

**From:** PAUL DULBERG paul\_dulberg@comcast.net    
**Subject:** Re: Legal Malpractice Case  
**Date:** October 10, 2018 at 5:34 PM  
**To:** Julia Williams juliawilliams@clintonlaw.net

PD

Oops forgot to attach the file...  
Here it is

On October 10, 2018 at 5:25 PM PAUL DULBERG <paul\_dulberg@comcast.net> wrote:

Hi Julia,

Per our discussion, here are the files.

Please find the attached zip file.

Download and extract the file to see what has been pleaded, the rulings etc...

Among the files is a file named second\_amended\_complaint\_comments.txt. Pay special attention to this file as it lays out what was going into the second amended complaint and lays out the case moving forward. There are large gaps of empty lines in this file. Please keep scrolling down to read all of it.

I hope this helps prepare you for our consultation this Friday.

Thank you,  
Paul

On October 9, 2018 at 10:37 AM Julia Williams <juliawilliams@clintonlaw.net> wrote:

Dear Paul,

Let's plan for 11 am on October 12, 2018 at our offices.

Best,

Julia Williams  
Of Counsel  
The Clinton Law Firm  
111 W. Washington, Ste. 1437  
Chicago, IL 60602  
P: 312.357.1515  
F: 312.201.0737

[juliawilliams@clintonlaw.net](mailto:juliawilliams@clintonlaw.net)

This message may be privileged and confidential. If you are not the intended recipient, please delete the email and notify the sender immediately.

On Oct 5, 2018, at 9:05 AM, PAUL DULBERG <[paul\\_dulberg@comcast.net](mailto:paul_dulberg@comcast.net)> wrote:

Good Morning Julia,  
What time is good next Friday?  
Thanks,  
Paul

On October 3, 2018 at 11:39 AM PAUL DULBERG <[paul\\_dulberg@comcast.net](mailto:paul_dulberg@comcast.net)> wrote:

Hi Julia,

It was nice to speak with you as well.

I can be at your office anytime between 10:00 am through 3:00 pm on the 12th of October.

The time is only limited because of the distance needed to travel coupled with when my brother needs to be home for his kids.

What time is best for you?

Also, I will forward you everything filed from the Gooch Firm to date over the next few days.

Thank you,  
Paul  
Paul Dulberg  
847-497-4250

On October 3, 2018 at 10:41 AM Julia Williams <[juliawilliams@clintonlaw.net](mailto:juliawilliams@clintonlaw.net)> wrote:

Dear Paul,

It was nice to talk to you today. We would be able to meet next Friday, let me know if that works for you and a good time.

Best Regards,

Julia Williams  
Of Counsel  
The Clinton Law Firm  
111 W. Washington, Ste. 1437  
Chicago, IL 60602  
P: 312.357.1515  
F: 312.201.0737  
[juliawilliams@clintonlaw.net](mailto:juliawilliams@clintonlaw.net)

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nt (2).zip



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, Gagnon 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;

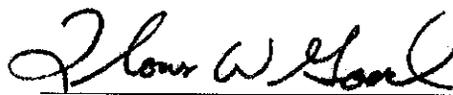
j) Were otherwise negligent in their representation of DULBERG, concealing from him necessary facts for DULBURG to make an informed decision as to the McGuire's, instead coercing him into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury.

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.

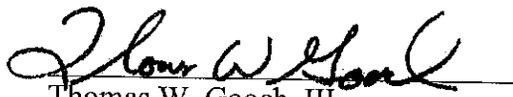
Respectfully submitted by,

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

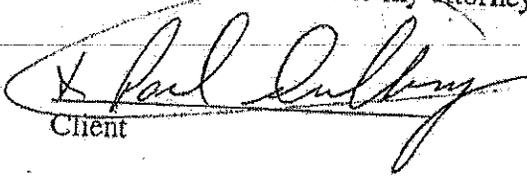
Thomas W. Gooch, III  
THE GOOCH FIRM  
209 S. Main Street  
Wauconda, IL 60084  
847-526-0110  
ARDC No.: 3123355  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)  
[office@goochfirm.com](mailto:office@goochfirm.com)

CONTRACT FOR LEGAL SERVICES

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to 40% in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.

  
Client

\_\_\_\_\_  
Client

Date: \_\_\_\_\_

LAW OFFICES OF THOMAS J. POPOVICH

By:  \_\_\_\_\_

Date: \_\_\_\_\_

LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
McHenry, Illinois 60050  
815/344-3797





3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 15 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, act or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create a unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

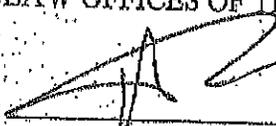
21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,  
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs  
of this action.

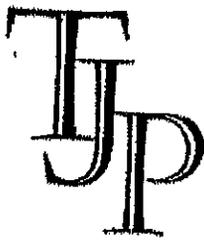
LAW OFFICES OF THOMAS J. POPOVICH, P.C.



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One of the Attorneys for Plaintiff

Hans A. Mast  
LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
Lake, Illinois 60050  
(815) 344-3797  
ARDC No. 06203684



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET  
McHENRY, ILLINOIS 60050  
TELEPHONE: 815.344.3797  
FACSIMILE: 815.344.5280  
[www.popovichlaw.com](http://www.popovichlaw.com)

THOMAS J. POPOVICH  
HANS A. MAST  
JOHN A. KORNAK

MARK J. VOGG  
JAMES P. TUTAJ  
ROBERT J. LUMBER  
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg  
4606 Hayden Court  
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*  
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

**COPY**  
HANS A. MAST

smq  
Enclosure



WAUKEGAN OFFICE  
210 NORTH MARTIN LUTHER  
KING JR. AVENUE  
WAUKEGAN, IL 60085

**GENERAL RELEASE AND SETTLEMENT AGREEMENT**

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22<sup>nd</sup> Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- I was not 65 or older on the date of the occurrence.
- I was not receiving SSI or SSDI on the date of the occurrence.
- I am not eligible to receive SSI or SSDI.
- I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: \_\_\_\_\_

\_\_\_\_\_  
PAUL DULBERG

STATE OF ILLINOIS        )  
  ) SS.  
COUNTY OF MCHENRY    )

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this \_\_\_\_\_ day of January, 2014.

\_\_\_\_\_  
Notary Public



Binding Mediation Award

Paul Dulberg

v.

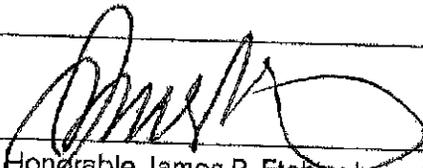
David Gagnon

ADR Systems File # 33391BMAG

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of: Paul Dulberg  
Gross Award: \$ 660,000.  
Comparative fault: 15 % (if applicable)  
Net Award: \$ 561,000

Comments/Explanation	<u>Medical</u>	<u>\$ 60,000.</u>
	<u>future medical</u>	<u>\$ 200,000.</u>
	<u>lost wage</u>	<u>\$ 250,000.</u>
	<u>PIS</u>	<u>75,000.</u>
	<u>LNL</u>	<u>75,000.</u>

  
The Honorable James P. Etchingham, (Ret.)





4. 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.

5. Dulberg’s complaint must be dismissed pursuant to 735 ILCS 5/2-615.

6. Dulberg admits in ¶13 of his Complaint, that he agreed to a \$5,000.00 settlement with the McGuires.

7. 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*. Dulberg is estopped from bringing this legal malpractice case because he expressly agreed to settle his case against the McGuires, and then continued to pursue his case against Gagnon. Dismissal is mandated under 735 ILCS 5/2-619(a)(9).

8. 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.

9. Here, the Plaintiff did not file his Legal Malpractice Complaint against Defendants until November 28, 2017, at least seven (7) months too late.

10. His claim must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

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](mailto:gflynn@clausen.com)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 7th day of February, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III  
The Gooch Firm  
209 S. Main Street  
Wauconda, IL 60084  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

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

**Katherine M. Keefe**  
Clerk of the Circuit Court  
\*\*\*Electronically Filed\*\*\*  
Transaction ID: 17111133930  
17LA000377  
02/07/2018  
McHenry County, Illinois  
22nd Judicial Circuit  
\*\*\*\*\*

PAUL DULBERG, )  
 )  
 )  
 Plaintiff, )  
 )  
 )  
 vs. )  
 )  
 )  
 THE LAW OFFICES OF THOMAS J. )  
 POPOVICH, P.C., and HANS MAST, )  
 )  
 )  
 Defendants. )

No. 17LA000377

Received Per Local Rule 1.19c

**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)<sup>1</sup>. 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

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<sup>1</sup> 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 (1<sup>st</sup> 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. (5<sup>th</sup>) 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. Dulberg Fails to Plead Facts in Support of His Conclusory Allegations**

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 (1<sup>st</sup>. Dist. 2002), and *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169 (1<sup>st</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>2</sup> 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.

<sup>3</sup> 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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 7th day of February, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III  
The Gooch Firm  
209 S. Main Street  
Wauconda, IL 60084  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

  
\_\_\_\_\_

# **EXHIBIT 1**

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

**Katherine M. Keefe**  
 Clerk of the Circuit Court  
 \*\*\*Electronically Filed\*\*\*  
 Transaction ID: 17111117451  
 17LA000377  
 11/28/2017  
 McHenry County, Illinois  
 22nd Judicial Circuit  
 \*\*\*\*\*

**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.

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.

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7. At this time, Gagnon 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;

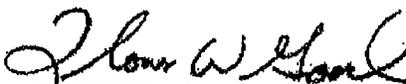
j) Were otherwise negligent in their representation of DULBERG, concealing from him necessary facts for DULBURG to make an informed decision as to the McGuire's, instead coercing him into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury.

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.

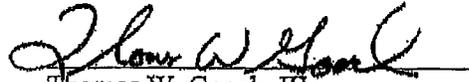
Respectfully submitted by,

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](mailto:gooch@goochfirm.com)

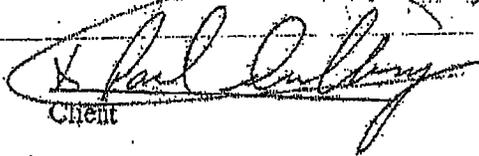
[office@goochfirm.com](mailto:office@goochfirm.com)

CONTRACT FOR LEGAL SERVICES

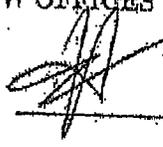
I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to ~~1/3~~ % in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.

  
Client

LAW OFFICES OF THOMAS J. POPOVICH

By:   
\_\_\_\_\_

\_\_\_\_\_  
Client

Date: \_\_\_\_\_

Date: \_\_\_\_\_

LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
McHenry, Illinois 60050  
815/344-3797





3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 15 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, act or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create a unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

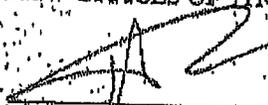
21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

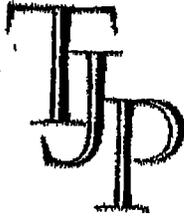
22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,  
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs  
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.

  
\_\_\_\_\_  
One of the Attorneys for Plaintiff

Hans A. Mast  
LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
Lake, Illinois 60050  
(815) 344-3797  
ARDC No. 06203624



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET  
McHENRY, ILLINOIS 60050  
TELEPHONE: 815.344.3797  
FACSIMILE: 815.344.5280  
[www.popovichlaw.com](http://www.popovichlaw.com)

THOMAS J. POPOVICH  
HANS A. MAST  
JOHN A. KONNAR

MARK J. VOGG  
JAMES P. TUTAJ  
ROBERT J. LUMBER  
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg  
4606 Hayden Court  
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*  
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

**COPY**  
HANS A. MAST

smg  
Enclosure



WAUKEGON OFFICE  
210 NORTH MARTIN LUTHER  
KING JR. AVENUE  
WAUKEGON, IL 60085

GENERAL RELEASE AND SETTLEMENT AGREEMENT

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22<sup>nd</sup> Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- I was not 65 or older on the date of the occurrence.
- I was not receiving SSI or SSDI on the date of the occurrence.
- I am not eligible to receive SSI or SSDI.
- I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released





Binding Mediation Award

Paul Dulberg

v.

David Gagnon

ADR Systems File # 33391BMAG

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

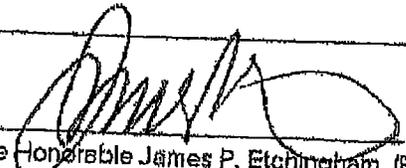
Finding in favor of: Paul Dulberg

Gross Award: \$ 660,000.

Comparative fault: 15 % (if applicable)

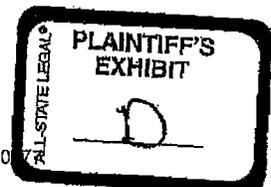
Net Award: \$ 561,000

Comments/Explanation	<u>Medical</u>	<u>\$ 60,000.</u>
	<u>Future medical</u>	<u>\$ 200,000.</u>
	<u>Lost wage</u>	<u>\$ 250,000.</u>
	<u>PIS</u>	<u>75,000.</u>
	<u>LNL</u>	<u>75,000.</u>

  
The Honorable James P. Etchingham, (Ret.)

ADR Systems • 20 North Clark Street • Floor 28 • Chicago, IL 60602  
312.950.2280 • Info@adrsystems.com • www.adrsystems.com

Received 11-28-2017 04:31 PM / Circuit Clerk Accepted on 11-29-2017 09:53 AM / Transaction #17111117451 / Case #17LA0007



# **EXHIBIT 2**

1/13

STATE OF ILLINOIS  
IN THE CIRCUIT COURT OF THE 22<sup>ND</sup> JUDICIAL CIRCUIT  
COUNTY OF McHENRY

PAUL DULBERG, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DAVID GAGNON, Individually, and as )  
Agent of CAROLINE MCGUIRE and BILL )  
MCGUIRE, and CAROLINE MCGUIRE )  
and BILL MCGUIRE, Individually, )  
)  
Defendants. )

Case No. 12 LA 178

**FILED**

**JAN 13 2014**

KATHERINE M. KEEFE  
McHENRY CITY, CIR. CLK.

**MOTION FOR GOOD FAITH FINDING AND FOR ORDER OF  
DISMISSAL WITH PREJUDICE BY DEFENDANTS BILL MCGUIRE  
AND CAROLYN MCGUIRE**

Defendants, BILL MCGUIRE (aka William McGuire) and CAROLYN MCGUIRE (improperly named Caroline), by and through their attorneys, Cicero, France, Barch & Alexander, P.C., hereby move this Court to dismiss all claims against them with prejudice and further request this Court to find that the settlement set forth in this motion was made in good faith and within the meaning and contemplation of the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1, et seq. In support of their Motion, Defendants Bill McGuire and Carolyn McGuire state as follows:

1. On or about March 15, 2012, Plaintiff Paul Dulberg filed a multiple count complaint seeking damages for personal injuries he generally attributes to a chain saw incident that occurred on or about June 28, 2011, at and upon the premises owned by Defendants Bill McGuire and Carolyn McGuire, known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

2. Plaintiff generally alleges that Defendant David Gagnon injured him with a chain

saw while working under the supervision and control of Defendants Bill McGuire and Carolyn McGuire. Defendant David Gagnon denies any and all liability for Plaintiff Paul Dulberg's injuries. Defendants Bill McGuire and Carolyn McGuire also deny any and all liability for Plaintiff Paul Dulberg's injuries and further deny that Defendant David Gagnon was under their control and supervision and working or acting as their employee or agent at the time of the alleged chain saw incident.

3. On February 1, 2013, Defendants Bill McGuire and Carolyn McGuire filed a cross-claim for contribution against Defendant David Gagnon. The cross-claim for contribution seeks contribution from Defendant David Gagnon for injuries claimed by Plaintiff Paul Dulberg and is based upon the terms and provisions of the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1, et seq.

4. Plaintiff Paul Dulberg and Defendants Bill McGuire and Carolyn McGuire have negotiated a settlement of all claims which Plaintiff brought or could have brought against Defendants Bill McGuire and Carolyn McGuire. The settlement was negotiated at arm's length over a substantial period of time, and with the advice of counsel on the part of both parties. There is no collusion or fraud on the part of any of the parties to the negotiation.

5. Pursuant to Section 100/2(c) of the Contribution Act, an alleged tortfeasor that settles with a claimant in good faith shall be discharged from liability for contribution to any other tortfeasors.

6. Defendants Bill McGuire and Carolyn McGuire deny and continue to deny liability to Plaintiff Paul Dulberg and further contest the nature and scope of the injuries Plaintiff Paul Dulberg attributes to the subject chain saw incident.

7. The lump-sum payment of \$5,000.00 to Plaintiff Paul Dulberg by or on behalf of

Defendants Bill McGuire and Carolyn McGuire constitutes adequate consideration for purposes of a good faith settlement under Section 100/2(c) of the Contribution Act.

8. Defendants Bill McGuire and Carolyn McGuire respectfully suggest that the settlement with Plaintiff Paul Dulberg is and was made in good faith within the meaning of the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/2(c).

WHEREFORE, the Defendants, BILL MCGUIRE and CAROLYN MCGUIRE, respectfully pray for the Court as follows:

- (1) For an Order declaring that the settlement between Plaintiff Paul Dulberg and Defendants Bill McGuire and Carolyn McGuire was made and entered into in good faith within the meaning of the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1, et seq.;
- (2) For an Order dismissing all civil complaints, cross-claims, counterclaims and contribution claims currently pending against Defendants Bill McGuire and Carolyn McGuire, and arising out of or otherwise connected to the injuries claimed by Plaintiff Paul Dulberg, with prejudice;
- (3) For an Order declaring that any potential future claims against Defendants Bill McGuire and Carolyn McGuire, including, without limitation, claims for contribution arising out of or otherwise connected to the chain saw incident and injuries claimed by Plaintiff Paul Dulberg, are barred;
- (4) For an Order declaring for purposes of Illinois Supreme Court Rule 304(a) that there is no just reason to delay enforcement or appeal of the Dismissal Order; and
- (5) That this Court enter an order granting such further relief as this Court deems just.

CAROLYN MCGUIRE and BILL MCGUIRE, Defendants,  
by their attorneys,  
CICERO, FRANCE, BARCH & ALEXANDER, P.C.,

By

  
RONALD A. BARCH (6209572)

Cicero, France, Barch & Alexander, P.C.  
6323 East Riverside Blvd.  
Rockford, IL 61114  
815/226-7700  
815/226-7701 (fax)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served upon:

Attorney Perry A. Accardo  
Law Office of M. Gerard Gregoire  
200 N. LaSalle St., Ste 2650  
Chicago, IL 60601-1092

Attorney Hans A. Mast  
Law Offices of Thomas J. Popovich  
3416 West Elm Street  
McHenry, IL 60050

by depositing the same in the United States Post Office Box addressed as above, postage prepaid, at Rockford, Illinois, at 5:00 o'clock p.m. on 1/9/14.



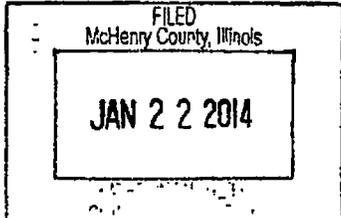
Cicero, France, Barch & Alexander, P.C.  
6323 East Riverside Blvd.  
Rockford, IL 61114  
815/226-7700  
815/226-7701 (fax)

# EXHIBIT 3

ORD 1

STATE OF ILLINOIS  
IN THE CIRCUIT COURT OF THE 22<sup>ND</sup> JUDICIAL CIRCUIT  
COUNTY OF McHENRY

PAUL DULBERG,	)	
	)	
Plaintiff,	)	Case No. 12 LA 178
	)	
vs.	)	
	)	
DAVID GAGNON, Individually, and as	)	
Agent of CAROLINE MCGUIRE and BILL	)	
MCGUIRE, and CAROLINE MCGUIRE	)	
and BILL MCGUIRE, Individually,	)	
	)	
Defendants.	)	



**GOOD FAITH FINDING AND ORDER OF DISMISSAL**

THIS CAUSE coming on to be heard on the Motion for Good Faith Finding and for Order of Dismissal with Prejudice filed by Defendants Bill McGuire and Carolyn McGuire, and the Court being fully advised in the premises,

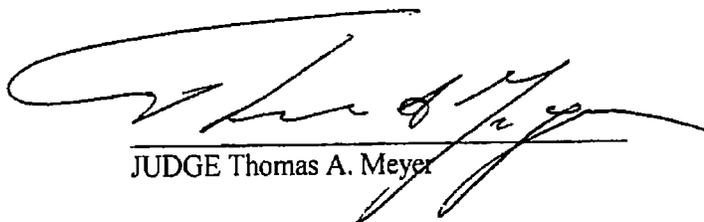
IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That settlement between Plaintiff Paul Dulberg and Defendants Bill McGuire and Carolyn McGuire (improperly named Caroline) constitutes a fair and reasonable and good faith settlement within the meaning of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 0.01 et seq.
2. That the good faith settlement shall henceforth constitute a bar to any and all claims that Plaintiff Paul Dulberg and Defendant David Gagnon and other known or unknown tortfeasors may have against Defendants Bill McGuire and Carolyn McGuire on account of or arising out of the injuries, if any, sustained by Plaintiff Paul Dulberg as a result of the alleged chain saw accident that occurred on June 28, 2011, whether by way of original action, third party claim, cross-claim, counterclaim, claim for contribution or otherwise.

3. That Defendants Bill McGuire and Carolyn McGuire be and are hereby dismissed from the above-captioned lawsuit as party defendants and cross-claimants, with prejudice, and in bar of further suit.

4. That that there is no just reason to delay the enforcement or appeal of this good faith finding and order of dismissal.

DATED: \_\_\_\_\_



JUDGE Thomas A. Meyer

Prepared by:  
Ronald A. Barch  
Cicero, France, Barch & Alexander, PC  
6323 East Riverside Blvd.  
Rockford, IL 61114  
815/226-7700

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

**Katherine M. Keefe**  
 Clerk of the Circuit Court  
 \*\*\*Electronically Filed\*\*\*  
 Transaction ID: 17111147104  
 17LA000377  
 03/27/2018  
 McHenry County, Illinois  
 22nd Judicial Circuit  
 \*\*\*\*\*

**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 (1<sup>st</sup> 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 entitle 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (5<sup>th</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> Dist., 1994).

25. In the case of *Wolfe v. Wolf*, 375 Ill.App.3d 702 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 discovered 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.

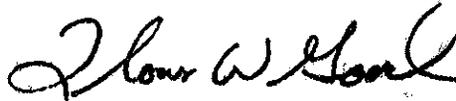
#### CONCLUSION

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,



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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

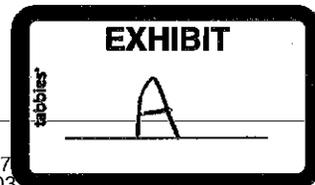
*Katherine M. Keefe*  
Clerk of the Circuit Court  
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02/07/2018  
McHenry County, Illinois  
22nd Judicial Circuit  
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**MEMORANDUM IN SUPPORT OF DEFENDANTS'**  
**COMBINED MOTION TO DISMISS**

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)<sup>1</sup>. 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

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<sup>1</sup> 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 (1<sup>st</sup> 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. (5<sup>th</sup>) 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. Dulberg Fails to Plead Facts in Support of His Conclusory Allegations**

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 (1<sup>st</sup> Dist. 2002), and *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169 (1<sup>st</sup> 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 McGuire's. Simply put, Dulberg fails to plead any facts in support of his conclusions that there was some liability against the McGuire's. 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 McGuire's 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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>2</sup> 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.

<sup>3</sup> 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  
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Attorneys for Defendants  
gflynn@clausen.com

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

**Katherine M. Keefe**  
Clerk of the Circuit Court  
\*\*\*Electronically Filed\*\*\*  
Transaction ID: 17111117451  
17LA000377  
11/28/2017  
McHenry County, Illinois  
22nd Judicial Circuit  
\*\*\*\*\*

PAUL DULBERG,

Plaintiff,

v.

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

Defendant.

No. 17LA000377

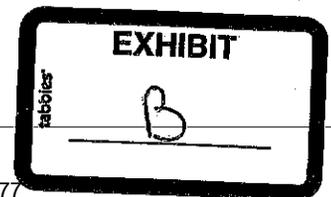
**NOTICE**  
**THIS CASE IS HEREBY SET FOR A**  
**SCHEDULING CONFERENCE IN**  
**COURTROOM 201 ON**  
**02/27/2018, AT 9:00 AM.**  
**FAILURE TO APPEAR MAY RESULT IN**  
**THE CASE BEING DISMISSED OR AN**  
**ORDER OF DEFAULT BEING ENTERED.**

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.



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;

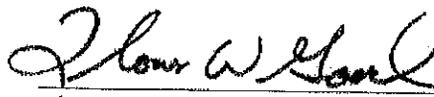
j) Were otherwise negligent in their representation of DULBERG, concealing from him necessary facts for DULBURG to make an informed decision as to the McGuire's, instead coercing him into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury.

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.

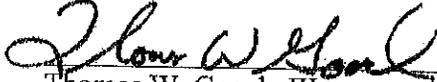
Respectfully submitted by,

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  
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[office@goochfirm.com](mailto:office@goochfirm.com)

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

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

**DEFENDANTS' REPLY IN SUPPORT OF 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 Reply in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at Law, and state as follows:

**I. INTRODUCTION**

One of the underpinnings of Dulberg's legal malpractice claim, is that a "high low agreement" he executed somehow caused him to settle his personal injury case for an amount lower than what he "expected." But Dulberg has failed to attach any such "high low agreement" to his complaint. He has also failed to identify the terms of the agreement in his complaint, and how the terms somehow affected his case. While in ¶ 3 of his Response he argues that the "high low agreement" was executed as part of the McGuire settlement, in view of Illinois Supreme Court Rule 137, he has not and cannot allege *in his complaint* that a "high low agreement" was executed as part of the McGuire settlement, or that Popovich or Mast had anything to do with it. In any case, the execution of a "high low agreement" by Dulberg in connection with the McGuire settlement makes little sense at the time, in view of Dulberg's later mediation and

settlement with the co-defendant, David Gagnon. Dulberg's mention of the "high low" coupled with his failure to explain its terms or significance, renders it a legal world equivalent of a "MacGuffin."

Dulberg cannot allege that he was "forced" to settle his case with the McGuires for \$5,000. He had every right to reject a settlement, or to retain new counsel. In fact, he alleges that Popovich withdrew over 21 months before the case was concluded (he retained successor counsel to handle the case). Moreover, he willingly agreed to a settlement with the McGuires while continuing to prosecute his case against Gagnon. He also fails to allege how he would have fared any better against the McGuires, "but for" Popovich's alleged malpractice, and fails to explain why he waited over 2 years after Popovich withdrew in order to sue the firm. For these reasons, Dulberg's complaint must be dismissed with prejudice.

## **II. DULBERG FAILS TO PLEAD FACTS IN SUPPORT OF EACH REQUISITE ELEMENT OF A LEGAL MALPRACTICE CLAIM**

Dulberg fails to support any of his conclusions that Popovich and Mast committed legal malpractice with factual support. It is not sufficient under Illinois law that the elements of a cause of action simply be regurgitated. In a legal malpractice action, not only must the elements of the legal malpractice claim be supported with facts, so must the allegations of the underlying case. However, Dulberg only makes conclusory statements in ¶ 21 of his Complaint, that additional actions should have been taken in the underlying case. But Dulberg fails to identify what those actions should have been.

Dulberg alleges that he was forced to settle his case against the McGuires for \$5,000.00. He does not allege in his Complaint whether the McGuires made a settlement offer, or whether Dulberg made a settlement demand. Did Mast forward a written settlement offer to Dulberg? Did he accept it and mail back an executed release? How was he pressured to settle? Dulberg

also fails to explain the effect of a “high low agreement” that he allegedly executed. Dulberg attaches a page from a binding mediation award he allegedly received against David Gagnon, but he fails to attach the unexplained high low agreement. 735 ILCS 5/2-606, states in pertinent part:

If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her.

Dulberg fails to attach the high low agreement, or otherwise explain the terms of the agreement and its significance. He also fails to explain why he would enter a high low agreement with the McGuires 21 months prior to a mediation with Gagnon.

Because Dulberg fails to plead facts in support of each and every element of his legal malpractice claim and his underlying claim and how he would have prevailed “but for” the negligence of Popovich and Mast, his case must be dismissed pursuant to 735 ILCS 5/2-615.

### **III. DULBERG IS ESTOPPED FROM REPUDIATING HIS SETTLEMENT AGREEMENT**

Dulberg asserts that he is not estopped from taking a position in this case that he did not understand the terms of his \$5,000.00 settlement agreement with the McGuires. His attempt to distinguish *Larson v. O'Donnell*, 375 Ill. App. 3d 702 (1st Dist. 2007) fails. Dulberg argues that unlike *Larson*, here there is no record of Dulberg testifying to knowing exactly what the terms of the settlement agreement[sic][were]. (Response, p. 8). However, here there is no dispute that Dulberg knowingly executed the settlement release in favor of the McGuires. Moreover, in a case cited by Dulberg, *Seymour v. Collins*, 2015 IL 118432 the Illinois Supreme Court wrote that “a statement under oath was not among the requirements for judicial estoppel.” *Seymour* at \*P38.

Dulberg also continues to argue in pages 8 and 9 of his Response that he was unable to make an informed decision about accepting settlement because he was never informed “by his attorneys that a “high low” agreement would limit his recovery against the remaining defendants.” (Response, ¶¶ 23 and 26). As discussed above, Dulberg has not and cannot allege in his complaint that Popovich or Mast had any involvement with any such “high low” agreement. Accordingly, his argument that they failed to inform him of the effects of the agreement, and how it could limit his recovery against the remaining defendants, is not well plead and amounts to a “red herring”. In fact, in ¶ 20 of his complaint, Dulberg sets forth the time frame of the execution of the “high low” agreement: “Following the execution of the mediation agreement with the “high low agreement” contained therein, and the final mediation award, Dulberg realized for the first time that the information MAST and POPOVICH had given Dulberg was false and misleading...” Which is it? Is he claiming that the “high low” was executed in 2015 prior to Popovich’s and Mast’s withdrawal, or at mediation (almost 2 years later in 2017)? Obviously Popovich and Mast could not have counseled Dulberg regarding a “high low” agreement he apparently executed 21 months after their attorney-client relationship ended. The allegations concerning the “high low” agreement are not well plead and are dispositive of Dulberg’s claims under section 2-615 and 735 ILCS 5/2-619 (a)(9).

**IV. DULBERG’S RELIANCE ON THE DISCOVERY RULE TO DELAY THE COMMENCEMENT OF THE STATUTE OF LIMITATIONS IS UNAVAILING**

Dulberg confirms in his Response that he is attempting to rely on the discovery rule in order to toll the statute of limitations. He also relies on language from the case of *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d (1st Dist. 1995) for the proposition that he is “presumed unable to distinguish any misapplication or negligence by the Defendants, on his own [sic].” He also alleges that he was provided with a legal opinion after the December 16, 2016 mediation

[with Gagnon] at which time he learned 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 McGuires was a serious and substantial mistake.” (Response, p. 11). How was the information misleading?

Again, Dulberg fails to describe how the settlement and dismissal of the McGuires was a mistake. But more importantly, he does not allege what happened in the 21 months after defendants were discharged as his counsel. Under Illinois law, he cannot simply bury his head in the sand. There was nothing preventing Dulberg from inquiring about the McGuires’ liability from his successor counsel, also a personal injury attorney. If he felt pressured into settling with the McGuires, why did he not seek a second opinion at the time of the settlement?

Dulberg has the burden of proving the date of discovery, and here he has failed to even allege sufficient facts to support a tolling of the limitations period. For that reason, his complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

## V. CONCLUSION

WHEREFORE, for the reasons stated in their Motion to Dismiss and Memorandum in Support, and as stated herein, 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 at Law with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

---

GEORGE K. FLYNN  
CLAUSEN MILLER P.C.

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(312) 855-1010  
Attorneys for Defendants  
[gflynn@clausen.com](mailto:gflynn@clausen.com)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 10th day of April, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III  
The Gooch Firm  
209 S. Main Street  
Wauconda, IL 60084  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)

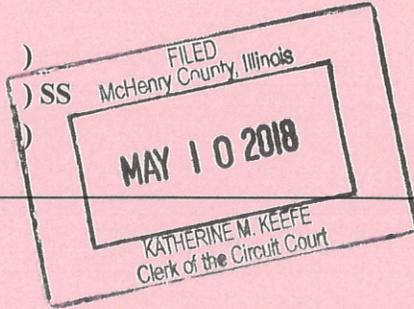
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

A handwritten signature in cursive script, appearing to read "Tom A. Walker", is written over a horizontal line.

IN THE CIRCUIT COURT OF THE 22<sup>ND</sup> JUDICIAL CIRCUIT

Ln. 6

STATE OF ILLINOIS  
COUNTY OF MCHENRY



GEN. NO. 17 LA 377  
 Jury  Non-Jury

Dulberg

vs.

Mast, et al

Date: 5-10-18 Plaintiff's Attorney S. Walczyk Defendant's Attorney G Flynn

**ORDER**

This matter before the Court on hearing on Defendants' combined Motion to Dismiss, both parties present by counsel, the Court fully advised in the premises

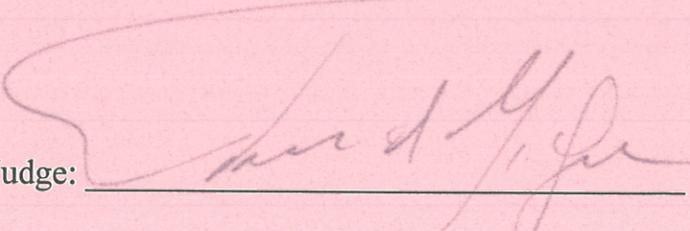
IT IS ORDERED:

1. Defendants' 2-615 motion to Dismiss is granted, and the 2-619 motion is denied.
2. Plaintiff granted 28 days to file a First Amended Complaint (6/7/18)
3. Defendants granted 28 days thereafter to Answer or otherwise plead (7/5/18)
4. Matter is set for status of pleadings on July 20, 2018 at 9:00 am in 201.

Prepared by: S. Walczyk / Groch Firm

Attorney for: Dulberg

Attorney Registration No.: 6315819

Judge: 

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

PAUL DULBERG, )

Plaintiff, )

v. )

No. 17 LA 377

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

Defendant. )

**FIRST AMENDED 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 First Amended 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.

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 same area.

7. At this time, Gagnon lost control of the chainsaw he was using causing it to strike and cut DULBERG's arm. 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 properly 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. Also MAST incorrectly informed DULBERG that the insurance policy limit for the Gagnon was only \$100,000.00, when in reality the policy was \$300,000.00.

14. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST began urging DULBERG to settle the matter against William McGuire and Caroline McGuire for \$5,000.00.

15. On November 18, 2013, MAST wrote two emails to DULBERG urging DULBERG to accept the \$5,000.00, "the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery...." \* \* \* "So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case". (See Emails attached as **Group Exhibit C.**)

16. Similarly, on November 20, 2013 MAST emailed DULBERG urging him to accept the \$5,000.00 otherwise “the McGuires will get out for FREE on a motion.” (See Emails attached as **Group Exhibit C.**)

17. On or around December 2013 or January 2014, MAST met with DULBERG and other family members and again advised them there was no cause of action against William McGuire and Caroline McGuire, and verbally told DULBERG that he had no choice but to execute a release in favor of the McGuires for the sum of \$5,000.00 and if he did not, he would get nothing.

18. DULBERG, having no choice in the matter, reluctantly agreed with MAST 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 D.**

19. 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

20. After accepting the \$5,000 settlement, DULBERG wrote MAST an email on January 29, 2014 stating “I trust your judgment.” (See Email attached as **Exhibit E.**)

21. MAST and POPOVICH continued to represent DULBERG into 2015 and continuously assured him that his case was being handled properly.

22. On February 22, 2015, as to any chance of settling the remainder of his case against Gagnon MAST wrote to DULBERG that, “There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only

alternative is to take the case to trial and I am not interested in doing that.” (See Email attached as **Exhibit F.**)

23. MAST and POPOVICH represented DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship due to a claimed failure of communication. MAST and POPOVICH withdrew from the representation of DULBERG.

24. Thereafter, DULBERG retained other attorneys and proceeded to a Court ordered 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. However, due to the settlement with the McGuires, DULBERG was only able to collect \$300,000.00 based upon the insurance policy available. A copy of the aforesaid Mediation Award is attached hereto as **Exhibit G.**

25. The McGuires 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. McGuires were well able to pay all, or a portion of the binding mediation award had they still remained parties.

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

27. Until the time of the mediation award, DULBERG 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 McGuires would only complicate the case.

28. Following the execution of the mediation agreement and the final mediation award, DULBERG realized for the first time in December of 2016 that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuires was a serious and substantial mistake.

29. It was not until the mediation in December 2016, based on the expert's opinions that DULBERG retained for the mediation, that DULBERG became reasonably aware that MAST and POPOVICH did not properly represent him by pressuring and coercing him to accept a settlement for \$5,000.00 on an "all or nothing" basis.

30. DULBERG was advised to seek an independent opinion from a legal malpractice attorney and received that opinion on or about December 16, 2016.

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG 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 McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;

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, for example hiring a liability expert;

d.) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;

e.) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;

- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails. into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

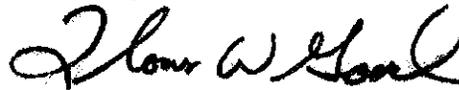
- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

32. 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 DULBERG to release the McGuires, 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,

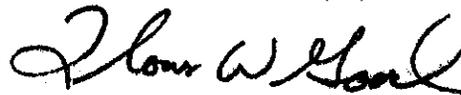
PAUL DULBERG, Plaintiff, by his  
attorneys THE GOOCH FIRM,



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Thomas W. Gooch, III

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



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Thomas W. Gooch, III

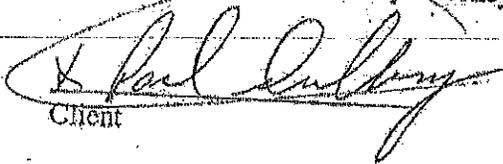
Thomas W. Gooch, III  
THE GOOCH FIRM  
209 S. Main Street  
Wauconda, IL 60084  
847-526-0110  
ARDC No.: 3123355  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)  
[office@goochfirm.com](mailto:office@goochfirm.com)

CONTRACT FOR LEGAL SERVICES

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to ~~1/3~~ % in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.

  
Client

LAW OFFICES OF THOMAS J. POPOVICH

\_\_\_\_\_  
Client

By:   
\_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
McHenry, Illinois 60050  
815/344-3797





3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 15 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, act or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create an unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

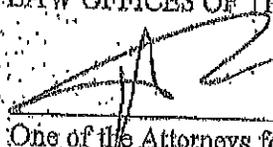
21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,  
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs  
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.



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One of the Attorneys for Plaintiff

Hans A. Mast  
LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
Lake, Illinois 60050  
(815) 344-3797  
ARDC No. 06203684

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Subject:** Fwd: Dave's Best and oldest friend John  
**Date:** December 28, 2016 10:33:35 AM CST  
**To:** paul\_dulberg@comcast.net

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Date:** November 20, 2013 at 7:26:53 AM CST  
**To:** Hans Mast <hansmast@comcast.net>  
**Subject:** Re: Dave's Best and oldest friend John

Morning Hans,  
Ok we can meet. I will call Sheila today and set up a time.  
Please send me a link to the current Illinois statute citing that the property owner is not liable for work done on their property resulting in injury to a neighbor.  
I need to read it myself and any links to recent case law in this area would be helpful as well.  
Thanks,  
Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Nov 20, 2013, at 6:59 AM, Hans Mast <hansmast@comcast.net> wrote:

Paul, lets meet again to discuss. The legality of it all is that a property owner does not have legal liability for a worker (whether friend, son or otherwise) who does the work on his time, using his own independent skills. Here, I deposed the McGuires, and they had nothing to do with how Dave did the work other than to request the work to be done. They had no control on how Dave wielded the chain saw and cut you. Its that simple. We don't have to accept the \$5,000, but if we do not, the McGuires will get out for FREE on a motion. So that's the situation.

----- Original Message -----

**From:** Paul Dulberg <pdulberg@comcast.net>  
**To:** Hans Mast <hansmast@comcast.net>  
**Sent:** Tue, 19 Nov 2013 02:29:56 -0000 (UTC)  
**Subject:** Re: Dave's Best and oldest friend John

I still don't get how they don't feel responsible for work done on their property by their own son that ended up cutting through 40% of my arm.

Perhaps their negligence is the fact that they didn't supervise the work close enough but they did oversee much of the days activity with David. Just because Dave was doing the work doesn't mean they were not trying to tell their kid what to do. They told him plenty of times throughout the day what to do. How is that not supervising?

Paul  
Paul Dulberg  
847-497-4250  
Sent from my iPad

On Nov 18, 2013, at 8:07 PM, Hans Mast <hansmast@comcast.net> wrote:

Paul whether you like it or not they don't have a legal liability for your injury because they were not directing the work. So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case

Sent from my iPhone

On Nov 18, 2013, at 7:40 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Only 5, That's not much at all.  
Is this a take it or leave it or do we have any other options?

If you want a negligence case for the homeowners ask what happened immediately after the accident.

Neither of them offered me any medical assistance nor did either of them call 911 and all Carol could think of besides calling David an idiot was calling her homeowners insurance.



They all left me out in the yard screaming for help while they were busy making sure they were covered.

She even went as far as to finally call the Emergency Room after I was already there just to tell me she was covered.

How selfish are people when they worry about if their insured over helping the person who was hurt and bleeding badly in their yard.

I'm glad she got her answer and had to share it with me only to find out her coverage won't even pay the medical bills.

I'm not happy with the offer.

As far as John Choyinski, he knows he has to call you and said he will tomorrow.

Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Nov 18, 2013, at 1:28 PM, Hans Mast <[hansmast@comcast.net](mailto:hansmast@comcast.net)> wrote:

Im waiting to hear from John. I tried calling him last week, but no one answered.

In addition, the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery....

Let me know what you think..

Hans

----- Original Message -----

From: Paul Dulberg <[pdulberg@comcast.net](mailto:pdulberg@comcast.net)>

To: Hans Mast <[hansmast@comcast.net](mailto:hansmast@comcast.net)>

Sent: Fri, 15 Nov 2013 22:41:26 -0000 (UTC)

Subject: Dave's Best and oldest friend John

Hans,

Just spoke with John Choyinski again about talking with you.

I am leaving your number with him as he has agreed to talk with you about David Gagnon.

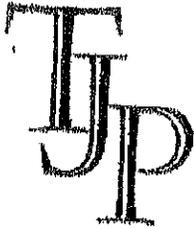
I believe he will try and call sometime tomorrow.

Paul

Oh and I know that nothing that happened right after the incident makes any difference as to the validity of the injuries but David's conduct immediately after the incident does show his lack of moral values for other humans and what he was willing and was not willing to do to help me get medical help. For his actions towards me or any other human being is enough to sue the shit out him alone. It is the things that happened afterwards that upset me the most.

Sorry for the rant but Dave was a complete ass all the way and deserves this.

Paul Dulberg  
847-497-4250  
Sent from my iPad



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET  
McHENRY, ILLINOIS 60050  
TELEPHONE: 815.344.3797  
FACSIMILE: 815.344.5280  
[www.popovichlaw.com](http://www.popovichlaw.com)

THOMAS J. POPOVICH  
HANS A. MAST  
JOHN A. KORNAK

MARK J. VOGG  
JAMES P. TUTAJ  
ROBERT J. LUMBER  
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg  
4606 Hayden Court  
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*  
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

**COPY**  
HANS A. MAST

smq  
Enclosure



WAUKEGAN OFFICE  
210 NORTH MARTIN LUTHER  
KING JR. AVENUE  
WAUKEGAN, IL 60085

GENERAL RELEASE AND SETTLEMENT AGREEMENT

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22<sup>nd</sup> Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- I was not 65 or older on the date of the occurrence.
- I was not receiving SSI or SSDI on the date of the occurrence.
- I am not eligible to receive SSI or SSDI.
- I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: \_\_\_\_\_

\_\_\_\_\_  
PAUL DULBERG

STATE OF ILLINOIS        )  
  ) SS.  
COUNTY OF MCHENRY    )

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this \_\_\_\_\_ day of January, 2014.

\_\_\_\_\_  
Notary Public

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Subject:** Fwd: McGuire settlement  
**Date:** December 28, 2016 10:21:55 AM CST  
**To:** paul\_dulberg@comcast.net

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Date:** January 29, 2014 at 1:59:31 PM CST  
**To:** Hans Mast <hansmast@comcast.net>  
**Subject:** Re: McGuire settlement

Ok, it's signed and in the mail.

Hope that some yahoo in the govt. doesn't someday decide to go after everyone they think they might get a dollar out of and end up holding me responsible for the McGuires fees incurred while they fight it out.

I'm not in the business of warranting, insuring or protecting the McGuires from government. Especially for only 5 grand. For that kind of protection it could cost millions but I trust your judgement.

Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Jan 29, 2014, at 11:49 AM, Hans Mast <hansmast@comcast.net> wrote:

SSD has to be part of it...its not going to effect anything...  
We can't prevent disclosure of the amount...

----- Original Message -----

**From:** Paul Dulberg <pdulberg@comcast.net>  
**To:** Hans Mast <hansmast@comcast.net>  
**Sent:** Wed, 29 Jan 2014 17:47:39 -0000 (UTC)  
**Subject:** Re: McGuire settlement

What and why do those questions have any relevance at all and why do they need to be part of this agreement?  
Particularly the one about being eligible.

Also, I cannot warranty against what SSDI, Medicare or any other government institution wishes to do.

Is it possible to make this agreement blind to the McGuires or David Gagnon?

What I mean is can we make it so that the amount of money cannot be told to them in any way?

It would drive David's ego crazy if he thought it was a large sum and was banned from seeing how much it is.

Paul Dulberg  
847-497-4250

Sent from my iPad

On Jan 29, 2014, at 10:51 AM, Hans Mast <hansmast@comcast.net> wrote:

Its not a big deal...if you weren't receiving it than don't check it...not sure what the question is...

----- Original Message -----

**From:** Paul Dulberg <pdulberg@comcast.net>  
**To:** Hans Mast <hansmast@comcast.net>  
**Sent:** Wed, 29 Jan 2014 16:16:04 -0000 (UTC)  
**Subject:** McGuire settlement

Here is a copy of the first page.

It has check boxes and one of the check boxes says;

I am not eligible to receive SSI or SSDI.

Another says;

I am not receiving SSI or SSDI.

As you know, I have applied for SSDI and SSI



**From:** Paul Dulberg <pdulberg@comcast.net>  
**Subject:** Fwd: Memo  
**Date:** December 27, 2016 6:11:20 PM CST  
**To:** paul\_dulberg@comcast.net

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Date:** February 22, 2015 at 7:42:25 PM CST  
**To:** Hans Mast <hansmast@att.net>  
**Subject:** Re: Memo

To believe David's version of events you must believe I was committing suicide.  
Who in their right mind puts his arm into a chainsaw?

I figured you would cop out again...

Now I'm left wondering...  
How hard is it to sue an atty?

And yes I am and have been looking for someone who will take this case...

The issue of my word vs David Gagnons... Did he cut me or did I cut myself?

Of course he cut me.

Next issue please?

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Feb 22, 2015, at 7:20 PM, Hans Mast <hansmast@att.net> wrote:

Paul I no longer can represent you in the case. We obviously have differences of opinion as to the value of the case. I've been telling you over a year now the problems with the case and you just don't see them. You keep telling me how injured you are and completely ignore that it doesn't matter if you passed away from the accident because we still have to prove that the defendant was at fault. While you think it is very clear - it is not. My guess is that seven out of 10 times you will lose the case outright. That means zero. That's why I have been trying to convince you to agree to a settlement. You clearly do not want to. There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only alternative is to take the case to trial and I am not interested in doing that. I will wait for you to find a new attorney. I can't assist you any further in this case. Just let me know.

Sent from my iPhone

On Feb 22, 2015, at 7:14 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Let's not be harsh, We have a couple of weeks till dr Kujawa's billing arrives.  
I agree showing me the memo is a good idea it's just not the accuracy I expected.  
I know I'm being confrontative about all of this but let's face it, my working days are over let alone a career I have been building since I was in high school. My dreams of family are over unless I have enough to provide and pay for the care of children and a roof.  
What's left for me?  
Facebook, scrap booking, crafts, etc... A life of crap...  
With ongoing pain and grip issues in my dominate arm/hand that are degenerative.

This is as total as it gets for us in the working class short of being paralyzed or dead.

I need someone who is on my side, top of their game and will see to it that I'm comfortable after all this is over.

What I feel is an attempt to settle for far less than this is remotely worth just to get me off the books.





Binding Mediation Award

Paul Dulberg

v.

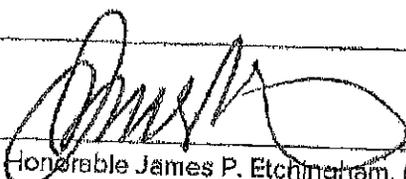
David Gagnon

ADR Systems File # 33391EMAG

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of: Paul Dulberg  
Gross Award: \$ 660,000.  
Comparative fault: 15 % (if applicable)  
Net Award: \$ 561,000

Comments/Explanation	<u>Medical</u>	<u>\$ 60,000.</u>
	<u>Future medical</u>	<u>\$ 200,000.</u>
	<u>Lost wages</u>	<u>\$ 250,000.</u>
	<u>P &amp; S</u>	<u>75,000.</u>
	<u>L &amp; L</u>	<u>75,000.</u>

  
The Honorable James P. Etchingham, (Ret.)



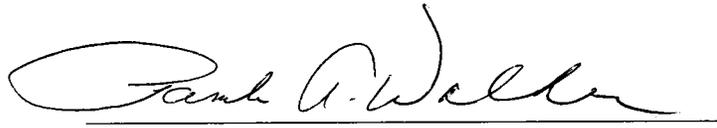


**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was caused to be served by Email on the 5th day of July, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III  
The Gooch Firm  
209 S. Main Street  
Wauconda, IL 60084  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.



Paul A. Walker

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

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

**DEFENDANTS' 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, move to dismiss Plaintiff's First Amended Complaint at Law, and state as follows:

1. 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. This legal malpractice case arises out of that underlying personal injury case.

2. 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).

3. 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).

4. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1st Dist. 1995).

5. Dulberg fails to allege requisite facts in support of a legal malpractice claim, including each and every element of the “underlying” case or “case within the case” against the McGuires.

6. Dulberg’s complaint must be dismissed pursuant to 735 ILCS 5/2-615.

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615, respectfully request this Honorable Court dismiss Plaintiff’s First Amended Complaint at Law 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](mailto:gflynn@clausen.com)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was caused to be served by Email on the 5th day of July, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III  
The Gooch Firm  
209 S. Main Street  
Wauconda, IL 60084  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.



---

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

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

**MEMORANDUM IN SUPPORT OF DEFENDANTS’  
MOTION TO DISMISS FIRST AMENDED COMPLAINT AT LAW**

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, submit this Memorandum in Support of Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint at Law 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 reluctantly agreed to accept the McGuires’ settlement offer. He has attempted to state a claim against Popovich and Mast for legal malpractice. However, 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”).

## **II. PROCEDURAL HISTORY**

On November 28, 2017, Plaintiff filed his single count Complaint at Law for legal malpractice. Defendants moved to dismiss. On May 10, 2018, the Court granted Defendants’ Motion to Dismiss pursuant to 735 ILCS 5/615 (see Order attached as Exhibit 1). During the hearing on Defendants’ Motion to Dismiss, Judge Meyer ordered that the Plaintiff plead with more particularity and specificity regarding any allegations that he was misled. The Court also ordered the Plaintiff to provide more specificity and particularity with respect to any claims that information provided by Defendants to the Plaintiff was false and misleading. Plaintiff filed its First Amended Complaint at Law on June 7, 2018.

## **III. STATEMENT OF FACTS**

### **A. The Following Facts Can Be Gleaned From The First Amended Complaint (Exhibit 2) 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 2, ¶ 6). Gagnon lost control of the chainsaw and caused personal injury to Dulberg. (Exhibit 2, ¶ 7). In May of 2012, Dulberg retained Popovich. (Exhibit 2, ¶8). On May 15, 2012, Mast filed a Complaint on behalf of Dulberg against Gagnon and the McGuires in the Circuit Court of McHenry County, Illinois, Case No, 12

LA 178. (Exhibit 2, ¶ 9, and Exhibit 2B)<sup>1</sup>. 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 2, ¶ 18 and Exhibit 2D). Defendants continued to represent Dulberg until March 2015. (Exhibit 2, ¶ 21). Dulberg retained successor counsel and proceeded to a binding mediation and received a mediation award (Exhibit 2, ¶ 24 and Exhibit 2G). After 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 2, ¶ 28-29).

**B. Alleged Acts of Negligence**

Popovich's and Mast's alleged malpractice revolves around the settlement of the underlying case between Dulberg and McGuires. The allegations of a breach of the standard of care are all contained in ¶ 31, subsections a) through o) inclusive. Paragraph 31 states as follows:

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG 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 McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;
- b) Failed to thoroughly investigate liability issues against property owners of the subject property;

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<sup>1</sup> The exhibits to the underlying complaint in Case No. 12 LA 178 will be referenced as Exhibits 2A, 2B, 2C, 2D, 2E, 2F, and 2G.

- c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG, for example hiring a liability expert;
- d) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;
- e) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;
- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails, into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that [sic] had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

#### **IV. 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 (1<sup>st</sup> 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. (5<sup>th</sup>) 1330029 (2014), quoting *Owens v. McDermott Will & Emery*, 316 Ill. App. 340 (1st Dist. 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 (1st Dist.1995).

**B. Dulberg Fails to Plead Facts in Support of His Conclusory Allegations**

Dulberg's second attempt at stating a claim fails no better than his first. He still fails to plead with specificity and particularity as to how he was misled, or how any information provided to him was false and misleading. His allegations are pled in conclusory fashion throughout. He also fails to plead any facts concerning the McGuires' liability in the underlying case. His allegations concern the viability of a tort claim against property owners. Accordingly, he must plead facts in support of the property owners' [the McGuires] liability in the underlying case. Instead, Dulberg pleads only conclusions. More is necessary under Illinois law.

Dulberg has failed to follow the court's direction from the hearing on Defendant's Motion to Dismiss. The allegations of negligence contained in ¶ 31 fail to allege any facts in support of the conclusions. For example, what necessary discovery was not conducted? (¶ 31 (c)) What is the law pertaining to a property owner's duties and responsibilities? (¶ 31 (f)). How did defendants falsely advise Dulberg that the actions taken regarding the McGuires was proper? (¶ 31 (i)). What was concealed from Dulberg? (¶ 31 (k)). The bottom line is that Dulberg has yet to explain how the McGuires would have been found liable. The only thing that can be gleaned

from the facts alleged in the Complaint and First Amended Complaint, is that Dulberg was injured on their property. He fails to explain how the McGuire's breached any duty to him, and how they would have been liable.

Additionally, Dulberg's allegations of coercion are not supported by his own pleadings. It is reasonably inferred from the pleadings that Dulberg had ample time to retain another attorney (in fact later he did). Exhibit E to his First Amended Complaint establishes that he deliberated over the decision to settle, and mailed a signed release back to Mast. So how was he coerced, when he alleges that he met with Mast, and then later mailed the executed release?

Moreover, his allegations regarding the failure to retain an expert are unsupported. He also fails to explain why his successor counsel did not retain an expert at the appropriate time if necessary. Lastly, Dulberg can never properly allege proximately caused damages regarding the allegation in ¶ 31 (e), that Gagnon's insurance coverage was \$300,000 and not \$100,000. In fact, Dulberg admits in ¶ 24 that he recovered \$300,000 in available coverage from Gagnon. If Mast incorrectly reported the available coverage, it did not cause any damage, as Dulberg's successor counsel was apparently able to recover the full amount of available coverage against the individual who injured Dulberg with a chainsaw.

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 has failed twice. His First Amended Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-615.

V. CONCLUSION

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 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

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GEORGE K. FLYNN  
CLAUSEN MILLER P.C.

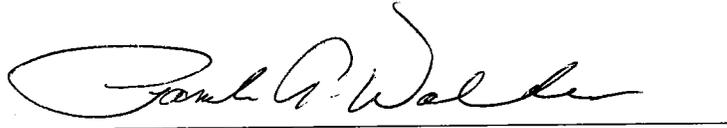
GEORGE K. FLYNN  
CLAUSEN MILLER P.C.  
ARDC No. 6239349  
10 South LaSalle Street  
Chicago, Illinois 60603-1098  
(312) 855-1010  
Attorneys for Defendants  
gflynn@clausen.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 5th day of July, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III  
The Gooch Firm  
209 S. Main Street  
Wauconda, IL 60084  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

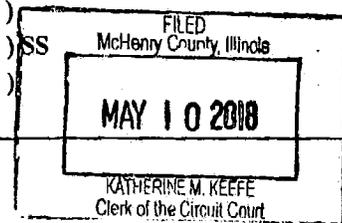
  
\_\_\_\_\_

# **EXHIBIT 1**

IN THE CIRCUIT COURT OF THE 22<sup>ND</sup> JUDICIAL CIRCUIT

Ln. 6

STATE OF ILLINOIS  
COUNTY OF MCHENRY



GEN. NO. 17 LA 377  
 Jury  Non-Jury

Dulberg

vs. Mast, et al

Date: 5-10-18 Plaintiff's Attorney S. Walczyk Defendant's Attorney G. Flynn

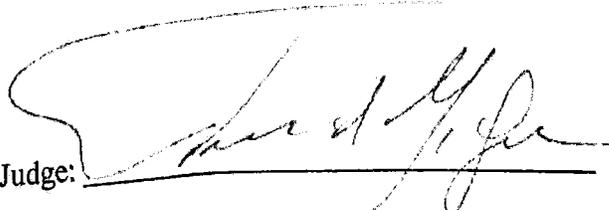
**ORDER**

This matter before the Court on hearing on Defendants' combined Motion to Dismiss, both parties present by counsel, the Court fully advised in the premises

IT IS ORDERED:

1. Defendants' 2-615 motion to Dismiss is granted, and the 2-619 motion is denied
2. Plaintiff granted 28 days to file a First Amended Complaint (6/7/18)
3. Defendants granted 28 days thereafter to Answer or otherwise plead (7/5/18)
4. Matter is set for status of pleadings on July 20, 2018 at 9:00 am in 201.

Prepared by: S. Walczyk / Couch Kim  
Attorney for: Dulberg  
Attorney Registration No.: 6315819

Judge: 

# **EXHIBIT 2**

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

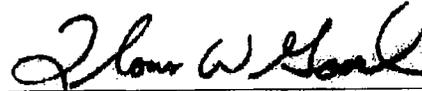
**Katherine M. Keefe**  
Clerk of the Circuit Court  
\*\*\*Electronically Filed\*\*\*  
Transaction ID: 17111166062  
17LA000377  
06/07/2018  
McHenry County Illinois  
22nd Judicial Circuit  
\*\*\*\*\*

PAUL DULBERG, )  
Plaintiff, )  
 ) No.: 17 LA 377  
v. )  
 )  
THE LAW OFFICES OF THOMAS J. )  
POPOVICH, P.C. and HANS MAST, )  
Defendants. )

**NOTICE OF FILING**

TO: George Flynn (gflynn@clausen.com)  
Clausen Miller, P.C.  
10 South LaSalle Street, 16th Floor  
Chicago IL 60603

**PLEASE TAKE NOTICE** that on **June 7, 2018** I caused to be filed with the Clerk of the Circuit Court of McHenry County, Illinois the attached *Plaintiff's First Amended Complaint at Law*.



Thomas W. Gooch, III

**PROOF OF SERVICE**

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedures, the undersigned certifies that she served a copy of the foregoing to whom it is addressed via the McHenry County I2File Efile System and via email transmission to on June 7, 2018.



THE GOOCH FIRM  
209 South Main Street  
Wauconda, Illinois 60084  
847 526 0110  
gooch@goochfirm.com  
office@goochfirm.com  
ARDC No.: 3123355



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 same area.

7. At this time, Gagnon lost control of the chainsaw he was using causing it to strike and cut DULBERG's arm. 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 properly 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. Also MAST incorrectly informed DULBERG that the insurance policy limit for the Gagnon was only \$100,000.00, when in reality the policy was \$300,000.00.

14. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST began urging DULBERG to settle the matter against William McGuire and Caroline McGuire for \$5,000.00.

15. On November 18, 2013, MAST wrote two emails to DULBERG urging DULBERG to accept the \$5,000.00, "the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery...." \* \* \* "So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case". (See Emails attached as **Group Exhibit C.**)

16. Similarly, on November 20, 2013 MAST emailed DULBERG urging him to accept the \$5,000.00 otherwise “the McGuires will get out for FREE on a motion.” (See Emails attached as **Group Exhibit C.**)

17. On or around December 2013 or January 2014, MAST met with DULBERG and other family members and again advised them there was no cause of action against William McGuire and Caroline McGuire, and verbally told DULBERG that he had no choice but to execute a release in favor of the McGuires for the sum of \$5,000.00 and if he did not, he would get nothing.

18. DULBERG, having no choice in the matter, reluctantly agreed with MAST 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 D.**

19. 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

20. After accepting the \$5,000 settlement, DULBERG wrote MAST an email on January 29, 2014 stating “I trust your judgment.” (See Email attached as **Exhibit E.**)

21. MAST and POPOVICH continued to represent DULBERG into 2015 and continuously assured him that his case was being handled properly.

22. On February 22, 2015, as to any chance of settling the remainder of his case against Gagnon MAST wrote to DULBERG that, “There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only

alternative is to take the case to trial and I am not interested in doing that.” (See Email attached as **Exhibit F.**)

23. MAST and POPOVICH represented DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship due to a claimed failure of communication. MAST and POPOVICH withdrew from the representation of DULBERG.

24. Thereafter, DULBERG retained other attorneys and proceeded to a Court ordered 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. However, due to the settlement with the McGuires, DULBERG was only able to collect \$300,000.00 based upon the insurance policy available. A copy of the aforesaid Mediation Award is attached hereto as **Exhibit G.**

25. The McGuires 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. McGuires were well able to pay all, or a portion of the binding mediation award had they still remained parties.

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

27. Until the time of the mediation award, DULBERG 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 McGuires would only complicate the case.

28. Following the execution of the mediation agreement and the final mediation award, DULBERG realized for the first time in December of 2016 that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuires was a serious and substantial mistake.

29. It was not until the mediation in December 2016, based on the expert's opinions that DULBERG retained for the mediation, that DULBERG became reasonably aware that MAST and POPOVICH did not properly represent him by pressuring and coercing him to accept a settlement for \$5,000.00 on an "all or nothing" basis.

30. DULBERG was advised to seek an independent opinion from a legal malpractice attorney and received that opinion on or about December 16, 2016.

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG 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 McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;
- 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, for example hiring a liability expert;
- d.) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;
- e.) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;

- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails, into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

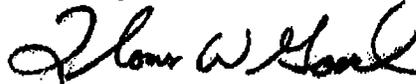
- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

32. 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 DULBERG to release the McGuires, 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.

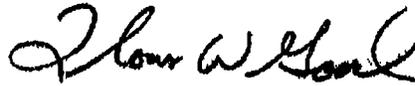
Respectfully submitted by,

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

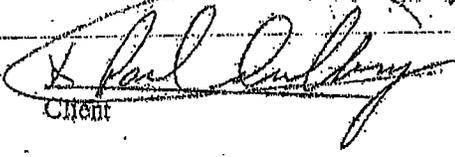
Thomas W. Gooch, III  
THE GOOCH FIRM  
209 S. Main Street  
Wauconda, IL 60084  
847-526-0110  
ARDC No.: 3123355  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)  
[office@goochfirm.com](mailto:office@goochfirm.com)

CONTRACT FOR LEGAL SERVICES

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to ~~1/3~~ % in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.

  
Client

LAW OFFICES OF THOMAS J. POPOVICH

By:   
\_\_\_\_\_

Client \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
McHenry, Illinois 60050  
815/344-3797





3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 15 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, not work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create an unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scared and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,  
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs  
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.

  
\_\_\_\_\_  
One of the Attorneys for Plaintiff

Hans A. Mast  
LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
Lake, Illinois 60050  
(815) 344-3797  
ARDC No. 06203684

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Subject:** Fwd: Dave's Best and oldest friend John  
**Date:** December 28, 2016 10:33:35 AM CST  
**To:** paul\_dulberg@comcast.net

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Date:** November 20, 2013 at 7:26:53 AM CST  
**To:** Hans Mast <hansmast@comcast.net>  
**Subject:** Re: Dave's Best and oldest friend John

Morning Hans,  
Ok we can meet. I will call Sheila today and set up a time.  
Please send me a link to the current Illinois statute citing that the property owner is not liable for work done on their property resulting in injury to a neighbor.  
I need to read it myself and any links to recent case law in this area would be helpful as well.  
Thanks,  
Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Nov 20, 2013, at 6:59 AM, Hans Mast <hansmast@comcast.net> wrote:

Paul, lets meet again to discuss. The legality of it all is that a property owner does not have legal liability for a worker (whether friend, son or otherwise) who does the work on his time, using his own independent skills. Here, I deposed the McGuires, and they had nothing to do with how Dave did the work other than to request the work to be done. They had no control on how Dave wielded the chain saw and cut you. Its that simple. We don't have to accept the \$5,000, but if we do not, the McGuires will get out for FREE on a motion. So that's the situation.

----- Original Message -----

**From:** Paul Dulberg <pdulberg@comcast.net>  
**To:** Hans Mast <hansmast@comcast.net>  
**Sent:** Tue, 19 Nov 2013 02:29:56 -0000 (UTC)  
**Subject:** Re: Dave's Best and oldest friend John

I still don't get how they don't feel responsible for work done on their property by their own son that ended up cutting through 40% of my arm.

Perhaps their negligence is the fact that they didn't supervise the work close enough but they did oversee much of the days activity with David. Just because Dave was doing the work doesn't mean they were not trying to tell their kid what to do. They told him plenty of times throughout the day what to do. How is that not supervising?

Paul  
Paul Dulberg  
847-497-4250  
Sent from my iPad

On Nov 18, 2013, at 8:07 PM, Hans Mast <hansmast@comcast.net> wrote:

Paul whether you like it or not they don't have a legal liability for your injury because they were not directing the work. So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case

Sent from my iPhone

On Nov 18, 2013, at 7:40 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Only 5, That's not much at all.  
Is this a take it or leave it or do we have any other options?

If you want a negligence case for the homeowners ask what happened immediately after the accident.

Neither of them offered me any medical assistance nor did either of them call 911 and all Carol could think of besides calling David an idiot was calling her homeowners insurance.



They all left me out in the yard screaming for help while they were busy making sure they were covered.

She even went as far as to finally call the Emergency Room after I was already there just to tell me she was covered.

How selfish are people when they worry about if their insured over helping the person who was hurt and bleeding badly in their yard.

I'm glad she got her answer and had to share it with me only to find out her coverage won't even pay the medical bills.

I'm not happy with the offer.

As far as John Choyinski, he knows he has to call you and said he will tomorrow.

Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Nov 18, 2013, at 1:28 PM, Hans Mast <[hansmast@comcast.net](mailto:hansmast@comcast.net)> wrote:

Im waiting to hear from John. I tried calling him last week, but no one answered.

In addition, the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery....

Let me know what you think..

Hans

----- Original Message -----

From: Paul Dulberg <[pdulberg@comcast.net](mailto:pdulberg@comcast.net)>  
To: Hans Mast <[hansmast@comcast.net](mailto:hansmast@comcast.net)>  
Sent: Fri, 15 Nov 2013 22:41:26 -0000 (UTC)  
Subject: Dave's Best and oldest friend John

Hans,

Just spoke with John Choyinski again about talking with you.

I am leaving your number with him as he has agreed to talk with you about David Gagnon.

I believe he will try and call sometime tomorrow.

Paul

Oh and I know that nothing that happened right after the incident makes any difference as to the validity of the injuries but David's conduct immediately after the incident does show his lack of moral values for other humans and what he was willing and was not willing to do to help me get medical help. For his actions towards me or any other human being is enough to sue the shit out him alone. It is the things that happened afterwards that upset me the most.

Sorry for the rant but Dave was a complete ass all the way and deserves this.

Paul Dulberg  
847-497-4250  
Sent from my iPad



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET  
McHENRY, ILLINOIS 60050  
TELEPHONE: 815.344.3797  
FACSIMILE: 815.344.5280  
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THOMAS J. POPOVICH  
HANS A. MAST  
JOHN A. KONNAR

MARK J. VOOG  
JAMES P. TUTAJ  
ROBERT J. LUMBER  
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg  
4606 Hayden Court  
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*  
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

**COPY**  
HANS A. MAST

smq  
Enclosure



WAUKEGON OFFICE  
210 NORTH MARTIN LUTHER  
KING JR. AVENUE  
WAUKEGON, IL 60085

**GENERAL RELEASE AND SETTLEMENT AGREEMENT**

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22<sup>nd</sup> Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- I was not 65 or older on the date of the occurrence.
- I was not receiving SSI or SSDI on the date of the occurrence.
- I am not eligible to receive SSI or SSDI.
- I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

- c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: \_\_\_\_\_

\_\_\_\_\_  
PAUL DULBERG

STATE OF ILLINOIS     )  
  ) SS.  
COUNTY OF MCHENRY    )

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this \_\_\_\_\_ day of January, 2014,

\_\_\_\_\_  
Notary Public

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Subject:** Fwd: McGuire settlement  
**Date:** December 28, 2016 10:21:55 AM CST  
**To:** paul\_dulberg@comcast.net

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Date:** January 29, 2014 at 1:59:31 PM CST  
**To:** Hans Mast <hansmast@comcast.net>  
**Subject:** Re: McGuire settlement

Ok, it's signed and in the mail.  
Hope that some yahoo in the govt. doesn't someday decide to go after everyone they think they might get a dollar out of and end up holding me responsible for the McGuire's fees incurred while they fight it out.  
I'm not in the business of warranting, insuring or protecting the McGuire's from government. Especially for only 5 grand. For that kind of protection it could cost millions but I trust your judgement.  
Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Jan 29, 2014, at 11:49 AM, Hans Mast <hansmast@comcast.net> wrote:

SSD has to be part of it...its not going to effect anything...  
We can't prevent disclosure of the amount...

----- Original Message -----

**From:** Paul Dulberg <pdulberg@comcast.net>  
**To:** Hans Mast <hansmast@comcast.net>  
**Sent:** Wed, 29 Jan 2014 17:47:39 -0000 (UTC)  
**Subject:** Re: McGuire settlement

What and why do those questions have any relevance at all and why do they need to be part of this agreement?  
Particularly the one about being eligible.  
Also, I cannot warranty against what SSDI, Medicare or any other government institution wishes to do.  
Is it possible to make this agreement blind to the McGuire's or David Gagnon?  
What I mean is can we make it so that the amount of money cannot be told to them in any way?  
It would drive David's ego crazy if he thought it was a large sum and was banned from seeing how much it is.

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Jan 29, 2014, at 10:51 AM, Hans Mast <hansmast@comcast.net> wrote:

Its not a big deal...if you weren't receiving it than don't check it...not sure what the question is...

----- Original Message -----

**From:** Paul Dulberg <pdulberg@comcast.net>  
**To:** Hans Mast <hansmast@comcast.net>  
**Sent:** Wed, 29 Jan 2014 16:16:04 -0000 (UTC)  
**Subject:** McGuire settlement

Here is a copy of the first page.  
It has check boxes and one of the check boxes says;  
I am not eligible to receive SSI or SSDI.  
Another says;  
I am not receiving SSI or SSDI.  
As you know, I have applied for SSDI and SSI



**From:** Paul Dulberg <pdulberg@comcast.net>  
**Subject:** Fwd: Memo  
**Date:** December 27, 2016 6:11:20 PM CST  
**To:** paul\_dulberg@comcast.net

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Date:** February 22, 2015 at 7:42:25 PM CST  
**To:** Hans Mast <hansmast@att.net>  
**Subject:** Re: Memo

To believe David's version of events you must believe I was committing suicide.  
Who in their right mind puts his arm into a chainsaw?

I figured you would cop out again...

Now I'm left wondering...  
How hard is it to sue an atty?

And yes I am and have been looking for someone who will take this case...

The issue of my word vs David Gagnons... Did he cut me or did I cut myself?

Of course he cut me.

Next issue please?

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Feb 22, 2015, at 7:20 PM, Hans Mast <hansmast@att.net> wrote:

Paul I no longer can represent you in the case. We obviously have differences of opinion as to the value of the case. I've been telling you over a year now the problems with the case and you just don't see them. You keep telling me how injured you are and completely ignore that it doesn't matter if you passed away from the accident because we still have to prove that the defendant was at fault. While you think it is very clear - it is not. My guess is that seven out of 10 times you will lose the case outright. That means zero. That's why I have been trying to convince you to agree to a settlement. You clearly do not want to. There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only alternative is to take the case to trial and I am not interested in doing that. I will wait for you to find a new attorney. I can't assist you any further in this case. Just let me know.

Sent from my iPhone

On Feb 22, 2015, at 7:14 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Let's not be harsh, We have a couple of weeks till dr Kujawa's billing arrives.  
I agree showing me the memo is a good idea it's just not the accuracy I expected.  
I know I'm being confrontative about all of this but let's face it, my working days are over let alone a career I have been building since I was in high school. My dreams of family are over unless I have enough to provide and pay for the care of children and a roof.

What's left for me?  
Facebook, scrap booking, crafts, etc... A life of crap...  
With ongoing pain and grip issues in my dominate arm/hand that are degenerative.

This is as total as it gets for us in the working class short of being paralyzed or dead.

I need someone who is on my side, top of their game and will see to it that I'm comfortable after all this is over.

What I feel is an attempt to settle for far less than this is remotely worth just to get me off the books.





Binding Mediation Award

Paul Dulberg

v.

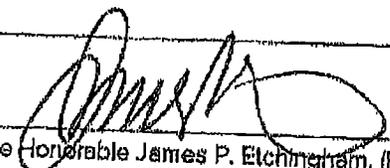
David Gagnon

ADR Systems File # 33391EMAG

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of: Paul Dulberg  
Gross Award: \$ 660,000.  
Comparative fault: 15 % (if applicable)  
Net Award: \$ 561,000

Comments/Explanation	<u>Medical</u>	<u>\$ 60,000.</u>
	<u>Future medical</u>	<u>\$ 200,000.</u>
	<u>Lost wage</u>	<u>\$ 250,000.</u>
	<u>PIS</u>	<u>75,000.</u>
	<u>LNL</u>	<u>75,000.</u>

  
The Honorable James P. Etchingham, (Ret.)

ADR Systems • 20 North Clark Street • Floor 26 • Chicago, IL 60602  
312.960.2260 • info@adrsystems.com • www.adrsystems.com



Ln 7

Dulberg  
Plaintiff

Circuit Clerk Use Only	
_____	ORD
_____	ORDJ
_____	ORDDWP

vs

Case Number 17 LA 377

Law Offices of Thomas Popovich et al  
Defendant

**ORDER**

FILED  
McHenry County, Illinois  
**JUL 20 2018**  
KATHERINE M. KEEFE  
Clerk of the Circuit Court

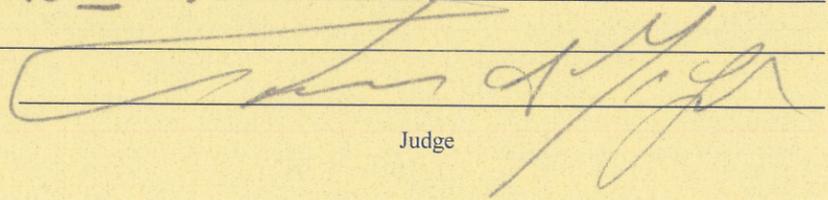
- Plaintiff(s) appear in person/by attorney S. WALCZYK
- Defendant(s) appear in person/by attorney G Flynn
- Summons not served; alias summons to issue; return date \_\_\_\_\_
- Summons has been properly served on Defendant(s) \_\_\_\_\_
- Defendant(s) appear and admit liability. Judgment for Plaintiff(s) against Defendant(s) for \$ \_\_\_\_\_, plus interest of \$ \_\_\_\_\_ plus attorney fees of \$ \_\_\_\_\_ for a total of \$ \_\_\_\_\_ plus court costs.
- Defendant(s), having failed to appear or otherwise respond to the summons, is found in default. Judgment for Plaintiff(s) against Defendant(s) for \$ \_\_\_\_\_, plus interest of \$ \_\_\_\_\_ plus attorney fees of \$ \_\_\_\_\_ for a total of \$ \_\_\_\_\_ plus court costs.
- Case set for  trial  arbitration on \_\_\_\_\_, 20\_\_ at \_\_\_\_\_ .m. in Courtroom \_\_\_\_\_
- Defendant(s) shall file an Appearance within \_\_\_\_\_ days of today's date, or without further Notice to Defendant(s), the trial date will be stricken and a judgment by default will be entered against Defendant(s) and in favor of Plaintiff(s).

**NOTICE TO DEFENDANT(S): THIS IS THE ONLY NOTICE YOU WILL RECEIVE OF THE TRIAL, OR ARBITRATION DATE AND YOUR OBLIGATION TO FILE AN APPEARANCE.**

- Defendant(s) shall file an answer or other pleading within \_\_\_\_\_ days of today's date.
- This case is continued on Motion of  Plaintiff;  Defendant;  By Agreement;  Court; to September 12, 2018 at 10:00 a.m. for hearing on Motion to.
- Case called, Plaintiff(s) fail to appear. Case dismissed for Plaintiff's failure to prosecute. Dismiss
- Case dismissed with/without prejudice on Plaintiff's motion. FIRST Amended Complaint
- After trial of this case, the Court enters a Judgment for Plaintiff(s) against Defendant(s) for \$ \_\_\_\_\_, plus interest of \$ \_\_\_\_\_ plus attorney fees of \$ \_\_\_\_\_ for a total of \$ \_\_\_\_\_ plus court costs.
- After trial of this case, the Court enters a Judgment for Defendant(s) against Plaintiff(s).

**COURT FURTHER ORDERS:**  
- Plaintiff granted 28 days (8/17/18) to Respond.  
- Defendants granted 14 days (8/31/18) to Reply.

Date: \_\_\_\_\_

  
Judge

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

PAUL DULBERG, )  
Plaintiff, )  
 ) No.: 17 LA 377  
v. )  
 )  
THE LAW OFFICES OF THOMAS J. )  
POPOVICH, P.C. and HANS MAST, )  
Defendants. )

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FIRST  
AMENDED COMPLAINT AT LAW**

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 "Defendants") Motion to Dismiss states to the Court the following:

**INTRODUCTION**

Defendants brought their Motion to Dismiss First Amended Complaint at Law, pursuant to Section 2-615. (See Defendants' Memorandum in Support of Defendants' 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. However, after review of the facts in the Complaint, this Honorable Court will determine that DULBERG's First Amended 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (2004); *King v. First Capital Financial Services Corp.* 215 Ill.2d 1, 12 (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 (1995).

**ARGUMENT**  
(under 2-615)

**I. Dulberg sufficiently states a cause of action for legal malpractice against the Defendants.**

1. In his First Amended 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. In the Motion to Dismiss, Defendants allege that DULBERG has not pled necessary facts. For example, Defendants argue that DULBERG did not plead enough facts as to what necessary discovery was not conducted under paragraph 31(c) of the First Amended Complaint (See Motion to Dismiss attached as **Exhibit A**, pg. 6) This is not true.

3. In that same paragraph, DULBERG gives an example of what type of discovery was necessary, i.e. hiring a liability expert. (See First Amended Complaint, **Exhibit B**, ¶31(c).)

4. Had Defendants conducted expert discovery in DULBERG's case, the expert would have opined as to the liability of both Gagnon and the McGuires. DULBERG's allegations that an expert should have been hired by MAST is proper because had MAST hired an expert prior to releasing the McGuires, the expert could have opined as to their liability which would have resulted in the McGuires staying in the case and DULBERG being able to obtain a much higher mediation award. Further, this opinion should have been made prior to settling with the McGuires in order to determine whether \$5,000.00 was a reasonable amount.

5. In their Motion, Defendants question why DULBERG's subsequent counsel did not retain an expert. (See Motion to Dismiss attached as **Exhibit A**, pg. 7) In fact, DULBERG and his subsequent counsel *did* retain an expert for the mediation and were successful in the mediation due to the expert's opinion as to liability. (See First Amended Complaint, **Exhibit B**, ¶24, 29.) Thus this issue in Defendants' Motion is moot.

6. DULBERG also discussed necessary discovery regarding insurance policies of Gagnon and McGuires. MAST failed to conduct discovery to obtain these insurance policies. This is evidenced in the First Amended Complaint where DULBERG pled that MAST advised him that Gagnon's insurance policy limit was only \$100,000.00, when in reality it was later discovered that the limit was \$300,000.00. (See First Amended Complaint, **Exhibit B**, ¶13, 22.) This shows that MAST did not have the sufficient discovery as to Gagnon's insurance policy.

7. Defendants' next issue with the First Amended Complaint is that DULBERG did not specify the law pertaining to a property owner's duties and responsibilities that MAST

should have been familiar with while representing DULBERG. (See Motion to Dismiss attached as **Exhibit A**, pg. 6.)

8. The law that MAST should have understood under paragraph 31(f) of the First Amended Complaint is premises liability and the liabilities of the parties involved in the underlying case. “Under the Premises Liability Act, the duty owed by a premises owner or occupier to an invitee or a licensee is that of ‘reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.’” (internal citation omitted) *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill.2d 213, 228 (Ill., 1996).

9. In this case, DULBERG was an invitee of the McGuires. “An invitee is defined as one who enters the premises of another with the owner’s or occupier’s express or implied consent for the mutual benefit of himself and the owner, or for a purpose connected with the business in which the owner is engaged.” *Rhodes v. Illinois Cent. Gulf R.R.*, *supra*. The McGuires had a duty of reasonable care to DULBERG as an invitee because DULBERG was on their property for their benefit, to cut down a tree. (See First Amended Complaint, **Exhibit B**, ¶6.)

10. MAST’s failure to become familiar with this law or chainsaw ownership liability, resulted in him coercing and pressuring DULBERG to accept a paltry settlement of \$5,000.00 with the McGuries, when in fact their liability was much more, as presented by the expert during the mediation. Based on this law, MAST would have seen that McGuires as homeowners did in fact owe a duty to DULBERG.

11. Also, had MAST reviewed the law on premises liability, he could have considered the law as to ultrahazardous circumstances and the strict liability of the homeowners. “Illinois has recognized strict liability principally in two instances:” \* \* \* “(2) when a defendant engages

in ultrahazardous or abnormally dangerous activity as determined by the courts, giving particular consideration, *inter alia*, to the appropriateness of the activity to the place where it is maintained, in light of the character of the place and its surroundings.” (internal citations omitted) *Miller v. Civil Constructors, Inc.*, 272 Ill.App.3d 263, 266 (2<sup>nd</sup> Dist., 1995). MAST should have considered strict liability as to the McGuires prior to advising DULBERG to settle.

12. Throughout the First Amended Complaint, DULBERG lists different ways (via email and in person communication) that Defendants falsely advised DULBERG that releasing the McGuires from liability was the proper course to take. (See First Amended Complaint, **Exhibit B**, ¶15-21.)

13. Also, MAST emailed and verbally told DULBERG that if he did not agree to the \$5,000.00 settlement with the McGuires, he would get nothing. (See First Amended Complaint, **Exhibit B**, ¶15-21.)

14. Overall, DULBERG has pled with enough specificity what MAST and/or the Defendants did improperly to breach the standard of care.

15. As to the specific allegations relating to Defendants’ concealment of facts to DULBERG, paragraph 31(k) of the First Amended Complaint, DULBERG stated what was concealed from him by the Defendants. Defendants concealed from DULBERG the actual policy limits from the McGuires and Gagnon, concealed facts relating to the explanation of liability law and what type of duty the McGuires owed to DULBERG, concealed that retaining an expert witness prior to accepting settlement would have been beneficial to DULBERG’s case, and concealed the fact that Defendants were handling everything properly when this was not the truth.

16. The facts pled regarding concealment are sufficiently pled in DULBERG's First Amended Complaint and must be taken as true in a Section 2-615 Motion.

17. Next, Defendants argue without any authority that DULBERG was not coerced because he had time to deliberate over the decision to settle. (See Motion to Dismiss attached as **Exhibit A**, pg. 7.) This is not true.

18. DULBERG's exhibits to the First Amended Complaint as well as the pleading itself demonstrate how MAST coerced DULBERG into the settlement with the McGuires.

19. DULBERG pled that MAST essentially gave him two options: to take the \$5,000.00 settlement or get nothing. DULBERG was coerced into this decision because he was unaware of any other option and forced to take the only available option.

20. On multiple occasions, MAST told DULBERG, via email, to accept the settlement otherwise the McGuires will get out of the case for free. (See First Amended Complaint, **Exhibit B**, ¶15, 16.)

21. DULBERG also pled that MAST verbally told him that he had no choice but to execute a release of the McGuires and accept the \$5,000.00. (See First Amended Complaint, **Exhibit B**, ¶17.)

22. Defendants also argue that Exhibit E to the First Amended Complaint shows that DULBERG had time to deliberate over the decision and thus could not have been coerced. (See Motion to Dismiss attached as **Exhibit A**, pg. 7.) This is not true.

23. Exhibit E to the First Amended Complaint is an email from DULBERG to MAST stating that the release was signed and put in the mail. Exhibit E further shows DULBERG's continued hesitation over the \$5,000.00 settlement however, based on the information that

MAST had told him, DULBERG said that he “trusted his judgment”. See Exhibit E to the First Amended Complaint.

24. “Coercion” and “duress” have essentially the same meaning: overpowering another's free will by imposition, oppression, or undue influence. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 341 Ill.App.3d 438, 446 (4<sup>th</sup> Dist., 2003). MAST continuous verbal and written threats to accept the settlement or get nothing resulted in DULBERG thinking (based on what his attorney was telling him) that he had no other choice but to accept this small settlement.

25. More importantly, whether DULBERG was coerced or acted willingly is a question of fact. *Schwartz v. Schwartz*, 29 Ill.App. 516, 527 (4<sup>th</sup> Dist., 1889).

26. The pleading and exhibit show that DULBERG made the decision to settle after meeting with MAST in person, and MAST telling him that he had no choice but to accept the settlement. DULBERG acted quickly to accept the settlement based on the information that MAST told him that if he would not accept it, the offer would be withdrawn and the McGuires would be successful on a summary judgment motion.

27. Simply because Exhibit E states that the release was mailed weeks later, does not mean that DULBERG was not coerced into accepting the settlement based on the information that he was given by his attorney whom he trusted.

28. In any event, the issue of coercion must be left to the trier of fact to decide after all evidence is obtained and at this point, determining a factual question on a Motion to Dismiss would be inappropriate.

29. Last Defendants raise the issue of proximate cause as to MAST’s improper determination of Gagnon’s insurance coverage limit being \$300,000.00 and not \$100,000.00.

(See Motion to Dismiss attached as **Exhibit A**, pg. 7.) As argued above, this allegation supports DULBERG's argument that MAST did not conduct the proper discovery, as evidenced by the incorrect policy limit. Had MAST not breached the standard of care and had he conducted proper discovery, DULBERG would have had the correct policy amount for Gagnon, and would have the insurance policy for the McGuires in order to make an informed decision as to settlement.

30. In DULBERG's case, he was forced to settle for an amount less than he would have reasonably received. After mediation, DULBERG was allowed only to recover to the extent of Gagnon's policy limits. (See First Amended Complaint, **Exhibit B**, ¶24, 27, 29.) Had MAST not allowed the release of the McGuires, DULBERG could have reasonably been able to collect the remainder of the mediation award against the McGuires. "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 (5<sup>th</sup> Dist., 1994). Thus, DULBERG properly brought a malpractice against the Defendants.

31. The allegations set forth as to the legal malpractice by DULBERG in his First Amended Complaint are not conclusions and when taken as true, are sufficient to withstand a Section 2-615 dismissal.

32. DULBERG has proven that the actions and inactions of the Defendants have caused DULBERG damages. (See First Amended Complaint, **Exhibit B**, ¶31, 32.) Any dispute as to the proximate cause and damages must be left to the jury as it is a factual question. 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 (1<sup>st</sup> 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 (1<sup>st</sup> Dist., 2009).

33. Defendants in their Motion to Dismiss are requiring of DULBERG to plead his entire case in a single Complaint. “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 (2<sup>nd</sup> 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 Defendants, thus should survive Defendants’ 2-615 Motion.

34. Accordingly, this Honorable Court should deny Defendants’ Motion in order to allow the case to be fully and properly litigated.

#### CONCLUSION

After review of the allegations in the First Amended Complaint and taking the allegations as true, this Honorable Court must find that DULBERG has properly stated and pled a claim for legal malpractice. 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 Second Amended Complaint to include any other facts this Court deems appropriate.

WHEREFORE your Plaintiff PAUL DULBERG prays this Honorable Court denies Defendants’ 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 Second Amended Complaint.

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



---

Thomas W. Gooch, III

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

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

**MEMORANDUM IN SUPPORT OF DEFENDANTS'**  
**MOTION TO DISMISS FIRST AMENDED COMPLAINT AT LAW**

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, submit this Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint at Law 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.

1624970.1



Dulberg now has a case of “buyer’s remorse,” admitting that he reluctantly agreed to accept the McGuires’ settlement offer. He has attempted to state a claim against Popovich and Mast for legal malpractice. However, 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”).

## **II. PROCEDURAL HISTORY**

On November 28, 2017, Plaintiff filed his single count Complaint at Law for legal malpractice. Defendants moved to dismiss. On May 10, 2018, the Court granted Defendants’ Motion to Dismiss pursuant to 735 ILCS 5/615 (see Order attached as Exhibit 1). During the hearing on Defendants’ Motion to Dismiss, Judge Meyer ordered that the Plaintiff plead with more particularity and specificity regarding any allegations that he was misled. The Court also ordered the Plaintiff to provide more specificity and particularity with respect to any claims that information provided by Defendants to the Plaintiff was false and misleading. Plaintiff filed its First Amended Complaint at Law on June 7, 2018.

## **III. STATEMENT OF FACTS**

### **A. The Following Facts Can Be Gleaned From The First Amended Complaint (Exhibit 2) 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 2, ¶ 6). Gagnon lost control of the chainsaw and caused personal injury to Dulberg. (Exhibit 2, ¶ 7). In May of 2012, Dulberg retained Popovich. (Exhibit 2, ¶8). On May 15, 2012, Mast filed a Complaint on behalf of Dulberg against Gagnon and the McGuires in the Circuit Court of McHenry County, Illinois, Case No, 12

LA 178. (Exhibit 2, ¶ 9, and Exhibit 2B)<sup>1</sup>. 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 2, ¶ 18 and Exhibit 2D). Defendants continued to represent Dulberg until March 2015. (Exhibit 2, ¶ 21). Dulberg retained successor counsel and proceeded to a binding mediation and received a mediation award (Exhibit 2, ¶ 24 and Exhibit 2G). After 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 2, ¶ 28-29).

**B. Alleged Acts of Negligence**

Popovich's and Mast's alleged malpractice revolves around the settlement of the underlying case between Dulberg and McGuires. The allegations of a breach of the standard of care are all contained in ¶ 31, subsections a) through o) inclusive. Paragraph 31 states as follows:

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG 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 McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;
- b) Failed to thoroughly investigate liability issues against property owners of the subject property;

---

<sup>1</sup> The exhibits to the underlying complaint in Case No. 12 LA 178 will be referenced as Exhibits 2A, 2B, 2C, 2D, 2E, 2F, and 2G.

- c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG, for example hiring a liability expert;
- d) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;
- e) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;
- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails, into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that [sic] had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

**IV. 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 (1<sup>st</sup> 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. (5<sup>th</sup>) 1330029 (2014), quoting *Owens v. McDermott Will & Emery*, 316 Ill. App. 340 (1st Dist. 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 (1st Dist.1995).

**B. Dulberg Fails to Plead Facts in Support of His Conclusory Allegations**

Dulberg's second attempt at stating a claim fails no better than his first. He still fails to plead with specificity and particularity as to how he was misled, or how any information provided to him was false and misleading. His allegations are pled in conclusory fashion throughout. He also fails to plead any facts concerning the McGuires' liability in the underlying case. His allegations concern the viability of a tort claim against property owners. Accordingly, he must plead facts in support of the property owners' [the McGuires] liability in the underlying case. Instead, Dulberg pleads only conclusions. More is necessary under Illinois law.

Dulberg has failed to follow the court's direction from the hearing on Defendant's Motion to Dismiss. The allegations of negligence contained in ¶ 31 fail to allege any facts in support of the conclusions. For example, what necessary discovery was not conducted? (¶ 31 (c)) What is the law pertaining to a property owner's duties and responsibilities? (¶ 31 (f)). How did defendants falsely advise Dulberg that the actions taken regarding the McGuires was proper? (¶ 31 (i)). What was concealed from Dulberg? (¶ 31 (k)). The bottom line is that Dulberg has yet to explain how the McGuires would have been found liable. The only thing that can be gleaned

from the facts alleged in the Complaint and First Amended Complaint, is that Dulberg was injured on their property. He fails to explain how the McGuire's breached any duty to him, and how they would have been liable.

Additionally, Dulberg's allegations of coercion are not supported by his own pleadings. It is reasonably inferred from the pleadings that Dulberg had ample time to retain another attorney (in fact later he did). Exhibit E to his First Amended Complaint establishes that he deliberated over the decision to settle, and mailed a signed release back to Mast. So how was he coerced, when he alleges that he met with Mast, and then later mailed the executed release?

Moreover, his allegations regarding the failure to retain an expert are unsupported. He also fails to explain why his successor counsel did not retain an expert at the appropriate time if necessary. Lastly, Dulberg can never properly allege proximately caused damages regarding the allegation in ¶ 31 (e), that Gagnon's insurance coverage was \$300,000 and not \$100,000. In fact, Dulberg admits in ¶ 24 that he recovered \$300,000 in available coverage from Gagnon. If Mast incorrectly reported the available coverage, it did not cause any damage, as Dulberg's successor counsel was apparently able to recover the full amount of available coverage against the individual who injured Dulberg with a chainsaw.

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 has failed twice. His First Amended Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-615.

V. CONCLUSION

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 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

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GEORGE K. FLYNN  
CLAUSEN MILLER P.C.

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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. ) No. 17 LA 377  
 )  
 THE LAW OFFICES OF THOMAS J. )  
 POPOVICH, P.C., and HANS MAST, )  
 )  
 Defendant. )

**FIRST AMENDED 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 First Amended 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.



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 same area.

7. At this time, Gagnon lost control of the chainsaw he was using causing it to strike and cut DULBERG's arm. 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 properly 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. Also MAST incorrectly informed DULBERG that the insurance policy limit for the Gagnon was only \$100,000.00, when in reality the policy was \$300,000.00.

14. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST began urging DULBERG to settle the matter against William McGuire and Caroline McGuire for \$5,000.00.

15. On November 18, 2013, MAST wrote two emails to DULBERG urging DULBERG to accept the \$5,000.00, "the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery...." \* \* \* "So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case". (See Emails attached as **Group Exhibit C**.)

16. Similarly, on November 20, 2013 MAST emailed DULBERG urging him to accept the \$5,000.00 otherwise “the McGuires will get out for FREE on a motion.” (See Emails attached as **Group Exhibit C.**)

17. On or around December 2013 or January 2014, MAST met with DULBERG and other family members and again advised them there was no cause of action against William McGuire and Caroline McGuire, and verbally told DULBERG that he had no choice but to execute a release in favor of the McGuires for the sum of \$5,000.00 and if he did not, he would get nothing.

18. DULBERG, having no choice in the matter, reluctantly agreed with MAST 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 D.**

19. 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

20. After accepting the \$5,000 settlement, DULBERG wrote MAST an email on January 29, 2014 stating “I trust your judgment.” (See Email attached as **Exhibit E.**)

21. MAST and POPOVICH continued to represent DULBERG into 2015 and continuously assured him that his case was being handled properly.

22. On February 22, 2015, as to any chance of settling the remainder of his case against Gagnon MAST wrote to DULBERG that, “There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only

alternative is to take the case to trial and I am not interested in doing that.” (See Email attached as **Exhibit F.**)

23. MAST and POPOVICH represented DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship due to a claimed failure of communication. MAST and POPOVICH withdrew from the representation of DULBERG.

24. Thereafter, DULBERG retained other attorneys and proceeded to a Court ordered 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. However, due to the settlement with the McGuires, DULBERG was only able to collect \$300,000.00 based upon the insurance policy available. A copy of the aforesaid Mediation Award is attached hereto as **Exhibit G.**

25. The McGuires 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. McGuires were well able to pay all, or a portion of the binding mediation award had they still remained parties.

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

27. Until the time of the mediation award, DULBERG 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 McGuires would only complicate the case.

28. Following the execution of the mediation agreement and the final mediation award, DULBERG realized for the first time in December of 2016 that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuires was a serious and substantial mistake.

29. It was not until the mediation in December 2016, based on the expert's opinions that DULBERG retained for the mediation, that DULBERG became reasonably aware that MAST and POPOVICH did not properly represent him by pressuring and coercing him to accept a settlement for \$5,000.00 on an "all or nothing" basis.

30. DULBERG was advised to seek an independent opinion from a legal malpractice attorney and received that opinion on or about December 16, 2016.

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG 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 McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;

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, for example hiring a liability expert;

d.) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;

e.) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;

- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails. into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

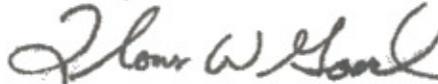
- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

32. 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 DULBERG to release the McGuires, 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,

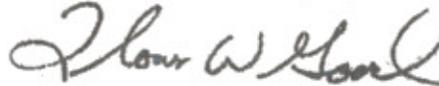
PAUL DULBERG, Plaintiff, by his  
attorneys THE GOOCH FIRM,



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Thomas W. Gooch, III

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



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Thomas W. Gooch, III

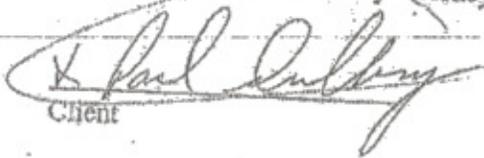
Thomas W. Gooch, III  
THE GOOCH FIRM  
209 S. Main Street  
Wauconda, IL 60084  
847-526-0110  
ARDC No.: 3123355  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)  
[office@goochfirm.com](mailto:office@goochfirm.com)

**CONTRACT FOR LEGAL SERVICES**

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to ~~33 1/3~~ % in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.

  
Client

\_\_\_\_\_  
Client

Date: \_\_\_\_\_

LAW OFFICES OF THOMAS J. POPOVICH

By:   
\_\_\_\_\_

Date: \_\_\_\_\_

LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
McHenry, Illinois 60050  
815/344-3797





3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 13 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, act or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create a unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

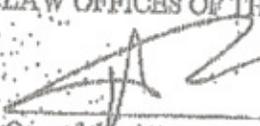
21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,  
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs  
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.



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One of the Attorneys for Plaintiff

Hans A. Mast  
LAW OFFICES OF THOMAS J. POPOVICH, P.C.  
3416 West Elm Street  
Lake, Illinois 60050  
(815) 344-3797  
ARDC No. 06203684

From: Paul Dulberg <pdulberg@comcast.net>  
Subject: Fwd: Dave's Best and oldest friend John  
Date: December 28, 2016 10:33:35 AM CST  
To: paul\_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>  
Date: November 20, 2013 at 7:26:53 AM CST  
To: Hans Mast <hansmast@comcast.net>  
Subject: Re: Dave's Best and oldest friend John

Morning Hans,  
Ok we can meet. I will call Sheila today and set up a time.  
Please send me a link to the current Illinois statute citing that the property owner is not liable for work done on their property resulting in injury to a neighbor.  
I need to read it myself and any links to recent case law in this area would be helpful as well.  
Thanks,  
Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Nov 20, 2013, at 6:59 AM, Hans Mast <hansmast@comcast.net> wrote:

Paul, lets meet again to discuss. The legality of it all is that a property owner does not have legal liability for a worker (whether friend, son or otherwise) who does the work on his time, using his own independent skills. Here, I deposed the McGuires, and they had nothing to do with how Dave did the work other than to request the work to be done. They had no control on how Dave wielded the chain saw and cut you. its that simple. We don't have to accept the \$5,000, but if we do not, the McGuires will get out for FREE on a motion. So that's the situation.

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>  
To: Hans Mast <hansmast@comcast.net>  
Sent: Tue, 19 Nov 2013 02:29:56 -0000 (UTC)  
Subject: Re: Dave's Best and oldest friend John

I still don't get how they don't feel responsible for work done on their property by their own son that ended up cutting through 40% of my arm.

Perhaps their negligence is the fact that they didn't supervise the work close enough but they did oversee much of the days activity with David. Just because Dave was doing the work doesn't mean they were not trying to tell their kid what to do. They told him plenty of times throughout the day what to do. How is that not supervising?

Paul  
Paul Dulberg  
847-497-4250

Sent from my iPad

On Nov 18, 2013, at 8:07 PM, Hans Mast <hansmast@comcast.net> wrote:

Paul whether you like it or not they don't have a legal liability for your injury because they were not directing the work. So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case

Sent from my iPhone

On Nov 18, 2013, at 7:40 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Only 5, That's not much at all.  
Is this a take it or leave it or do we have any other options?

If you want a negligence case for the homeowners ask what happened immediately after the accident.

Neither of them offered me any medical assistance nor did either of them call 911 and all Carol could think of besides calling David an idiot was calling her homeowners insurance.



They all left me out in the yard screaming for help while they were busy making sure they were covered.

She even went as far as to finally call the Emergency Room after I was already there just to tell me she was covered.

How selfish are people when they worry about if their insured over helping the person who was hurt and bleeding badly in their yard.

I'm glad she got her answer and had to share it with me only to find out her coverage won't even pay the medical bills.

I'm not happy with the offer.

As far as John Choyinski, he knows he has to call you and said he will tomorrow.

Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Nov 18, 2013, at 1:28 PM, Hans Mast <[hansmast@comcast.net](mailto:hansmast@comcast.net)> wrote:

Im waiting to hear from John. I tried calling him last week, but no one answered.

In addition, the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery....

Let me know what you think..

Hans

----- Original Message -----

From: Paul Dulberg <[pdulberg@comcast.net](mailto:pdulberg@comcast.net)>  
To: Hans Mast <[hansmast@comcast.net](mailto:hansmast@comcast.net)>  
Sent: Fri, 15 Nov 2013 22:41:26 -0000 (UTC)  
Subject: Dave's Best and oldest friend John

Hans,

Just spoke with John Choyinski again about talking with you.

I am leaving your number with him as he has agreed to talk with you about David Gagnon.

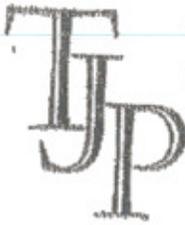
I believe he will try and call sometime tomorrow.

Paul

Oh and I know that nothing that happened right after the incident makes any difference as to the validity of the injuries but David's conduct immediately after the incident does show his lack of moral values for other humans and what he was willing and was not willing to do to help me get medical help. For his actions towards me or any other human being is enough to sue the shit out him alone. It is the things that happened afterwards that upset me the most.

Sorry for the rant but Dave was a complete ass all the way and deserves this.

Paul Dulberg  
847-497-4250  
Sent from my iPad



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET  
McHENRY, ILLINOIS 60050  
TELEPHONE: 815.344.3797  
FACSIMILE: 815.344.5280  
www.popovichlaw.com

THOMAS J. POPOVICH  
HANS A. MAST  
JOHN A. KORNAK

MARK J. VOGG  
JAMES P. TUTAJ  
ROBERT J. LUMBER  
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg  
4606 Hayden Court  
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*  
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

**COPY**  
HANS A. MAST

smg  
Enclosure



WAUKEGAN OFFICE  
210 NORTH MARTIN LUTHER  
KING JR. AVENUE  
WAUKEGAN, IL 60085

GENERAL RELEASE AND SETTLEMENT AGREEMENT

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22<sup>nd</sup> Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- I was not 65 or older on the date of the occurrence.
- I was not receiving SSI or SSDI on the date of the occurrence.
- I am not eligible to receive SSI or SSDI.
- I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: \_\_\_\_\_

\_\_\_\_\_  
PAUL DULBERG

STATE OF ILLINOIS     )  
  ) SS.  
COUNTY OF MCHENRY    )

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this \_\_\_\_\_ day of January, 2014.

\_\_\_\_\_  
Notary Public

From: Paul Dulberg <pdulberg@comcast.net>  
Subject: Fwd: McGuire settlement  
Date: December 28, 2016 10:21:55 AM CST  
To: paul\_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>  
Date: January 29, 2014 at 1:59:31 PM CST  
To: Hans Mast <hansmast@comcast.net>  
Subject: Re: McGuire settlement

Ok, it's signed and in the mail.  
Hope that some yahoo in the govt. doesn't someday decide to go after everyone they think they might get a dollar out of and end up holding me responsible for the McGuire fees incurred while they fight it out.  
I'm not in the business of warranting, insuring or protecting the McGuire from government. Especially for only 5 grand. For that kind of protection it could cost millions but I trust your judgement.  
Paul

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Jan 29, 2014, at 11:49 AM, Hans Mast <hansmast@comcast.net> wrote:

SSD has to be part of it...its not going to effect anything...  
We can't prevent disclosure of the amount...

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>  
To: Hans Mast <hansmast@comcast.net>  
Sent: Wed, 29 Jan 2014 17:47:39 -0000 (UTC)  
Subject: Re: McGuire settlement

What and why do those questions have any relevance at all and why do they need to be part of this agreement?  
Particularly the one about being eligible.

Also, I cannot warranty against what SSDI, Medicare or any other government institution wishes to do.

Is it possible to make this agreement blind to the McGuire or David Gagnon?

What I mean is can we make it so that the amount of money cannot be told to them in any way?

It would drive David's ego crazy if he thought it was a large sum and was banned from seeing how much it is.

Paul Dulberg  
847-497-4250

Sent from my iPad

On Jan 29, 2014, at 10:51 AM, Hans Mast <hansmast@comcast.net> wrote:

Its not a big deal...if you weren't receiving it than don't check it...not sure what the question is...

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>  
To: Hans Mast <hansmast@comcast.net>  
Sent: Wed, 29 Jan 2014 16:16:04 -0000 (UTC)  
Subject: McGuire settlement

Here is a copy of the first page.

It has check boxes and one of the check boxes says;

I am not eligible to receive SSI or SSDI.

Another says;

I am not receiving SSI or SSDI.

As you know, I have applied for SSDI and SSI



**From:** Paul Dulberg <pdulberg@comcast.net>  
**Subject:** Fwd: Memo  
**Date:** December 27, 2016 6:11:20 PM CST  
**To:** paul\_dulberg@comcast.net

**From:** Paul Dulberg <pdulberg@comcast.net>  
**Date:** February 22, 2015 at 7:42:25 PM CST  
**To:** Hans Mast <hansmast@att.net>  
**Subject:** Re: Memo

To believe David's version of events you must believe I was committing suicide.  
Who in their right mind puts his arm into a chainsaw?

I figured you would cop out again...

Now I'm left wondering...  
How hard is it to sue an atty?

And yes I am and have been looking for someone who will take this case...

The issue of my word vs David Gagnons... Did he cut me or did I cut myself?

Of coarse he cut me.

Next issue please?

Paul Dulberg  
847-497-4250  
Sent from my iPad

On Feb 22, 2015, at 7:20 PM, Hans Mast <hansmast@att.net> wrote:

Paul I no longer can represent you in the case. We obviously have differences of opinion as to the value of the case. I've been telling you over a year now the problems with the case and you just don't see them. You keep telling me how injured you are and completely ignore that it doesn't matter if you passed away from the accident because we still have to prove that the defendant was at fault. While you think it is very clear - it is not. My guess is that seven out of 10 times you will lose the case outright. That means zero. That's why I have been trying to convince you to agree to a settlement. You clearly do not want to. There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only alternative is to take the case to trial and I am not interested in doing that. I will wait for you to find a new attorney. I can't assist you any further in this case. Just let me know.

Sent from my iPhone

On Feb 22, 2015, at 7:14 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Let's not be harsh, We have a couple of weeks till dr Kujawa's billing arrives.  
I agree showing me the memo is a good idea it's just not the accuracy I expected.  
I know I'm being confrontative about all of this but let's face it, my working days are over let alone a career I have been building since I was in high school. My dreams of family are over unless I have enough to provide and pay for the care of children and a roof.

What's left for me?

Facebook, scrap booking, crafts, etc... A life of crap...

With ongoing pain and grip issues in my dominate arm/hand that are degenerative.

This is as total as it gets for us in the working class short of being paralyzed or dead.

I need someone who is on my side, top of their game and will see to it that I'm comfortable after all this is over.

What I feel is an attempt to settle for far less than this is remotely worth just to get me off the books.





Binding Mediation Award

Paul Dulberg

v.

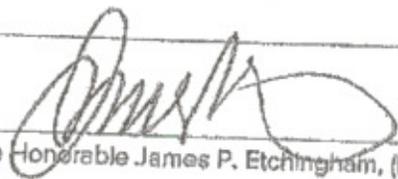
David Gagnon

ADR Systems File # 33391BMAG

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of: Paul Dulberg  
Gross Award: \$ 660,000.  
Comparative fault: 15 % (if applicable)  
Net Award: \$ 561,000

Comments/Explanation	<u>Medical</u>	<u>\$ 60,000.</u>
	<u>future medical</u>	<u>\$ 200,000.</u>
	<u>Lost Wage</u>	<u>\$ 250,000.</u>
	<u>PIS</u>	<u>75,000.</u>
	<u>LNL</u>	<u>75,000.</u>

  
The Honorable James P. Etchingham, (Ret.)





CLAUSEN MILLER P.C.  
CHICAGO, IL  
NEW YORK  
CALIFORNIA  
NEW JERSEY  
INDIANA  
WISCONSIN

CLAUSEN MILLER LLP  
LONDON, ENGLAND



Clausen Miller LLP, LONDON  
Clausen Miller P.C.  
Grenier Avocats, PARIS  
Studio Legale Corapi, ROME  
van Cutsem-Wittamer-Marnef & Partners, BRUSSELS  
Wilhelm Partnerschaft von Rechtsanwälten mbB, DÜSSELDORF

---

*Attorneys at Law*

George K. Flynn  
Direct Line: (312) 606-7726  
E-Mail: [gflynn@clausen.com](mailto:gflynn@clausen.com)

10 South LaSalle Street • Chicago, IL 60603 • [www.clausen.com](http://www.clausen.com)  
Tel: 312.855.1010 • Fax: 312.606.7777

August 30, 2018

Honorable Thomas A. Meyer  
Judge of the Circuit Court of McHenry County  
McHenry County Government Center  
2200 N. Seminary Avenue, Room 201  
Woodstock, IL 60098

Re: *Paul Dulberg v. Law Offices of Thomas J. Popovich, P.C., et al.*  
Case No: 17LA000377  
Our File No.: 27 9517 00 7

Dear Judge Meyer:

The above matter is set before you on September 12, 2018 at 10:00 a.m. Enclosed are courtesy copies of the following:

1. Defendants' Motion to Dismiss;
2. Memorandum in Support of Defendants' Motion to Dismiss First Amended Complaint at Law;
3. Plaintiff's Response to Defendants' Motion to Dismiss First Amended Complaint at Law; and
4. Reply in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint at Law.

Very truly yours,

CLAUSEN MILLER P.C.

By: *George K. Flynn*

George K. Flynn

GKF:pw  
Enclosures  
cc: Mr. Thomas W. Gooch, III (by email w/1 enc.)

**Kathleen Wilson**

---

**From:** no-reply@tylerhost.net  
**Sent:** Thursday, August 30, 2018 4:15 PM  
**To:** Kathleen Wilson  
**Subject:** Filing Submitted for Case: 17LA000377; DULBERG, PAUL VS MAST, HANS, ET AL;  
Envelope Number: 2042006



ODYSSEY  
**eFileIL**<sup>™</sup>

**Filing Submitted**

Envelope Number: 2042006  
Case Number: 17LA000377  
Case Style: DULBERG, PAUL VS MAST, HANS,  
ET AL

The filing below has been submitted to the clerk's office for review. Please allow 24 - 48 hours for clerk office processing.

Filing Details	
<b>Court</b>	File & Serve
<b>Date/Time Submitted</b>	8/30/2018 4:14 PM CST
<b>Filing Type</b>	EFileAndServe
<b>Filing Description</b>	Reply in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint at Law
<b>Type of Filing</b>	EFileAndServe
<b>Filed By</b>	Kathleen Wilson
<b>Filing Attorney</b>	George Flynn

Fee Details	
Your account is never charged until your filing is accepted. If you see any pending charges on your account prior to acceptance, this is an authorization hold to ensure the funds are available so your filing can be accepted without delay.	
If the filing is canceled or rejected these funds will be released and will return to your account according to your financial institution's policies (typically 3-10 business days).	
This envelope is pending review and fees may change.	
Case Fee Information	\$3.08
Payment Service Fees	\$0.09
Provider Service Fees	\$2.99
Response	\$0.00
<b>Total:</b> \$3.08 (The envelope still has pending filings and the fees are subject to change)	

### Document Details

<b>Lead Document</b>	DULBERG REPLY IN SUPPORT.pdf
<b>Lead Document Page Count</b>	5
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<https://www.fileandserveillinois.com>

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

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

**REPLY IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS  
PLAINTIFF’S FIRST AMENDED COMPLAINT AT LAW**

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, submit this Reply in Support of Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint at Law with prejudice, and state as follows:

**I. INTRODUCTION**

Dulberg’s Response misses the point, and adds facts and theories that are not contained in his pleading. He now asserts that Mast failed to become familiar with the law of “chainsaw ownership liability” (Res. p. 4, ¶10), and that Mast “could have considered” the law as to ultrahazardous circumstances and the strict liability of the homeowners. But these facts and theories are not plead, and cannot be inferred from his First Amended Complaint. Moreover, what potential theories of recovery “could have been considered” [by a lawyer being sued for malpractice] is not the standard. Dulberg must ultimately demonstrate that he would have prevailed against the landowners in the case within the case. Instead, Dulberg fails to plead, or

now argue, facts and law that would have imposed liability upon a homeowner for an accident which occurred when their adult son and his buddy were trimming a tree in the backyard. There is no allegation that the McGuire's were supervising the work, or that they owed some duty to supervise. Dulberg does not allege what they did wrong, only that they were liable.

**II. DULBERG FAILS TO ADDRESS PROXIMATE CAUSE-THAT HE WOULD HAVE PREVAILED BUT FOR MALPRACTICE**

A fundamental omission from Dulberg's pleading and his argument, is that he has not plead (and will be unable to establish), that he would have prevailed in the underlying case against the landowners. The cases upon which he relies do not support his contentions.

**A. Negligence**

Dulberg's pleading still relies only on conclusions about the potential liability of the landowners, and not facts or law. The case upon which he relies for the proposition that the landowners would have been liable to him (had he not settled with them) is unavailing, and simply sets out elements of premises liability law in Illinois. Dulberg cites *Rhodes v. Illinois Cent. Gulf R.R.* 172 Ill. 2d, 213, 228 (1996) to inform the court that the "duty owed by a premises owner or occupier to an invitee or a licensee is that of "reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them." But he fails to plead facts here about how the McGuire's breached any duty to him, or how they did not use reasonable care under the circumstances when Dulberg volunteered to assist their adult son in trimming a tree. What did they do wrong?

Notably, *Rhodes* involved an alleged wrongful death of an intoxicated trespasser on the property of the defendant railroad. A Chicago police officer found the deceased laying on a bench on the defendant's property. The police took him to the hospital where he eventually died. The plaintiff's estate was awarded a significant verdict at trial by the jury. The Illinois Supreme

Court reversed and remanded, ordering a new trial with instructions consistent with its holdings (and instructing the jury to determine whether the decedent was a trespasser or invitee). The case is simply not on point.

**B. Strict Liability**

For the first time, Dulberg raises in his Response (p. 4, ¶11) an allegation that “had MAST reviewed the law on premises liability, he could have considered the law as to ultrahazardous circumstances and the strict liability of the homeowners.” He then cites to a case, apparently to reference one element of strict liability analysis (*vis a vis* landowners). But *Miller v. Civil Constructors, Inc.* 272 Ill. App. 3d 263, 266 (2nd Dist. 1995) is not helpful to him. In *Miller*, the plaintiff appealed the dismissal of his strict liability claim against a construction company and a city, after he was hit by a stray bullet which ricocheted during the course of firearm target practice at a nearby gravel pit. The appellate court affirmed the dismissal. “Under the circumstances presented, we hold as a matter of law that the discharge of firearms is not an ultrahazardous activity which would support plaintiff’s strict liability claims.” (*Miller* at \*265). Dulberg fails to analyze *Miller* and explain how it is applicable here, which it is not.

One attorney may handle a case differently from another attorney, but these differences do not amount to a breach of the standard of care. In a legal malpractice case in Illinois, more is needed than a suggestion that an attorney “could have considered” a particular theory, and did not. A legal malpractice plaintiff must plead and prove that he would have been successful in the undertaking. Here, Dulberg must plead that he would have been successful in prosecuting a strict liability case. The fact is, he cannot support the factual or legal assertion that backyard chainsaw tree-trimming is a strict liability proposition. Moreover, his bare allegations that a liability expert should have been retained, as a red herring. There is no factual allegation as to why such an expert mattered.

### **III. DULBERG FALLS SHORT IN ALLEGING THAT HE WAS MISLED**

Dulberg fails to specify how he was misled. Even if Mast made a mistake about the McGuire's insurance coverage, it made no difference, and there is no damage. Dulberg cannot explain why \$300,000 versus \$100,000 in coverage made any difference, when he settled for \$5000. Had the he settled for \$99,999.99, his argument for damages may be colorable. In any event, he alleges no facts in support of the allegation that facts were "concealed." His other allegations that Mast concealed facts, include a quantum leap, now arguing in the Response at p. 5, ¶15, that Mast concealed facts relating to the explanation of liability law and what type of duty the McGuires's owed. This is absurd, given that Dulberg still has not alleged what the duty was, how it was breached, or in laymen's terms—what the McGuire's did wrong.

### **IV. CONCLUSION**

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 respectfully request this Honorable Court dismiss Plaintiff's Complaint First Amended Complaint at Law 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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was caused to be served through the McHenry County I2File Efile System and by email on the 31st day of August, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III  
The Gooch Firm  
209 S. Main Street  
Wauconda, IL 60084  
[gooch@goochfirm.com](mailto:gooch@goochfirm.com)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

  
\_\_\_\_\_

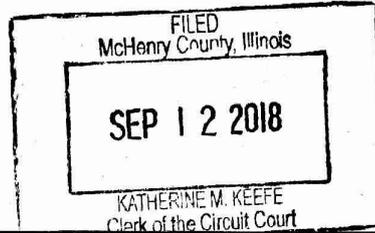
IN THE CIRCUIT COURT OF THE 22<sup>ND</sup> JUDICIAL CIRCUIT

STATE OF ILLINOIS )  
 ) SS  
COUNTY OF MCHENRY )

GEN. NO. 17 LA 377  
 Jury  Non-Jury

Dulberg

VS.



Papovich + Most

Date: 9-12-18 Plaintiff's Attorney S. Lm. Walezyk Defendant's Attorney George Flynn

ORDER

This matter coming to be heard on Defendants' motion to dismiss Plaintiff's First Amended Complaint, it is hereby ordered:

- 1) Defendants' motion is granted as more fully described on the record and below.
- 2) Paragraphs ~~24~~ 31(b), (c), (f), (g), (h), (i), (k), (l), (m), (n), and (o) are stricken as conclusions or being redundant.

3) Plaintiff is granted leave to replead by October 10, 2018. Defendants to file a responsive pleading by November 7, 2018.

4) Status hearing on November 13, 2018 at 9:00 a.m.

Prepared by: George Flynn  
Attorney for: Defendants  
Attorney Registration No.: 6239349

Judge: [Signature]

1 STATE OF ILLINOIS )  
 ) SS:  
2 COUNTY OF MCHENRY )

3 IN THE TWENTY-SECOND JUDICIAL CIRCUIT  
4 MCHENRY COUNTY, ILLINOIS

5 PAUL DULBERG, )

6 Plaintiff, )

7 vs. )

No. 17 LA 377

8 THE LAW OFFICES OF THOMAS )

9 J. POPOVICH, P.C., and )

HANS MAST, )

10 Defendants. )

11

12

ELECTRONICALLY RECORDED Report of

13

Proceedings had in the above-entitled cause before

14

The Honorable Thomas A. Meyer, Judge of the Circuit

15

Court of McHenry County, Illinois, on the 12th day of

16

September, 2018, in the McHenry County Government

17

Center, Woodstock, Illinois.

18

APPEARANCES:

19

CLAUSEN MILLER, PC, by:

MR. GEORGE K. FLYNN,

20

on behalf of the Defendants.

21

22

23

24

1 THE COURT: Counsel, which one you on?

2 MR. FLYNN: Dulberg.

3 THE COURT: Is opposing counsel here?

4 MR. FLYNN: She's not. I received an email. She  
5 said she was going to be late. She's in Waukegan.

6 THE COURT: I'm sorry, how late?

7 MR. FLYNN: I'm not sure how late, Judge. She said  
8 she's in Waukegan. Mr. Gooch was apparently ill today,  
9 so she's going to be covering today's hearing.

10 THE COURT: And she's in Waukegan now?

11 MR. FLYNN: She's in Waukegan. Originally thought  
12 she might be able to be here by 10:30, but she said the  
13 judge stepped up 15 minutes late on her other matter,  
14 so --

15 THE COURT: I mean, that's about an hour drive.

16 MR. FLYNN: The email I received was -- I was in the  
17 car as well, so 10 or 15 minutes ago.

18 THE COURT: Okay. See if you can email her and find  
19 out if we can get an ETA.

20 MR. FLYNN: Okay.

21 THE COURT: And we'll work from there.

22 MR. FLYNN: Okay. Thanks, Judge.

23 THE COURT: Thank you.

24

1                   (Whereupon, the above-entitled cause  
2                   was passed and subsequently recalled.)

3           THE COURT:   Okay.   Counsel, if you can approach.   So  
4 Dulberg versus Mast.

5           MR. FLYNN:   Good morning, Your Honor.   George Flynn  
6 on behalf of the defendants.   I did -- I received  
7 communication from counsel.   She was walking to her car  
8 at the Waukegan courthouse at 11 -- I'm sorry, at 10:10,  
9 and she indicated that her GPS estimated she would  
10 arrive here at one hour and six minutes.

11          THE COURT:   11:30-ish.   Fair?

12          MR. FLYNN:   Fair.

13          THE COURT:   All right.   Well, rather than delay  
14 this, I'm going to rule from the bench based upon my  
15 review of the amended complaint and consideration of the  
16 briefs in support of and opposition to.

17                   I'm going to strike the complaint.   The basis  
18 of my decision is I think the complaint states a cause  
19 of action, but there are so many things in there that  
20 are unsupported by factual allegations that I think it  
21 best just to deal with them now rather than at a later  
22 date.   I reviewed -- and I'm looking for the specific  
23 allegations of negligence within the amended complaint.  
24 I felt that in paragraph 31, subparagraph (a) included

1 enough of a fact that I -- I'm going to tell you the  
2 ones I think can stand. Then I'm going to strike the  
3 rest of them and try to explain it. I think paragraph  
4 (a) gave me enough of a fact that I would allow it to  
5 stand. I felt that (b) was a conclusion; (c) was  
6 redundant of (a); (d) I was going to allow to stand, it  
7 alleges something; (e) I was going to allow to stand;  
8 (f) is a conclusion, it's not a fact -- Where are we?  
9 -- (g) I'm just going to strike, it's a conclusion;  
10 (h), it's a conclusion, strike it; (i) it's a  
11 conclusion, strike it; (j) I'm going to allow to stand;  
12 (k) I'm -- I'm going to strike. It says there were  
13 necessary facts, but doesn't tell me what those  
14 necessary facts were. I think an allegation of coercion  
15 can stand, but I'm not quite sure what it is we're  
16 alleging.

17 MR. FLYNN: So just to clarify, Judge, you're ruling  
18 that there can be an allegation of coercion, but it's  
19 not supported by facts here --

20 THE COURT: Yeah.

21 MR. GLYNN: -- under the 615 standard?

22 THE COURT: Yeah.

23 MR. GLYNN: Okay.

24 THE COURT: (1) there might be some facts in there,

1 but I'm not sure what they are, so I'm going to strike  
2 it. I mean, there might be a factual basis to support  
3 what they're getting at, but I don't know what it is. I  
4 don't think it's supported, so I think it's a  
5 conclusion. I'll strike -- (m) is a conclusion, I'll  
6 strike it; (n) is I think duplicative of (a) and (c);  
7 and (o) is just a conclusion.

8 I will allow them to replead because I think  
9 the ones I've -- and I hate to make you the note-taker,  
10 but it saves you a return trip, and I was going to ask  
11 questions, but these -- this is what I felt about the  
12 allegations in the complaint. I think there is -- this  
13 -- for going -- as far as going forward is concerned, if  
14 there were more paragraphs that weren't conclusions, I  
15 might have allowed the complaint to stand and just  
16 strike -- strike them on their face rather than go  
17 through the trouble of re-pleading. Unfortunately, most  
18 of the paragraphs were conclusions that I felt had to be  
19 stricken, and I'm dealing with that now. As a result,  
20 I'm striking the complaint.

21 Plaintiff gets to re-plead and the -- and if  
22 they just -- and if they limit it to the ones I've  
23 allowed to stand that I've advised you about that I  
24 think are adequate, then I'm going to -- I would deny

1 future 615 based on the same concepts.

2 Does that make sense?

3 MR. FLYNN: I -- without having gone through each of  
4 the subparagraphs, yes, I understand the Court's ruling.  
5 I think that the general theme of our motion was that  
6 the plaintiff hasn't set forth what a breach of any duty  
7 would have been as far as the McGuires and what legal  
8 standard they would have been held to and how they  
9 breached that.

10 THE COURT: I think --

11 MR. GLYNN: Just because they're a land owners and  
12 an accident happened on their property doesn't mean  
13 they're liable on this.

14 THE COURT: And I -- actually, I take that back. I  
15 agree, but I think that there was enough implicit in the  
16 allegations that I still felt that there was going to be  
17 an adequate cause of action, and to clarify what I said  
18 earlier, I would agree that they've got to explain that  
19 better, but it's -- I probably -- since I'm striking the  
20 complaint, I'm going to direct them to do that. I felt  
21 that I could read enough in here to understand what they  
22 were getting at, that I wouldn't have struck the  
23 complaint solely on that basis.

24 Does that answer your question?

1 MR. FLYNN: I think so.

2 THE COURT: Okay. There's a lot to unpack here, but  
3 I think that there are enough allegations and enough of  
4 an understanding of where they're going that I think  
5 they're going to be able to state a cause of action, at  
6 least insofar as 2-615 is concerned.

7 We'll see what they say in their new complaint.  
8 Do you want to give them 28 days --

9 MR. FLYNN: Sure.

10 THE COURT: -- to file?

11 What would you like to do? Twenty-eight after  
12 or --

13 MR. GLYNN: Yes.

14 THE COURT: Okay. So let's put the case out  
15 60 days. That will each give you plenty of time, and  
16 that will take us to November 13th. That is a Tuesday.  
17 Does that day work for you?

18 MR. FLYNN: Yes.

19 THE COURT: Okay. And for purposes of the record,  
20 we were advised that -- about 10:15 that plaintiff's  
21 counsel was about an hour drive away having been  
22 detained in Waukegan. As a result, I just decided to --  
23 rather than continuing the hearing and going through the  
24 process I just did, I would provide my ruling and save

1 everybody some effort.

2 Questions?

3 MR. FLYNN: 9:00 o'clock status on November 13th?

4 THE COURT: Yes.

5 Mr. Dulberg, any questions? I don't really  
6 want you to get substantively involved because you're  
7 represented, but do you want any clarification of  
8 anything I just said?

9 MR. DULBERG: Clarification, no. But I will say  
10 that I don't think that we should have to try the case  
11 in the pleading.

12 THE COURT: And you don't have to. And that's not  
13 what I've said. That's not what he said. But there are  
14 certain allegations that I didn't feel were adequate and  
15 that's the basis of my dismissal.

16 MR. DULBERG: (Inaudible).

17 THE COURT: I don't want you to argue too much  
18 because, again, you've got an attorney and I don't want  
19 to involve you. I just -- Do you have any questions?

20 MR. DULBERG: No.

21 THE COURT: Okay. All right. Counsel, if you could  
22 draft the order.

23 MR. FLYNN: I will, Judge, based on my -- the  
24 note-taking that I did, and can I reference the

1 transcript. This is recorded, I believe, --

2 THE COURT: Yeah.

3 MR. FLYNN: -- correct?

4 THE COURT: Yeah, that's fine.

5 MR. FLYNN: Okay.

6 THE COURT: Yeah, I think they're going to need the  
7 transcript probably to get through all that.

8 MR. FLYNN: Fair enough.

9 THE COURT: Okay? Thank you.

10 MR. FLYNN: Thank you, Judge.

11 (Which was and is all of the evidence  
12 offered at the hearing of said cause  
13 this date.)

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1 STATE OF ILLINOIS )  
 ) SS:  
2 COUNTY OF MCHENRY )

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I, Stacey A. Collins, an Official Court Reporter for the Circuit Court of McHenry County, State of Illinois, do hereby certify that I reported in shorthand the proceedings had in the above entitled cause and that the foregoing is a true and correct transcript of all the proceedings heard.



---

Stacey A. Collins, CSR  
Official Court Reporter  
License No. 084-002377

Comments to the Gooch firm concerning the first amended complaint:

It is my opinion that the first amended complaint failed to adequately address the underlying case that DULBERG had against the MCGUIRES. Please note the case of Ignarski v Norbut which serves as an example of the same problem. I quote the relevant sections from Ignarski v Norbut below...

"The elements of a legal malpractice claim are: (1) the existence of an attorney client relationship which establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorneys negligence, the plaintiff would have prevailed in the underlying action; and (4) damages. (Pelham v. Griesheimer (1982), 92 Ill. 2d 13, 64 Ill. Dec. 544, 440 N.E.2d 96; Sheppard v. Krol (1991), 218 Ill.App.3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates v. Pontikes (1986), 151 Ill.App.3d 116, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Because legal malpractice claims must be predicated upon an unfavorable result in the underlying suit, no malpractice exists unless counsel's negligence has resulted in the loss of the underlying action. (Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Plaintiff is required to establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit. (Sheppard, 218 Ill.App.3d at 257, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Damages will not be presumed, and the client bears the burden of proving he suffered a loss as a result of the attorney's alleged negligence. Sheppard 218 Ill.App.3d at 257, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E.2d 1186.

As a result of the foregoing, the plaintiff at bar was required to plead a case within a case. In particular, he was required to plead ultimate facts establishing why KFC had a duty to protect him from the criminal acts of third parties."

Likewise in the case of DULBERG, the first amended complaint does not plead ultimate facts establishing why the MCGUIRES had a duty of reasonable care to DULBERG and how the MCGUIRES breached that duty.

The complaint must plead: 1) the existence of a duty owed to DULBERG by the MCGUIRES 2) a breach of that duty; 3) an injury proximately caused by the breach; and 4) damages.

More from Ignarski v Norbut...

"As previously stated, the plaintiff failed to plead a case within a case. In particular, because the second amended complaint did not contain ultimate facts as to why KFC owed plaintiff a duty of protection, it did not satisfy the proximate cause requirement (i.e., but for the attorney's negligence, plaintiff would have prevailed in the underlying action). Plaintiff, however, essentially seeks to dispose of the proximate cause requirement. In attempting to do so, plaintiff ignores Illinois case law which has repeatedly rejected this position. In Sheppard 218 Ill.App.3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212, the defendant was injured at work by an unidentified and allegedly defective forklift. The \*291 defendant attorney was retained to investigate and file a product liability action against the manufacturer of the forklift. The complaint alleged that the attorney never investigated the facts, never identified the manufacturer, and failed to institute legal proceedings. Subsequently, plaintiff's employer disposed of the forklift making it impossible to prosecute the claim. The trial court dismissed plaintiff's complaint because it did not plead, and plaintiff could not prove, that he would have prevailed in the product liability suit "but for the defendant's negligence." In affirming the trial court's dismissal, this court rejected the plaintiff's argument that defendant's negligence should absolve the plaintiff of his responsibility to identify the forklift manufacturer. Sheppard, 218 Ill.App.3d at 258; 161 Ill. Dec. 85, 578 N.E.2d 212; see also Beastall v. Madson (1992), 235 Ill.App.3d 95, 175 Ill. Dec. 865, 600 N.E.2d 1323; Coofc v. Gould (1982), 109 Ill.App.3d 311, 64 Ill. Dec. 896. 440 N.E.2d 448."

In short, we have no case against MAST unless we can establish that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action. In other words, we have to show that DULBERG would have prevailed against the MCGUIRES if it wasn't for the actions of MAST. The first amended complaint did not sufficiently address the "case within a case" or the "underlying case", which is against the MCGUIRES.

The judge needs more details on the legal basis by which DULBERG could have prevailed against the MCGUIRES if MAST didn't give such crappy counsel.

I believe that the following argument establishes the legal basis by which DULBERG would have prevailed against the MCGUIRES and this argument or something like it should be included in the second amended complaint...

#### HOW TO PRESENT THE LIABILITY OF THE MCGUIRES:

Premises liability is generally defined as "[a] landowner's or landholder's tort liability for conditions or activities on the premises." Black's Law Dictionary (9th ed. 2009).

A premises-liability action is a negligence claim. See, Salazar v. Crown Enterprises, Inc., 328 Ill. App. 3d 735, 740, 767 N.E.2d 366, 262 Ill. Dec. 906 (1st Dist. 2002).

The essential elements of a cause of action based on common-law negligence are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. Ward v. Kmart Corp., 136 Ill. 2d 132, 140, 554 N.E.2d 223, 143 Ill. Dec. 288 (1990).

Under the Premises Liability Act, "the owner or lessee of premises owes a duty of 'reasonable care under the circumstances' to those lawfully on the premises." Simmons v. American Drug Stores, Inc., 329 Ill. App. 3d 38, 43, 768 N.E.2d 46, 51, 263 Ill. Dec. 286 (1st Dist. 2002), quoting 740 ILCS 130/2 (West 2000). In a situation where a plaintiff alleges that an injury was caused by a condition on the defendant's property, and the plaintiff was an invitee on the property, whether the injury is reasonably foreseeable is determined pursuant to section 343A of the Restatement (Second) of Torts. Section 343 of the Restatement provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965).

An exception to this general rule, known as the open and obvious danger rule, is set forth in section 343A of the Restatement. It provides:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts § 343A(1).

Facts:

a) MCGUIRES purchased and provided GAGNON with a chainsaw without following the directions and heeding the warnings clearly printed in the operator's manual that accompanied the chainsaw. Chainsaw was purchased on 5-22-2011 and was first used on 6-28-2011, the day DULBERG was injured.

b) The operator's manual clearly states in large, bold font: "WARNING - To ensure safe and correct operation of the chainsaw, the operator's manual should always be kept with or near the machine. Do not lend or rent your chainsaw without the operator's instruction manual."

c) Just under this warning on the same page the operator's manual clearly states in large, bold font: "WARNING - Allow only persons who understand this manual to operate your chainsaw."

d) The manual has a list clearly labeled as "SAFETY RULES". The first listed rule is: "Read this manual carefully until you completely understand and can follow all safety rules, precautions, and operating instructions before attempting to use the unit."

e) The second listed safety rule is: "Restrict the use of your saw to adult users who understand and can follow safety rules, precautions, and operating instructions found in this manual."

f) The fourth listed safety rule is: "Keep children, bystanders, and animals a minimum of 35 feet (10 meters) away from the work area. Do not allow other people or animals to be near the chainsaw when starting or operating the chainsaw (Fig.2)." There is a large picture next to this rule of people standing at least 35 feet away from a person operating a chainsaw.

g) The MCGUIRES asked DULBERG to help GAGNON. DULBERG did not go to the MCGUIRES property to help cut down a tree. He went to see if he wanted the wood. Only after he was on the property for more than two hours was he asked by the MCGUIRES if he could help GAGNON.

h) The MCGUIRES were in possession of the owners manual and looked at it while DULBERG was present, however they asked DULBERG to help GAGNON anyway. They had the manual and DULBERG did not. They had access to knowledge about the warnings clearly stated in the manual that DULBERG did not have. "A duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given." (Pitler, 92 Ill.App.3d at 745, 47 Ill.Dec. 942, 415 N.E.2d 1255, quoting Kirby v. General Paving Co. (1967), 86 Ill.App.2d 453, 457, 229 N.E.2d 777.)

i) Had the MCGUIRES read and followed the warnings and safety rules in the operators manual, the injury to DULBERG could not have occurred.

As stated in part (g), DULBERG came to the property in order to see if he wanted the wood from the tree and not to help with cutting. Only after being on the property for more than two hours in the MCGUIRES' presence did the MCGUIRES ask DULBERG to help GAGNON. Therefore

DULBERG was clearly an invitee and was owed a duty of 'reasonable care' by the MCGUIRES.

The MCGUIRE'S were in possession of the operator's manual of the chainsaw. They were also the owners of the chainsaw. Multiple warnings were clearly printed in bold font in the operator's manual, so the MCGUIRES should have realized that asking DULBERG to help GAGNON while not following any of the warnings described in parts (b), (c), (d), (e), and (f) involved an unreasonable risk of harm to DULBERG.

The MCGUIRES should have expected that since DULBERG did not have access to the operator's manual he was not aware of the explicit warnings described in parts (b), (c), (d), (e), and (f).

Therefore the MCGUIRES failed to exercise reasonable care toward DULBERG. They had access to knowledge about the warnings clearly stated in the manual that DULBERG did not have. "A duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given." (Pitler, 92 Ill.App.3d at 745, 47 Ill.Dec. 942, 415 N.E.2d 1255, quoting Kirby v. General Paving Co. (1967), 86 Ill.App.2d 453, 457, 229 N.E.2d 777.)

The chainsaw accident was or should have been reasonably foreseeable to a person who read the warnings described in parts (b), (c), (d), (e), and (f) and failed to heed those warnings. Had the MCGUIRES read and followed the warnings and safety rules in the operators manual, the injury to DULBERG could not have occurred.

Also, MAST could have attempted to impose liability on a possessor of land by a negligence claim rather than through Premises Liability.

In this case, under the general negligence theory, all the plaintiff would need to prove is that the defendant negligently created the dangerous condition on its premises. Plaintiff would only need to prove the existence of a duty owed to DULBERG, breach of the duty, and that the breach proximately caused the injuries.

## CONCERNING MAST'S LIABILITY

Arguments which support the liability of MAST have already been made in the first amended complaint. However, there were a few important points that were not mentioned yet in the previous complaints and could definitely be of use in the second amended complaint. They are as follows...

MAST told DULBERG at a meeting in which DULBERG was trying to decide whether to accept the MCGUIRE's offer of \$5,000 that because the restatement of torts 318 is not applicable in Illinois, DULBERG had no case against the MCGUIRES and that the MCGUIRES did not have to offer any settlement at all. DULBERG asked MAST to cite case law that shows why the MCGUIRES were not at least partially liable for DULBERG'S injury, and MAST cited *Tilscher v Spangler*, a case which confirms that restatement of torts 318 is not applicable in Illinois. But note the claim of MCGUIRE'S liability given above relies on restatement of torts 343 or a general negligence claim. It is completely independent of restatement of torts 318.

At the same meeting MAST also informed DULBERG that the MCGUIRES made an offer of \$5,000 to be nice (they did not have to offer anything) and if DULBERG did not accept the offer it would be withdrawn and the MCGUIRES will ask for summary judgement. MAST informed DULBERG that the presiding judge would grant the MCGUIRES a summary judgement dismissing the case against them, leaving DULBERG with no settlement at all from the MCGUIRES.

According to Illinois law, summary judgment should be granted if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (*Carruthers v. Christopher & Co.* (1974), 57 Ill. 2d 376, 380, 313 N.E.2d 457.) It should never be granted unless the right of the movant is free from doubt. (*Murphy v. Urso* (1981), 88 Ill. 2d 444, 464, 58 Ill. Dec. 828, 430 N.E.2d 1079.) If the affidavits and other materials disclose a dispute as to any material issue of fact, summary judgment must be denied even if the court believes the movant will or should prevail at trial. Summary judgment procedure is not designed to try an issue of fact, but rather to determine if one exists. (*Ray v. Chicago* (1960), 19 Ill. 2d 593, 599, 169 N.E.2d 73.) In considering a motion for summary judgment, the court must strictly construe all things filed in support of the motion

while liberally construing all things filed in opposition thereto. (Kolakowski v. Voris (1980), 83 Ill. 2d 388, 398, 47 Ill. Dec. 392, 415 N.E.2d 397.) If fair minded persons could draw different inferences from the evidence, the issues should be submitted to a jury to determine what conclusion seems most reasonable. (Silberstein v. Peoria Town and Country Bowl, Inc. (1970), 120 Ill.App.2d 290, 293-94, 257 N.E.2d 12.)

Therefore, when MAST told DULBERG that if he did not accept the offer of \$5,000 the MCGUIRES would get out of the case on a motion for a summary judgement, MAST effectively informed DULBERG that:

- a) the MCGUIRES' lack of liability for DULBERG's injury was free from doubt
- b) there existed no genuine issue of material fact that the MCGUIRES are entitled to summary judgement as a matter of law
- c) affidavits and other materials did not disclose any dispute as to any material issue of fact in this case
- d) the court while strictly construing all things filed in support of the motion and while liberally construing all things filed in opposition thereto would have found the MCGUIRES liable for nothing with respect to DULBERG'S accident and would have granted a motion for summary judgement
- e) fair minded persons could not draw different inferences from the evidence that the MCGUIRES were not in any way liable for DULBERG'S accident.

According to Illinois Rules of Professional Conduct of 2010,

Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Also, listed under RULE 1.0: TERMINOLOGY under the heading 'Informed Consent':

"The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise

to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel."

Mast did not follow these rules as explained in the complaints already filed with the court.

Within these notes I tried to explain 3 points:

1) That the first amended complaint failed to adequately address the underlying case that DULBERG had against the MCGUIRES. In other words, we have to show that DULBERG would have prevailed against the MCGUIRES if it wasn't for the actions of MAST. The first amended complaint did not sufficiently address the "case within a case" or the "underlying case", which is against the MCGUIRES.

2) The case against the McGuires could be made by using the restatement of torts 343 or by using general negligence or in any other way that a premises liability or negligence expert would recommend.

3) Arguments which support the liability of MAST have already been made in the first amended complaint. But there are a few additional arguments that that may prove helpful to include. They are the reasons Mast gave to Dulberg why he will get \$5,000 or nothing. The only case Mast cited to Dulberg was Tilscher v Spangler, and because the case confirmed that restatement of torts 318 is not applicable in Illinois, Mast told Dulberg he has no case against the McGuires. Mast also told Dulberg the judge would grant a summary judgement if Dulberg refused the offer.

I hope the details within these comments prove helpful in writing a more robust second amended complaint.

