme Court Rule 137, that he had made a diligent investigation of the facts and circumstances around the Complaint he filed, and further had ascertained the appropriate law. MAST evidently believed a very good and valid cause of action existed against Caroline McGuire and William McGuire.

13. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST met with DULBERG and other family members and advised them there was no cause of action against William McGuire and Caroline McGuire, and told DULBERG he had no choice but to execute a release in favor of the McGuire's for the sum of $5,000.00. DULBERG, having no choice in the matter, reluctantly agreed with MAST and to accept the sum of $5,000.00 releasing not only William and Caroline McGuire, but also Auto-Owners Insurance Company from any further responsibility or liability in the matter. A copy of the aforesaid general release and settlement agreement is attached hereto as **Exhibit C**.

14. MAST and POPOVICH continued to represent DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship.

15. Continuously throughout the period of representation, MAST and POPOVICH represented repeatedly to DULBERG there was no possibility of any liability against William and/or Caroline McGuire and/or Auto-Owners Insurance Company, and lulled DULBERG into believing that the matter was being properly handled. Then, due to a claimed failure of communication, MAST and POPOVICH withdrew from the representation of DULBERG.

16. Thereafter, DULBERG retained other attorneys and proceeded to a binding mediation before a retired Circuit Judge, where DULBERG received a binding mediation award of $660,000.00 in gross, and a net award of $561,000.00. Unfortunately, a "high-low agreement" had been executed by DULBERG, reducing the maximum amount he could recover to $300,000.00 based upon the insurance policy available. The award was substantially more than that sum of money, and could have been recovered from McGuire's had they not been dismissed from the Complaint. A copy of the aforesaid Mediation Award is attached hereto as **Exhibit D.**

17. The McGuire's were property owners and had property insurance covering injuries or losses on their property, as well as substantial personal assets, including the property location where the accident took place at 1016 West Elder Avenue, in the City of McHenry, Illinois. McGuire's were well able to pay all, or a portion of the binding mediation award had they still remained parties.

18. DULBURG, in his relationship with POPOVICH and MAST, cooperated in all ways with them, furnishing all necessary information as required, and frequently conferred with them.

19. Until the time of the mediation award, DULBURG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH'S and MAST'S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuire's would only complicate the case.

20. Following the execution of the mediation agreement with the "high-low agreement" contained therein, and the final mediation award, DULBURG realized for the first time that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuire's was a serious and substantial mistake. Following the

mediation, DULBERG was advised to seek an independent opinion from an attorney handling Legal Malpractice matters, and received that opinion on or about December 16, 2016.

21. MAST and POPOVICH, jointly and severally, breached the duties owed DULBURG by violating the standard of care owed DULBERG in the following ways and respects:

a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuire's) who employed Gagnon, and sought the assistance of DULBERG;

b) Failed to thoroughly investigate liability issues against property owners of the subject property;

c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG;

d) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property;

e) Improperly urged DULBURG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;

f) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuire's and their obvious liability were a very necessary party to the litigation;

g) Falsely advised DULBURG throughout the period of their representation, that the actions taken regarding the McGuire's was proper in all ways and respects, and that DULBURG had no choice but to accept the settlement;

h) Failed to properly explain to DULBURG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;

i) Continually reassured DULBURG that the course of action as to the property owners was proper and appropriate;

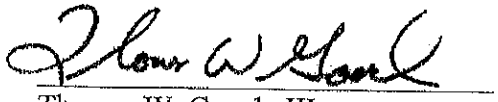
j) Were otherwise negligent in their representation of DULBERG, concealing from him necessary facts for DULBURG to make an informed decision as to the McGuire's, instead coercing him into signing a release and settlement agreement and accept a paltry sum of $5,000.00 for what was a grievous injury.

22. That DULBERG suffered serious and substantial damages, not only as a result of the injury as set forth in the binding mediation award, but due to the direct actions of MAST and POPOVICH in urging DULBURG to release the McGuire's, lost the sum of well over $300,000.00 which would not have occurred but for the acts of MAST and THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.

WHEREFORE, your Plaintiff, PAUL DULBERG prays this Honorable Court to enter judgment on such verdict as a jury of twelve (12) shall return, together with the costs of suit and such other and further relief as may be just, all in excess of the jurisdictional minimums of this Honorable Court.

Respectfully submitted by,

PAUL DULBERG, Plaintiff, by his attorneys THE GOOCH FIRM,



Thomas W. Gooch, III

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF TWELVE (12) PERSONS.

Thomas W. Gooch, III

Thomas W. Gooch, III
THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
847-526-0110
ARDC No.: 3123355
gooch@goochfirm.com
office@goochfirm.com